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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Docket Number TM–02–03]

RIN 0581–AC19

National Organic Program; Amendments to the National List of Allowed and Prohibited Substances

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List) to reflect recommendations submitted to the Secretary by the National Organic Standards Board (NOSB). Technical corrections have also been included in this final rule to clarify specific sections of the National List and adequately reflect previous NOSB recommendations. Consistent with recommendations from the NOSB, this final rule would: add ten substances, along with any restrictive annotations, to the National List, revise the annotations of two substances, and make eight technical revisions.

EFFECTIVE DATE: This rule becomes effective November 3, 2003.

FOR FURTHER INFORMATION CONTACT: Richard H. Mathews, Program Manager, National Organic Program, Telephone: (202) 720–3252; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, the Secretary established, within the National Organic Standards (NOS) (7 CFR part 205), the National List (§§ 205.600 through 205.607). The National List is the Federal list that identifies synthetic substances and ingredients that are allowed and nonsynthetic (natural) substances and ingredients that are prohibited for use in organic production and handling. Since established, the National List has not been amended. However, under the authority of the Organic Foods Production Act of 1990 (OFPA), as amended (7 U.S.C. 6501 *et seq.*), the National List can be amended by the Secretary based on proposed amendments developed by the NOSB.

This final rule amends the National List to reflect recommendations submitted to the Secretary by the NOSB from June 6, 2000 through October 20, 2002. Between the specified time period, the NOSB has recommended that the Secretary add ten substances to §§ 205.601 through 205.603 of the National List based on petitions received from industry participants. These substances were evaluated by the NOSB using the criteria specified in OFPA (7 U.S.C. 6517 and 6518) and the NOS. The NOSB also recommended that the Secretary revise the annotations of two substances included within sections 205.602 and 205.605.

The NOSB has recommended that the Secretary add additional substances to sections 205.603 and 205.605 which have not been included in this final rule but are under review and, as appropriate, will be included in future rulemaking.

In addition to the amendments made based on June 6, 2000 through October 20, 2002, NOSB recommendations, this final rule also makes technical revisions to specific sections of the National List that provide clarity and adequately reflect the intent of the paragraphs identified within those sections.

II. Overview of Amendments

The following provides an overview of the amendments made to designated sections of the National List:

Section 205.601 Synthetic Substances Allowed for Use in Organic Crop Production

This final rule amends the introductory paragraph of § 205.601 by adding language to clarify that synthetic substances used in crop production must be used in a manner which does not contribute to contamination of crops, soil, or water. The amendment further clarifies that synthetic substances, except those in paragraphs (c), (j), (k), and (l), may only be used when the provisions of § 205.206(a) through (d) prove insufficient to prevent or control the target pest.

This final rule amends paragraph (a) of § 205.601 (as algicide, disinfectants and sanitizers, including irrigation cleaning systems) by adding the following materials:

Copper Sulfate, for use as an algicide, is limited to one application per field during any 24-month period. Application rates are limited to those which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent.

Ozone Gas, for use as an irrigation system cleaner only; and

Peracetic acid, for use in disinfecting equipment, seed, and asexually propagated planting material.

Paragraph (a) is further amended by correcting the spelling of the word ''demisters'' contained in subparagraph (a)(4) to ''demossers.''

This final rule amends paragraph (e) of § 205.601 by adding the following material:

Copper Sulfate, for use as tadpole shrimp control in rice production, is limited to one application per field during any 24-month period. Application rates are limited to levels which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent.

This final rule amends paragraph (f) by changing ''As insect attractants'' to ''As insect management.''

This final rule amends paragraph (i) of § 205.601 (as plant disease control) by adding the following substance:

Peracetic acid, for use to control fire blight bacteria.

Paragraph (i) is further amended by removing the annotation contained in subparagraph (i)(3).

This final rule revises paragraph (k) of § 205.601 (as plant growth regulators) by inserting the word ''gas'' behind ''ethylene'' to be consistent with the June 2000 NOSB recommendation for the substance. Section 205.601(k) now reads ''As plant growth regulators—Ethylene gas, for regulation of pineapple flowering.''

This final rule revises paragraph (m) of § 205.601 by inserting a new subpart (2) as follows:

(2) EPA List 3—Inerts of unknown toxicity—for use only in passive pheromone dispensers.

Section 205.602 Nonsynthetic Substances Prohibited for Use in Organic Crop Production

This final rule amends § 205.602 by adding the following substance:

Calcium chloride, except as a brine-sourced foliar spray to treat physiological disorders associated with calcium uptake.

This final rule revises current paragraph (h) of § 205.602 by amending its annotation to read as follows:

Sodium nitrate—unless use is restricted to no more than 20% of the crop's total nitrogen requirement; use in spirulina production is unrestricted until October 21, 2005.

Section 205.603 Synthetic Substances Allowed for Use in Organic Livestock Production

This final rule revises current subparagraph (4) of § 205.603(a) by correcting the spelling of the word ''chlorohexidine'' to ''chlorhexidine.''

This final rule revises paragraph (b)(4) by replacing ''Bordeaux mixes'' with ''as external pest control.''

This final rule amends paragraph (d) of § 205.603 (as feed additives) by adding the following three substances:

DL—Methionine, DL—Methionine—Hydroxy Analog, and DL—Methionine—Hydroxy Analog Calcium—for use only in organic poultry production until October 21, 2005.

This final rule revises current subparagraph (1) of § 205.603(d) by removing examples (i) and (ii) copper sulfate and magnesium sulfate, as they are both approved for use by FDA and do not need to be listed individually as examples. As currently published, subparagraphs § 205.603(d)(1)(i) and (ii) may have misled some readers to believe that the use of trace minerals are limited only to copper sulfate and magnesium sulfate. Therefore, the revision made in this final rule for current subparagraph (1) of § 205.603(d) reads ''Trace minerals, used for enrichment or fortification when FDA approved.''

This final rule amends current paragraph (e) of § 205.603 (as synthetic inert ingredients as classified by the Environmental Protection Agency (EPA), for use with nonsynthetic substances or synthetic substances listed in this section and used as active pesticide ingredients in accordance with any limitations on the use of such substances) by redesignating current paragraph (f) of § 205.603 as subparagraph (1) under § 205.603(e). While drafting § 205.603 for final publication in the **Federal Register**, current paragraph (f) was intended to be designated as § 205.603(e)(1), however, its designation was not properly assigned. Therefore, this final rule redesignates current paragraph (f) of § 205.603 as subparagraph (e)(1) of the same section.

Section 205.605 Nonagricultural (Nonorganic) Substances Allowed as Ingredients in or on Processed Products Labeled as ''Organic'' or ''Made With Organic (Specified Ingredients or Food Group(s))''

This final rule amends current paragraph (a) of § 205.605 by adding agar-agar, carageenan and tartaric acid as technical corrections. These substances were included on the National List proposed in the **Federal Register** on December 16, 1997, but were inadvertently omitted from the National List published in the **Federal Register** on March 13, 2000, and the final rule published on December 21, 2000, Final Rule (7 CFR part 205).

This final rule revises current paragraph (b)(10) of § 205.605 by amending its annotation to read as follows:

Ethylene, allowed for postharvest ripening of tropical fruit and degreening of citrus.

Paragraph (b) is further amended by adding tartaric acid as a technical correction.

Ethylene, for organic crop production, was a substance that was petitioned and reviewed for inclusion onto the National List after promulgation of the proposed rule published in the **Federal Register** on March 13, 2000. The NOSB approved and recommended that ethylene gas be included on the National List with the annotation ''for regulation of pineapple flowering.'' After receiving the NOSB recommendation for the material, the NOP, while finalizing the NOS, included the material on the National List without receiving public comment on the material through the Federal rulemaking process. As a result, the proposed rule requested public comment on the use of ethylene gas and this final rule addresses comments that were received on the use of ethylene gas for regulation of pineapple flowering.

III. Related Documents

Eight notices were published regarding the meetings of the NOSB and its deliberations on recommendations and substances petitioned for amending the National List. Substances and recommendations included in this final rule were announced for NOSB deliberation in the following **Federal Register** Notices: (1) 64 FR 54858, October 8, 1999, (Ethylene); (2) 65 FR 33802, May 25, 2000, (Ethylene gas); (3) 65 FR 64657, October 30, 2000, (Calcium borogluconate and Peracetic acid); (4) 66 FR 10873, February 20, 2001, (Poloxalene); (5) 66 FR 48654, September 21, 2001, (Calcium chloride, Copper sulfate, Methionine); (6) 67 FR 19375, April 19, 2002, (Potassium sorbate and Sodium propionate); (7) 67 FR 54784, August 26, 2002, (Ozone gas, Pheromones, Sodium (Chilean) nitrate, Propylene glycol, Magnesium hydroxide/Magnesium oxide, Kaolin pectin, Bismuth subsalicylate, Flunixin, Xylazine, Tolazoline, Butorphanol, Mineral oil, Activated charcoal, Epinephrine); and (8) 67 FR 62950, October 9, 2002, (Potassium sulfate and Calcium propionate).

IV. Statutory and Regulatory Authority

The Organic Foods Production Act of 1990 (OFPA), as amended (7 U.S.C. 6501 *et seq.*), authorizes the Secretary, at § 6517(d)(1), to make amendments to the National List based on proposed amendments developed by the NOSB. Sections 6518(k)(2) and 6518(n) of OFPA authorize the NOSB to develop proposed amendments to the National List for submission to the Secretary and establish a petition process by which persons may petition the NOSB for the purpose of having substances evaluated for inclusion onto or deletion from the National List. The National List petition process is implemented under § 205.607 of the NOS. The current petition process (65 FR 43259) can be accessed through the NOP Web site at *http://www.ams.usda.gov/nop.*

A. Executive Order 12866

This action has been determined to be non-significant for purposes of Executive Order 12866, and therefore, does not have to be reviewed by the Office of Management and Budget.

B. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. The final rule was reviewed under this Executive Order and no additional related information has been obtained since then. This final rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under section 2115 of the Organic Foods Production Act (OFPA) (7 U.S.C. 6514) from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to

be accredited as a certifying agent, as described in section 2115(b) of the OFPA (7 U.S.C. 6514(b)). States are also preempted under sections 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 7 U.S.C. 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to section 2108(b)(2) of the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to section 2120 (f) of the OFPA (7 U.S.C. 6519(f)), this regulation would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspections Act (21 U.S.C. 451 *et seq.*), or the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*), nor the authority of the Administrator of the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*).

Section 2121 of the OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose is to fit regulatory actions to the scale of businesses subject to the action. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Pursuant to the requirements set forth in the RFA, the Agricultural Marketing Service (AMS) performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000. AMS has also considered the economic impact of this action on small entities and has determined that this final rule will have an impact on a substantial number of small entities. However, AMS has determined that the impact on entities affected by this rule will not be significant. The effect of this rule will be to allow the use of additional substances in agricultural production and handling. This action relaxes the regulations published in the final rule and provides small entities with more tools to use in day-to-day operations. The AMS concludes that the economic impact of this addition of allowed substances, if any, will be minimal and entirely beneficial to small agricultural service firms. Accordingly, the Administrator of the AMS hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Small agricultural service firms, which include producers, handlers, and accredited certifying agents, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $750,000 and small agricultural producers are defined as those having annual receipts of less than $5,000,000.

The U.S. organic industry at the end of 2001 included nearly 6,600 certified crop and livestock operations, including organic production and handling operations, producers, and handlers. These operations reported certified acreage totaling more than 2.34 million acres, 72,209 certified livestock, and 5.01 million certified poultry. Data on the numbers of certified handling operations are not yet available, but likely number in the thousands, as they would include any operation that transforms raw product into processed products using organic ingredients. Growth in the U.S. organic industry has been significant at all levels. From 1997 to 2001, the total organic acreage grew by 74 percent; livestock numbers certified organic grew by almost 300 percent over the same period, and poultry certified organic increased by 2,118 percent over this time. Sales growth of organic products has been equally significant, growing on average around 20 percent per year. Sales of organic products were approximately $1 billion in 1993, but are estimated to reach $13 billion this year, according to the Organic Trade Association (the association that represents the U.S. organic industry). In addition, USDA has accredited 85 certifying agents who have applied to USDA to be accredited in order to provide certification services to producers and handlers. A complete list of names and addresses of accredited certifying agents may be found on the AMS NOP Web site, at *http://www.ams.usda.gov/nop.* AMS believes that most of these entities would be considered small entities under the criteria established by the SBA.

D. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act of 1995, the existing information collection requirements for the NOP are approved under OMB number 0581–0181. No additional collection or recordkeeping requirements are imposed on the public by this final rule. Accordingly, OMB clearance is not required by section 350 (h) of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, or OMB's implementing regulation at 5 CFR part 1320.

E. Comments Received

Altogether, 23 comments were received on these proposed revisions and amendments. Commenters included consumers, producers, processors, the National Organic Standards Board (NOSB), certifying agents, food industry organizations, State governments, and trade organizations.

Section 205.601 Synthetic Substances Allowed for Use in Organic Crop Production

No comments were opposed to the revision of the introductory text concerning use of materials as required in 205.203(c) and 205.206(a)–(d). One commenter, however, questioned whether every substance in 205.601 has to be measured against the criteria in 205.206(a)–(d). The commenter pointed out that algicides should be measured against these criteria in paragraphs 205.206(a)–(d), but that disinfectants, sanitizers, and cleaning materials in irrigation systems should not have to meet the criteria in (a)–(d). The commenter suggests revising paragraph 205.601(b) to include algicides and

removing the term algicides from 205.601(a). We agree that the use of disinfectants and sanitizers listed in § 205.601(a) should not be measured against the criteria in paragraphs 205.206 (a)–(d). Accordingly, we have amended the introductory text to exclude disinfectants and sanitizers. We disagree, however, with removing algicides from § 205.601(a). We recognize that there may be similar types of changes that could be made to improve the organization of the National List and the categories of materials and substances. Therefore, we will request that the NOSB begin work on addressing such organizational issues for inclusion in future rulemaking. One commenter asked that the final rule be written in plain English so that an average person will understand what is being said. We have made considerable efforts to write these regulations in plain English, but note that the regulations dealing with the National List are inherently difficult to understand because of their technical nature.

(a) As algicides, disinfectants and sanitizers, including irrigation cleaning systems—(3) Copper Sulfate. Two commenters opposed the addition of copper sulfate to the National List when it was published in December, 2000 and restated their opposition; one commenter cited problems with harmonization with European standards which do not allow the use of copper sulfate. USDA is currently engaged in discussions with the European Union (EU) concerning harmonization and mutual recognition of our respective standards for organic production and processing, and we believe these issues will be addressed in those discussions. Copper sulfate has been the subject of considerable debate and review at more than one NOSB public meeting, and the annotations restricting its use reflect an attempt by the NOSB to address all of the concerns raised regarding the use of copper sulfate in organic systems. Two commenters requested that the phrase ''in aquatic rice systems'' be added as it was stated in the NOSB recommendation. These two comments have merit and we have made the requested change.

(5) Ozone gas. No commenters opposed the addition of ozone gas.

(6) Peracetic acid. One commenter noted that many peracetic acid formulations contain small amounts of toxic stabilizer compounds, and that the National List should only be for formulations of this material that do not have synthetic stabilizers in them. However, we believe the NOSB understands the full nature of peracetic acid and its uses and made its recommendation accordingly. The public is invited to petition the NOSB to reconsider any material at any time that new information becomes available. Such information should also be forwarded to the NOSB prior to its re-review of any materials on the National List before the sunset date of five years after being added to the List. One commenter asked that this paragraph be further amended to require that documentation be shown that alternatives including biocontrols have been tried. However, with the revision to the introductory text in this subsection, we believe the additional annotation is not necessary and the final rule remains as proposed.

(e) As insecticides (including acaricides or mite control)—(3) Copper Sulfate. The word ''aquatic'' will be added before the words ''rice production'' to be consistent with the revised wording in paragraph (a) (3).

(f) As insect attractants—Pheromones. Commenters pointed out that the word ''attractants'' may be somewhat inaccurate. Pheromones may also include mating disruption or other general confusion, not necessarily synonymous with attraction. We have amended the paragraph to state ''as insect management.'' We also received two comments urging a policy guidance statement be issued to clarify types of pheromones permitted as those that are EPA-exempt or EPA-registered without additional synthetic toxicants (unless those are also on the List) or those containing no List 1 or List 2 inerts. We will publish on our Web site such policy guidance.

(i) As plant disease control—(3) Hydrated lime. Numerous commenters pointed out that the annotation is incorrectly written in the current regulations. As currently written, the annotation reads ''must be used in a manner that minimizes copper accumulation in the soil.'' However, there is no copper in hydrated lime. The annotation referred to an earlier reference to ''Bordeaux mixes'' that are a combination of copper sulfate plus hydrated lime. Accordingly, we have deleted the annotation altogether as suggested by the commenters.

(7) Peracetic acid. Commenters pointed out that the proposed annotation referring to EPA approval is unnecessary, as the material is currently regulated by EPA and it is unnecessary to restate EPA's status in the NOP regulation. These comments have merit and we have amended the annotation to read ''for use to control fire blight bacteria.'' And one comment opposed the addition of additional synthetic materials to the National List, specifically, the addition of paracetic acid to section 205.601. The commenter raised concerns that the addition of synthetic materials to the National List could continue a disturbing trend of moving organic systems away from the basic principles of minimizing use and dependence on purchased inputs, especially synthetic substances. Congress recognized that synthetic materials might be necessary for organic production to develop and that is why the National List was created in the first place. Moreover, the process of adding a material to the National List is sufficiently rigorous that by itself, the process will provide a natural limit to the number of materials that may be added to the List.

(k) As plant growth regulators. No commenters opposed to the addition of ''gas'' behind ''ethylene.''

(m) As synthetic inert ingredients as classified by the EPA, for use with nonsynthetic substances or synthetic substances listed in this section and used as an active pesticide ingredient in accordance with any limitations on the use of such substances—(2) EPA List 3—Inerts of unknown toxicity—for use only in passive pheromone dispensers. One commenter objected to the addition of any List 3 Inert unless a Technical Advisory Panel (TAP) review is conducted and the NOSB approved the substance for addition to the National List. However, we believe the annotation accurately reflects the NOSB's understanding that in passive pheromone dispensers, the allowance of List 3 Inerts poses no significant harm to sustainable systems, including crops, soil, and water. Accordingly, no change is made to this provision.

Section 205.602 Nonsynthetic Substances Prohibited for Use in Organic Crop Production

No comments were opposed to the addition of calcium chloride.

The language in the proposed rule on sodium nitrate differs in two places, and may be misleading. The amendment to paragraph (g) should read: Sodium nitrate—unless use is restricted to no more than 20 percent of the crop's total nitrogen requirement; use in spirulina production is unrestricted until October 21, 2005.'' Two commenters opposed the use of sodium nitrate in any amount, or for any crop production, and one of those commenters cited problems with harmonization with European standards for organic crop production. USDA is currently engaged in discussions with the European Union (EU) concerning harmonization and mutual recognition of our respective standards for organic production and processing, and we

believe these issues will be addressed in those discussions. Sodium nitrate was a subject of considerable debate and review at more than one NOSB public meeting, and the annotation restricting its use reflects an attempt by the NOSB to address all of the concerns that were raised regarding the use of sodium nitrate in organic systems.

The NOSB also commented that the natural substance sodium chloride (also known as salt) should be prohibited and added to 205.602, with the annotation that it be permitted in organic cotton production to comply with emergency spray programs or to prevent immediate loss of crop. The NOSB pointed out that failure to add this material to 205.602 means that it may be used without restriction, when the NOSB recommended its addition to the list of prohibited natural materials in 1995. However, we did not include this material for comment in the proposed rule that was issued in April 2003. Therefore, we believe it is inappropriate to add this material to this final rule without offering the public a chance to comment on the NOSB's recommendation. This material can be included in subsequent rulemaking so that the public can comment on its proposed addition to 205.602, with the annotation recommended by the NOSB.

Section 205.603 Synthetic Substances Allowed for Use in Organic Livestock Production

(b) As topical treatment, external parasiticide or local anesthetic as applicable—(4) hydrated lime. The annotation following hydrated lime refers to Bordeaux mixes, which the NOSB correctly points out is a crop protection material, not a livestock material. The NOSB recommended changing the annotation to replace ''Bordeaux mixes'' with ''as external pest control.'' We agree and have revised the annotation accordingly.

(d) As feed additives—(1) DL-Methionine; DL-Methionine—hydroxy analog, and DL-Methionine—hydroxy analog calcium—for use only in organic poultry production until October 21, 2005. We received two comments in opposition to the addition of these three methionine materials as a feed additive for organic poultry feed; one comment cited problems with EU harmonization, which we have addressed above. Methionine has been the subject of considerable debate and review at more than one NOSB meeting, and the annotation restricting its use reflects an attempt by the NOSB to address all of the concerns raised regarding the use of methionine in organic systems.

(2) Trace minerals, used for enrichment or fortification when FDA approved. We received two comments raising concerns on this proposed change. One commenter seemed to think that we were eliminating trace minerals from allowed synthetic materials for use in livestock production. We are not eliminating their use; rather we eliminated the references to copper sulfate and magnesium sulfate to eliminate the perception that only those two trace minerals could be used since they were the only two examples listed. As long as the trace mineral is approved by FDA for use in feed supplements for the purpose of enrichment or fortification, the trace mineral is allowed under these regulations. Notwithstanding their allowed use in paragraph (d)(2), producers are also bound to comply with paragraphs (a) and (b) of § 205.237 dealing with livestock feed, including paragraph (b)(2) and (b)(6), which prohibit a producer from providing feed supplements or additives in amounts above those needed for adequate nutrition and health maintenance for the species at its specific stage of life or use feed additives and supplements in violation of the Federal Food, Drug, and Cosmetic Act. These livestock feed standards are also why we did not take the recommended changes of the second commenter that wanted a two-year period of use for minerals approved by the NOSB after a TAP review is conducted, and questioned NOP's policy with respect to trace minerals for animal feeds. This commenter cited an NOSB statement in 1995 that nutrients should come from organic sources, followed by non-synthetic sources if organic is unavailable, and only allowing synthetic sources of minerals if natural sources are unavailable. We believe that the regulations as written, especially § 205.237(a) addresses this concern by requiring feed to be 100 percent organic, with exceptions for nonsynthetic substances and synthetic substances as allowed under § 205.603(d).

Section 205.605 Nonagricultural (Nonorganic) Substances Allowed as Ingredients in or on Processed Products Labeled as ''Organic'' or ''Made With Organic (Specified Ingredients or Food Group(s))''

The proposed rule contained a typographical error, listing both nonsynthetic and synthetic lists as § 205.605(a). The synthetic nonagricultural substance list should be denoted as § 205.605(b).

(b) Synthetics allowed—Tartaric acid. As noted in the proposed rule, tartaric acid was one of three materials that were inadvertently omitted from publication on the National List in the final regulations that were published on December 21, 2000, and the proposed rule would amend the National List to include tartaric acid in § 205.605(a). However, the NOSB pointed out in their comments that the NOSB had approved both synthetic and nonsynthetic forms of tartaric acid. Accordingly, § 205.605(a) and (b) are amended to include tartaric acid.

Ethylene—we received one comment asking why this is not in the list of synthetic materials approved for crop production, since it deals with ripening for fruit. However, its use is clearly intended for fruit that has left the farm and is enroute to final consumers and is more appropriately considered part of a processing function to prepare the fruit for final purchase. Three commenters opposed its addition to the National List, citing general concerns about adding more synthetic materials to the National List and degrading the status of organic products and one of those comments cited problems with European harmonization.

Congress recognized that synthetic materials might be necessary for organic production to develop and that is why the National List was created in the first place. Moreover, the process of adding a material to the National List is sufficiently rigorous that by itself, the process will provide a natural limit to the number of materials that may be added to the List.

The USDA is currently engaged in discussions with the European Union (EU) concerning harmonization and mutual recognition of our respective standards for organic production and processing, and we believe these issues will be addressed in those discussions.

Pursuant to 5 U.S.C. 553, it is found and determined that good course exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register**.

This rule reflects recommendations submitted to the Secretary by the NOSB. The ten substances proposed to be added to the National List were based on petitions from the industry and evaluated by the NOSB using criteria in the Act and the regulations. Because these substances are critical to organic production and handling operations, the National List should be amended as soon as possible.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Imports, Labeling, Organically produced products, Plants,

Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

■ For the reasons set forth in the preamble, 7 CFR part 205, Subpart G is amended as follows:

PART 205—NATIONAL ORGANIC PROGRAM

■ 1. The authority citation for 7 CFR part 205 continues to read as follows:

Authority: 7 U.S.C. 6501–6522.

■ 2. Section 205.601 is amended by:
■ a. Revising the introductory text.
■ b. Redesignating paragraphs (a)(3) and (a)(4) as paragraphs (a)(4) and (a)(7), respectively.
■ c. Adding new paragraphs (a)(3), (a)(5), and (a)(6).
■ d. Revising the word ''demisters'' in newly redesignated paragraph (a)(7) to read ''demossers.''
■ e. Redesignating paragraphs (e)(3) through (e)(7) as paragraphs (e)(4) through (e)(8).
■ f. Adding a new paragraph (e)(3).
■ g. Revising paragraph (f).
■ h. Revising paragraph (i)(3).
■ i. Redesignating paragraphs (i)(7) through (i)(10) as paragraphs (i)(8) through (i)(11), respectively.
■ j. Adding a new paragraph (i)(7).
■ k. Revising paragraph (k).
■ l. Adding new paragraph (m)(2).

The revisions read as follows:

§ 205.601 Synthetic substances allowed for use in organic crop production.

In accordance with restrictions specified in this section, the following synthetic substances may be used in organic crop production: *Provided,* That, use of such substances do not contribute to contamination of crops, soil, or water. Substances allowed by this section, except disinfectants and sanitizers in paragraph (a) and those substances in paragraphs (c), (j), (k), and (l) of this section, may only be used when the provisions set forth in § 205.206(a) through (d) prove insufficient to prevent or control the target pest.

(a) * * *

(3) Copper sulfate—for use as an algicide in aquatic rice systems, is limited to one application per field during any 24-month period. Application rates are limited to those which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent.

* * * * *

(5) Ozone gas—for use as an irrigation system cleaner only.

(6) Peracetic acid—for use in disinfecting equipment, seed, and asexually propagated planting material.

* * * * *

(e) * * *

(3) Copper sulfate—for use as tadpole shrimp control in aquatic rice production, is limited to one application per field during any 24-month period. Application rates are limited to levels which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent.

* * * * *

(f) As insect management. Pheromones.

* * * * *

(i) * * *

(3) Hydrated lime.

(7) Peracetic acid—for use to control fire blight bacteria.

* * * * *

(k) As plant growth regulators. Ethylene gas—for regulation of pineapple flowering.

* * * * *

(m) * * *

(2) EPA List 3—Inerts of unknown toxicity—for use only in passive pheromone dispensers.

* * * * *

■ 3. Section 205.602 is revised to read as follows:

§ 205.602 Nonsynthetic substances prohibited for use in organic crop production.

The following nonsynthetic substances may not be used in organic crop production:

(a) Ash from manure burning.

(b) Arsenic.

(c) Calcium chloride, brine process is natural and prohibited for use except as a foliar spray to treat a physiological disorder associated with calcium uptake.

(d) Lead salts.

(e) Potassium chloride—unless derived from a mined source and applied in a manner that minimizes chloride accumulation in the soil.

(f) Sodium fluoaluminate (mined).

(g) Sodium nitrate—unless use is restricted to no more than 20% of the crop's total nitrogen requirement; use in spirulina production is unrestricted until October 21, 2005.

(h) Strychnine.

(i) Tobacco dust (nicotine sulfate).

(j)–(z) [Reserved]

■ 4. Section 205.603 is amended by:
■ a. Revising paragraph (a).
■ b. Revising the word ''chlorohexidine'' in paragraph (a)(4) to read ''chlorhexidine''.
■ c. Redesignating paragraphs (b)(1) through (b)(5) as (b)(2) through (b)(6), respectively and redesignating paragraph (b)(6) as paragraph (b)(1).
■ d. Revising newly redesignated paragraph (b)(4).
■ e. Redesignating paragraphs (d)(1) and (d)(2) as paragraphs (d)(2) and (d)(3), respectively.
■ f. Adding a new paragraph (d)(1).
■ g. Revising newly redesignated paragraph (d)(2).
■ h. Revising the designation for paragraph (f) to read ''(e)(1)''.
■ i. Reserving paragraphs (f)–(z).

The revisions and addition read as follows:

§ 205.603 Synthetic substances allowed for use in organic livestock production.

* * * * *

(a) As disinfectants, sanitizer, and medical treatments as applicable.

(1) Alcohols.

(i) Ethanol—disinfectant and sanitizer only, prohibited as a feed additive.

(ii) Isopropanol—disinfectant only.

(2) Aspirin—approved for health care use to reduce inflammation.

(3) Biologics—Vaccines.

(4) Chlorhexidine—Allowed for surgical procedures conducted by a veterinarian. Allowed for use as a teat dip when alternative germicidal agents and/or physical barriers have lost their effectiveness.

(5) Chlorine materials—disinfecting and sanitizing facilities and equipment. Residual chlorine levels in the water shall not exceed the maximum residual disinfectant limit under the Safe Drinking Water Act.

(i) Calcium hypochlorite.

(ii) Chlorine dioxide.

(iii) Sodium hypochlorite.

(6) Electrolytes—without antibiotics.

(7) Glucose.

(8) Glycerine—Allowed as a livestock teat dip, must be produced through the hydrolysis of fats or oils.

(9) Hydrogen peroxide.

(10) Iodine.

(11) Magnesium sulfate.

(12) Oxytocin—use in postparturition therapeutic applications.

(13) Parasiticides. Ivermectin—prohibited in slaughter stock, allowed in emergency treatment for dairy and breeder stock when organic system plan-approved preventive management does not prevent infestation. Milk or milk products from a treated animal cannot be labeled as provided for in subpart D of this part for 90 days following treatment. In breeder stock, treatment cannot occur during the last third of gestation if the progeny will be sold as organic and must not be used during the lactation period of breeding stock.

(14) Phosphoric acid—allowed as an equipment cleaner, *Provided,* That, no direct contact with organically managed livestock or land occurs.

(b) * * *

(4) Lime, hydrated—as external pest control, not permitted to cauterize physical alterations or deodorize animal wastes.

* * * * *

(d) * * *

(1) DL-Methionine, DL-Methionine—hydroxy analog, and DL-Methionine—hydroxy analog calcium—for use only in organic poultry production until October 21, 2005.

(2) Trace minerals, used for enrichment or fortification when FDA approved.

* * * * *

■ 5. Section 205.605 is revised to read as follows:

§ 205.605 Nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s)).''

The following nonagricultural substances may be used as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s))'' only in accordance with any restrictions specified in this section.

(a) *Nonsynthetics allowed:*

Acids (Alginic; Citric—produced by microbial fermentation of carbohydrate substances; and Lactic).

Agar-agar.

Bentonite.

Calcium carbonate.

Calcium chloride.

Carageenan.

Colors, nonsynthetic sources only.

Dairy cultures.

Diatomaceous earth—food filtering aid only.

Enzymes—must be derived from edible, nontoxic plants, nonpathogenic fungi, or nonpathogenic bacteria.

Flavors, nonsynthetic sources only and must not be produced using synthetic solvents and carrier systems or any artificial preservative.

Kaolin.

Magnesium sulfate, nonsynthetic sources only.

Nitrogen—oil-free grades.

Oxygen—oil-free grades.

Perlite—for use only as a filter aid in food processing.

Potassium chloride.

Potassium iodide.

Sodium bicarbonate.

Sodium carbonate.

Tartaric acid.

Waxes—nonsynthetic (Carnauba wax; and Wood resin).

Yeast—nonsynthetic, growth on petrochemical substrate and sulfite waste liquor is prohibited (Autolysate; Bakers; Brewers; Nutritional; and Smoked—nonsynthetic smoke flavoring process must be documented).

(b) *Synthetics allowed:*

Alginates.

Ammonium bicarbonate—for use only as a leavening agent.

Ammonium carbonate—for use only as a leavening agent.

Ascorbic acid.

Calcium citrate.

Calcium hydroxide.

Calcium phosphates (monobasic, dibasic, and tribasic).

Carbon dioxide.

Chlorine materials—disinfecting and sanitizing food contact surfaces, *Except,* That, residual chlorine levels in the water shall not exceed the maximum residual disinfectant limit under the Safe Drinking Water Act (Calcium hypochlorite; Chlorine dioxide; and Sodium hypochlorite).

Ethylene—allowed for postharvest ripening of tropical fruit and degreening of citrus.

Ferrous sulfate—for iron enrichment or fortification of foods when required by regulation or recommended (independent organization).

Glycerides (mono and di)—for use only in drum drying of food.

Glycerin—produced by hydrolysis of fats and oils.

Hydrogen peroxide.

Lecithin—bleached.

Magnesium carbonate—for use only in agricultural products labeled ''made with organic (specified ingredients or food group(s)),'' prohibited in agricultural products labeled ''organic''.

Magnesium chloride—derived from sea water.

Magnesium stearate—for use only in agricultural products labeled ''made with organic (specified ingredients or food group(s)),'' prohibited in agricultural products labeled ''organic''.

Nutrient vitamins and minerals, in accordance with 21 CFR 104.20, Nutritional Quality Guidelines For Foods.

Ozone.

Pectin (low-methoxy).

Phosphoric acid—cleaning of food-contact surfaces and equipment only.

Potassium acid tartrate.

Potassium tartrate made from tartaric acid.

Potassium carbonate.

Potassium citrate.

Potassium hydroxide—prohibited for use in lye peeling of fruits and vegetables.

Potassium iodide—for use only in agricultural products labeled ''made with organic (specified ingredients or food group(s)),'' prohibited in agricultural products labeled ''organic''.

Potassium phosphate—for use only in agricultural products labeled ''made with organic (specific ingredients or food group(s)),'' prohibited in agricultural products labeled ''organic''.

Silicon dioxide.

Sodium citrate.

Sodium hydroxide—prohibited for use in lye peeling of fruits and vegetables.

Sodium phosphates—for use only in dairy foods.

Sulfur dioxide—for use only in wine labeled ''made with organic grapes,'' Provided, That, total sulfite concentration does not exceed 100 ppm.

Tartaric acid.

Tocopherols—derived from vegetable oil when rosemary extracts are not a suitable alternative.

Xanthan gum.

(c)–(z) [Reserved]

■ 6. In § 205.607, paragraph (c) is revised to read as follows:

§ 205.607 Amending the National List.

* * * * *

(c) A petition to amend the National List must be submitted to: Program Manager, USDA/AMS/TMP/NOP, 1400 Independence Ave., SW., Room 4008–So., Ag Stop 0268, Washington, DC 20250.

* * * * *

Dated: October 27, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03–27415 Filed 10–30–03; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 101, 141, 201, 260, 352, and 357

[Docket Nos. RM02–14–000 and RM02–14–001; Order No. 634–A]

Regulation of Cash Management Practices

October 23, 2003.

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission is amending its regulations to implement reporting requirements for FERC-regulated entities that participant in cash

management programs. The Commission is also modifying certain aspects of the documentation requirements that became effective August 7, 2003.

EFFECTIVE DATE: This rule is effective December 1, 2003.

FOR FURTHER INFORMATION CONTACT:
Rosemary Womack (Technical Information), Office of the Executive Director, Division of Regulatory Accounting Policy, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8989.
Peter Roidakis (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8206.

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I. Introduction

1. On June 26, 2003, the Federal Energy Regulatory Commission (Commission or FERC) issued an Interim Rule, which amended its regulations under 18 CFR parts 101, 201, and 352 of the Commission's Uniform Systems of Accounts by implementing documentation requirements for FERC-regulated entities that participate in cash management programs. Cash management or ''money pool'' programs typically concentrate affiliates' cash assets in joint accounts for the purpose of providing financial flexibility and lowering the cost of borrowing.

2. The regulations require that FERC-regulated entities subject to these rules place their cash management agreements in writing, specify the duties and responsibilities of cash management program participants and administrators, specify the methods for calculating interest and for allocating interest income and expenses, and specify any restrictions on deposits or borrowings by participants.

3. In the Interim Rule, the Commission also sought comments on new reporting requirements that would require FERC-regulated entities to file their cash management agreements with the Commission and notify the Commission when their proprietary capital ratios drop below 30 percent and when their proprietary capital ratios subsequently return to or exceed 30 percent. The reporting requirements were reflected in changes to 18 CFR parts 141, 260, and 357 of the Commission's regulations for public utilities and licensees, natural gas companies, and oil pipeline companies.

4. This Final Rule amends the Commission's regulations under 18 CFR parts 141, 260, and 357 of the Uniform System of Accounts for public utilities and licensees, natural gas companies, and oil pipeline companies by implementing the reporting requirements proposed in the Interim Rule, with some modifications. The modifications require FERC-regulated entities to compute their proprietary capital ratios quarterly (as compared to a proposed monthly computation) and to notify the Commission within 45 days after the end of each calendar quarter if their proprietary capital ratios drop below or subsequently exceed 30 percent (as compared to a proposed 15 day period for computation and 5 day notification deadline).

5. The Final Rule also modifies certain aspects of the documentation requirements that were implemented in the Interim Rule and became effective August 7, 2003. Specifically, the Commission is revising parts 101 and 201, Account 146 C, and part 352, Account 13(c), to require that FERC-regulated entities maintain documentation related only to the administrator and the FERC-regulated entity (rather than documentation related to all cash management participants). Account 146 B(1), (2) and (4) and Account 13(b)(1), (2) and (4) are also revised to require that FERC-regulated entities document the interest rates on deposits or borrowings in the cash management agreements, but not on the daily records for each deposit, withdrawal or borrowing. Additionally, the regulations are revised to require records showing the monthly balances of cash management programs, rather than daily balances.

6. The documentation and reporting requirements the Commission is adopting in this Final Rule directly address the deficiencies in cash management programs found by the Chief Accountant in audits conducted in 2002. At that time, FERC-regulated entities had $16 billion in cash management accounts. More recently, analysis indicates that FERC-regulated entities have $25.2 billion in cash management accounts. The documentation and reporting requirements the Commission is adopting are needed to ensure that rates paid by the customers of FERC-regulated entities are just and reasonable. The additional financial transparency required by these rules will also aid the Commission in meeting its oversight and market monitoring obligations and will benefit the investing public.

7. In sum, the Final Rule applies to all FERC-regulated entities that have not been granted waivers of the Commission's accounting regulations and the FERC Annual Report Forms 1, 1–F, 2, 2–A or 6 filing requirements.[1] Due to the nature of electric cooperatives, the Commission is exempting them from the requirement to notify the Commission when their proprietary capital ratios drop below 30 percent and when their proprietary capital ratios subsequently return to or exceed 30 percent.[2] Electric cooperatives must comply with the Final Rule except for the notification requirements stated above.

II. Background

8. An investigation by the Chief Accountant in March 2002 revealed that FERC-regulated entities had approximately $16 billion of assets in cash management accounts. The preliminary results of the investigation also revealed severe recordkeeping deficiencies:

- Cash management agreements generally were not formalized in writing.
- The terms of the programs and the interest associated with loans were not documented in writing.
- It was unclear whether interest had been paid to subsidiary companies by the parent companies.

9. The Commission issued a Notice of Proposed Rulemaking (NOPR) on August 1, 2002, 67 FR 51150 (Aug. 7, 2002), IV FERC Stats. & Regs. ¶ 32,561 (August 1, 2002), to amend its Uniform Systems of Accounts for public utilities

[1] Reporting requirements for the Annual Report Forms can be found at Section 141.1 for Form 1, Section 141.2 for Form 1–F, Section 260.1 for Form 2, Section 260.2 for Form 2–A and Section 357.2 for Form 6.

[2] Electric cooperatives that have paid off their debt to the Rural Utilities Services are subject to the Commission's regulations.

and licensees,[3] natural gas companies,[4] and oil pipeline companies.[5] The NOPR proposed to require that, as a prerequisite to a FERC-regulated entity participating in a cash management program, the FERC-regulated entity shall maintain a minimum proprietary capital ratio of at least 30 percent and the FERC-regulated entity and its parent shall maintain investment grade credit ratings. Also, the NOPR proposed new documentation requirements for cash management programs.

10. The Commission issued an interim rule on June 26, 2003, 68 FR 40500 (July 8, 2003), FERC Stats. & Regs. ¶ 31,145 (June 26, 2003), which amended its regulations under 18 CFR parts 101, 201, and 352 of the Commission's Uniform Systems of Accounts for public utilities and licensees, natural gas companies, and oil pipeline companies by implementing the documentation requirements proposed in the NOPR. The interim regulations required that FERC-regulated entities maintain their cash management agreements in writing, that the agreements specify the duties and responsibilities of cash management program participants and administrators, specify the methods for calculating interest and for allocating interest income and expenses, and specify any restrictions on deposits or borrowings by participants. The regulations became effective August 7, 2003 for all FERC-regulated entities that have not been granted waivers of the Commission's accounting regulations and the FERC Annual Report Forms 1, 1–F, 2, 2–A or 6 filing requirements.

11. The Commission decided not to adopt the financial prerequisites proposed in the NOPR. Instead, the Commission sought comments on new reporting requirements that require FERC-regulated entities participating in cash management programs to file agreements related to such programs with the Commission and to notify the Commission when their proprietary capital ratios drop below 30 percent, and when they subsequently return to or exceed 30 percent. These new reporting requirements were reflected in revisions to parts 141, 260, and 357 of the Commission's regulations. The Commission also concluded that the information collected through the new reporting requirements would be considered non-confidential in nature and be made available to the general public via FERC's eLibrary (formerly FERRIS) accessed from FERC's Home Page.[6] The Commission did not implement the new reporting requirements in the Interim Rule, but sought comments on these requirements.

12. Requests for stay of the Interim Rule were denied in an order dated August 21, 2003.[7]

III. Discussion

13. The Commission received twenty-five comments[8] in response to the new reporting requirements or comments asking clarification of the documentation requirements that became effective August 7, 2003. While commenters generally support the Commission's decision not to impose prerequisites to cash management program participation, some commenters question whether the Commission has authority to require utilities to file agreements associated with cash management programs. Other commenters ask whether the Commission has a statutory basis for cash management oversight of public utility affiliates of registered holding companies and of utilities whose money pools are regulated by state commissions.

14. Several commenters also suggested various changes to make compliance with the proposed regulations easier. The suggested changes principally involve the time period for performing the proprietary capital ratio calculation, the deadline for notifying the Commission when the proprietary capital ratio falls below, or subsequently returns to or exceeds 30 percent, and the requirement to file cash management agreements with the Commission.

15. After careful consideration of the comments received, the Commission is implementing the new reporting requirements with some modifications, as discussed below, and is modifying certain aspects of the documentation requirements that became effective August 7, 2003.

16. Consistent with the discussions below, the Commission also denies all requests for rehearing of the Interim Rule.

A. Statutory Basis for the Rule

17. The Interim Rule did not propose to regulate participation in cash management programs, nor did it establish any prerequisites for participation in cash management programs as the Notice of Proposed Rulemaking had originally proposed. Rather, the Interim Rule merely established documentation requirements and proposed reporting requirements. The Final Rule requires FERC-regulated entities subject to the rule to file their cash management agreements with the Commission, as well as notify the Commission when their proprietary capital ratios drop below 30 percent. The provisions in the Federal Power Act (FPA), Natural Gas Act (NGA), and Interstate Commerce Act (ICA) that authorize the Commission to require reports and documentation to administer these statutes provide ample authority for issuance of the Final Rule.[9]

18. Most commenters do not challenge the Commission's legal authority to set the documentation and reporting requirements of the Interim Rule.[10] A few commenters still raise such challenges, however, and we address their concerns here. EEI, for example, argues that the Commission lacks a legal or factual basis for the reporting requirements.[11] Southern California Edison Company (Edison) supports EEI's comments on the Interim Rule. Duke Energy asserts that the Commission lacks the statutory authority to regulate the financial transactions of Duke Energy's FERC-regulated entities, including their participation in cash management programs.

19. The short answer is that the Commission is not ''regulating'' cash management programs. Rather, the Final Rule implements reporting and documentation requirements, which are

[3] Part 101 Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act. 18 CFR part 101 (2003).

[4] Part 201 Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act. 18 CFR part 201 (2003).

[5] Part 352 Uniform System of Accounts Prescribed for Oil Pipeline Companies Subject to the Provisions of the Interstate Commerce Act. 18 CFR part 352 (2003).

[6] *http://www.ferc.gov/.*

[7] 104 FERC ¶ 61,217 (2003).

[8] Commenters on the Interim Rule are listed in the appendix to this final rule.

[9] *See* 15 U.S.C. 717g (2000); 15 U.S.C. 717i (2000); 16 U.S.C. 825 (2000); 16 U.S.C. 825c (2000); 49 App. U.S.C. 20(1) (1988); 49 App. U.S.C. 20(5) (1988).

[10] For example, the Interstate Natural Gas Association of America (INGAA), which had initially argued that the Commission does not have authority to establish prerequisites for money pool participation, does not argue that the Commission lacks the legal authority to set the Final Rule's reporting requirements. Others such as the American Public Gas Association (APGA) strongly confirm the Commission's legal authority to impose the needed reporting requirements in the Final Rule, consistent with the Commission's mandate to protect customers from unjust and unreasonable rates.

[11] The legal basis for the 30 percent proprietary capital reporting obligation and other reporting obligations is discussed here, while the choice of a 30 percent proprietary capital level for initiating the report is discussed *infra.*

amply justified by the enormous amount of assets of regulated entities in cash management programs. In 2002, the Commission found at least $16 billion of regulated entities' assets in such accounts and that amount has increased in 2003 to approximately $25 billion. This is an enormous, mostly unregulated, pool of money in cash management programs that may detrimentally affect regulated rates. The Final Rule properly requires that FERC-regulated entities document and report information to aid the Commission in monitoring cash management programs, but is not in the nature of a regulation governing participation in cash management programs. The reporting requirements allow the Commission to protect ratepaying customers of regulated entities by providing greater transparency of cash management activities.

20. AOPL and Chevron Pipeline Company, *et al.*, in their comments on the Interim Rule question the Commission's statutory authority for the record-keeping requirements, insofar as the Final Rule may intend to require such records of non-FERC-regulated entities. Shell Pipeline Company LP shares these concerns. The Final Rule does not require recordkeeping or reports from non-jurisdictional entities. Accordingly, the recordkeeping and reporting requirements of the NGA, FPA, and ICA provide express statutory authority for the reporting requirements of the Final Rule, which are imposed solely on FERC-regulated entities.

21. Specifically, NGA Section 8 provides that ''[e]very natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act * * *,'' [12] and NGA Section 10 provides that ''[e]very natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this act.'' [13] FPA Section 301 provides that ''[e]very licensee and public utility shall make, keep and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act * * *,'' [14] and FPA Section 304 provides that ''[e]very licensee and every public utility shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this Act.'' [15] Section 20(1) of the ICA provides that ''[t]he Commission is authorized to require annual, periodical, or special reports from [oil pipeline] carriers * * * and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary * * *,'' [16] and Section 20(5) of the ICA authorizes the Commission ''in its discretion, [to] prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers and their lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. * * *.'' [17]

22. In sum, the Commission is entrusted with the responsibility to ensure that rates are just and reasonable and that FERC-regulated entities provide the services to which they have committed.[18] The transparency-enhancing reporting requirements adopted in the Final Rule for cash management programs—in which over $25 billion of regulated entities' funds are deposited (and accessible to others in their corporate family)—will help ensure that both goals are achieved.

23. Requiring that FERC-regulated entities that participate in money pools file reports and maintain documents does not impermissibly extend the Commission's jurisdiction to unregulated parent companies (or other unregulated affiliates). The Commission is requiring jurisdictional entities to document cash management transactions and file cash management agreements to which the jurisdictional entities are parties. This is squarely within the ambit of the Commission's statutory authority.

B. Applicability of the Rule to Registered Holding Companies

24. The Interim Rule applied the documentation requirements to all FERC-regulated entities that have not been granted waivers of the Commission's accounting regulations and the FERC Annual Report Forms 1, 1–F, 2, 2–A or 6 filing requirements. This includes subsidiaries of registered holding companies that are regulated by the SEC pursuant to Public Utility Holding Company Act (PUHCA).[19]

25. In the Interim Rule, the Commission found that to protect ratepayers, the Commission needed to better understand the financial condition of the companies it regulates, including their cash management practices. And while the Commission agreed with many commenters that the SEC regulates some aspects of a registered holding company's cash management programs, the SEC's case-by-case analysis of these programs did not provide assurance that documentation adequate for this Commission's regulatory oversight would be maintained.

26. Therefore, the Interim Rule required that FERC-regulated entities that are also subject to PUHCA follow the documentation requirements adopted in the Commission's Uniform Systems of Accounts and proposed that FERC-regulated holding company subsidiaries follow the same reporting requirements as all other FERC-regulated entities subject to this rule.

Comments Received:

27. EEI requested rehearing and clarification of the applicability of the rule to subsidiaries of registered holding companies, asserting that regulation by the Commission is unnecessary and barred by Section 318 of the FPA.[20] While acknowledging that ''the documentation requirements the FERC is imposing differ somewhat from the SEC's requirements,'' EEI goes on to assert that any regulated holding company's cash management program ''already satisfies documentation requirements comparable to those that would be imposed in the interim rule.''

[12] 15 U.S.C. 717g (2000).

[13] 15 U.S.C. 717i (2000).

[14] 16 U.S.C. 825 (2000).

[15] 16 U.S.C. 825c (2000).

[16] 49 App. U.S.C. 20(1) (1988).

[17] 49 App. U.S.C. 20(5) (1988).

[18] *See* FPA Sections 205 and 206, NGA Sections 4 and 5, and ICA Title 49 App. Sections 1(5) and 15(1).

[19] 15 U.S.C. 79a *et seq.* (2000).

[20] Section 318 of the Federal Power Act provides as follows:

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, such person is subject both to a requirement of [PUHCA] or of a rule, regulation or order thereunder and to a requirement of [the FPA], or of any rule, regulation, or order thereunder, the requirement of [PUHCA] shall apply to such person, and such person shall not be subject to the requirement of [the FPA] or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of [PUHCA], in which case the requirements of [the Federal Power Act] shall apply to such person.

Thus, EEI asserts, there is ''no reason to create redundant requirements for registered holding company systems.'' EEI makes the same policy and legal arguments against the reporting requirements proposed in the Interim Rule.

28. FirstEnergy, while not requesting rehearing, reiterates many of EEI's comments. FirstEnergy also points out that the documentation the Interim Rule requires companies to maintain is different from the documentation that the SEC requires companies to maintain under PUHCA. Additionally, FirstEnergy echoes EEI's argument that the SEC has the sole and exclusive jurisdiction over the regulation of cash management programs. Finally, in regard to the proposed notification and filing requirements, FirstEnergy argues that ''in our view, there is no critical need for utilities to file this information with the Commission'' and that ''such information could then be made available to the Commission in connection with an audit or other Commission proceeding.''

Commission Response:

29. The Commission finds that to better ensure that rates for jurisdictional services are just and reasonable, it must examine the financial structure of the entities it regulates. As the Commission stated in the Interim Rule, regulated entities routinely place large quantities of funds (over $25 billion, at last count) into cash management accounts. As recent market events have shown, financial troubles may afflict both PUHCA and non-PUHCA companies. A highly leveraged company, with the accompanying fixed interest expense and future obligation to repay the principal, may be in a weakened financial position if there is an unfavorable change in the business climate. This event may result in an inadequate flow of cash which may have an adverse impact on the FERC-regulated entity's ability to remain solvent. As a result, it is vital to the Commission's statutory mission that it has on hand the necessary information to understand how regulated entities are accounting for their assets.

30. Section 318 of the FPA governs conflicts between the Commission's and the SEC's regulations.[21]

31. FirstEnergy and EEI mistakenly seem to believe that the Commission's requirements are in conflict with the requirements of the SEC, and are therefore barred by FPA Section 318. The Final Rule does not dictate the content of or terms for participating in a cash management program. And nothing in the regulations the Commission is adopting is incompatible with existing SEC requirements.

32. While the SEC sometimes requires the filing of cash management agreements and notification of changes in a holding company's capital equity, there is nothing that prevents a registered holding company from making one filing with the SEC and its subsidiary making another filing with FERC. Therefore, there is no conflict, and Section 318 does not bar the proposed regulations.

C. Applicability of the Rule to Utilities Regulated by State PUCs

33. The Interim Rule did not specifically address application of the rule to companies whose cash management programs are regulated by State Public Utility Commissions (PUCs).

Comments Received:

34. EEI and Duke Energy suggest that the Interim Rule should not apply to a public utility or licensee whose participation in cash management arrangements or whose securities and debts are regulated by the utility commission of the State in which the public utility or licensee is organized and operating. The commenters argue that those companies are subject to oversight similar to the oversight the Commission is imposing here. Second, EEI suggests that Section 204(f) of the FPA excludes such State-regulated public utility activities from further Commission regulation.[22] If a State utility commission already regulates a utility's participation in a cash management arrangement, or regulates the utility's securities and debt, EEI asserts that the Commission should defer to the state commission's regulation of those activities and not also apply the documentation and reporting requirements of the Final Rule to the utility.

35. National Grid, PacifiCorp, Edison, and others urge the Commission to avoid imposing cash management program requirements that either conflict with or inappropriately duplicate requirements of state commissions that may have existing regulatory oversight. PacifiCorp, for instance, states that it already receives regulatory permission for its cash management operations from six states and is loath to modify those agreements since any modification would require it to seek regulatory approval from each of those states, as well as the SEC. Both PacifiCorp and National Grid companies seek clarification that the new cash management rules pertain only to proper documentation, reporting, and notification, and not modification of their cash management programs. Edison believes that the proposed reporting requirements are unduly burdensome, considering that Edison is already regulated by both the California Public Utilities Commission (CPUC) and the SEC with respect to affiliate transactions. According to Edison, CPUC's rules and regulations already require it to comply with voluminous documentation and other requirements concerning its relationship with its affiliates.

Commission Response:

36. The Commission's Final Rule does not conflict with any requirement of any State PUC. The Final Rule does not require entities to alter their cash management agreements, nor will the Commission alter them after they are filed. Further, as mentioned earlier, the FPA gives the Commission broad authority to collect the information it needs to administer the FPA, NGA and ICA. The documentation and reporting requirements all fall within this broad grant of power.

37. EEI and Duke Energy's concern over Section 204(f)'s limitation on the Commission's authority over the issuance of securities regulated by a state commission is misplaced. Section 204 does not apply because the Commission is not regulating the issuance of any security by means of this Final Rule. Therefore, in response to EEI's concerns, none of the Final Rule's requirements regulates a public utility's ability to ''issue any security, or assume any obligation or liability.''

38. In response to other complaints about duplication of effort, the

[21] In the *Arcadia* case, *Arcadia, Ohio* v. *Ohio Power Co.,* 498 U.S. 73 (1990) (*Arcadia*), cited by both FirstEnergy and EEI, the Supreme Court declined to address the issue of whether Section 318 prohibits all Commission regulation of a subject matter regulated by the SEC or ''only such regulation as actually imposes a conflicting requirement.'' *Arcadia,* 498 U.S. at 77. Instead, the Court held that the Commission's actions at issue did not relate to one of the four subject matters laid out in Section 318 and concluded, therefore, that there was no conflict between the actions of the Commission and the actions of the SEC. The complete chronology of the *Arcadia* case is as follows: *Ohio Power Co.,* 39 FERC 61,098 (1987), *reh'g denied,* 43 FERC 61,046 (1988), *vacated sub nom. Ohio Power* v. *FERC,* 880 F.2d 1400 (D.C. Cir. 1989), *reh'g denied,* 897 F.2d 540 (D.C. Cir. 1989), *order on cert. Arcadia* v. *Ohio Power Co.,* 498 U.S. 73 (1990), *order on remand sub nom. Ohio Power Co.* v. *FERC,* 954 F.2d 779 (D.C. Cir. 1992), *cert. denied sub nom. Arcadia* v. *Ohio Power Co.,* 506 U.S. 981 (1992).

[22] 16 U.S.C. 824c(f). Section 204 of the FPA reads as follows:

''The provisions of this Section [204 dealing with Commission regulation of public utility securities and liabilities] shall not apply to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.''

Commission reiterates the need for this information in carrying out its statutory obligations to customers. The burden imposed on regulated entities by the Final Rule is extremely low while the benefits to the Commission and the public of documenting over $25 billion worth of regulated assets is high. The Commission would be remiss in its obligation to ensure just and reasonable rates if it were to ignore the effects on its jurisdictional entities of having these large sums in cash management programs.

D. Submission of Cash Management Agreements

39. The interim rule proposed requiring FERC-regulated entities subject to the rule to file their cash management agreements with the Commission, and to file any subsequent changes within 10 days from the date of change. The Commission is adopting this requirement in the Final Rule.

Comments Received:

40. Several commenters [23] argue that FERC-regulated entities should not be required to file cash management agreements with the Commission. A few commenters argue that doing so is unnecessary. For example, INGAA, Duke Energy and FirstEnergy assert that because the Interim Rule requires FERC-regulated entities to maintain documentation supporting their cash management agreements which are subject to audit, there is no compelling reason to have the agreements filed with the Commission. Duke Energy adds that the Commission's own annual reporting requirements require FERC-regulated entities to provide the Commission with a description of material terms of their agreements in footnotes to their annual reports.

41. Other commenters [24] suggest that the Commission should merely require companies to maintain documentation, subject to Commission review, without requiring companies to submit the information. EEI expresses the concern that filing cash management agreements would invite proceedings unintended by the Commission, and requests that the Commission clarify that the documents are for informational purposes only, and not subject to complaints or protests. Commenters [25] also argue that the new reporting requirement is excessively burdensome.

42. Additionally, Cinergy asks that the Commission clarify that the initial submission of the agreements for programs established prior to the effective date of the rule shall be within 10 days of the effective date of this rule.

Commission Response:

43. The underlying premise of this reporting requirement is that additional transparency of cash management activities between FERC-regulated entities and their affiliates will allow the Commission and other users of financial information to make decisions based on relevant and accurate information. The only way to achieve this transparency is to require FERC-regulated entities to file their cash management documents with the Commission, which will consequently make them available to the public. In addition, the requirement that any subsequent changes to an existing agreement be filed within 10 days of the date of the change is necessary to provide users of financial information with knowledge of when such decisions are being made. Since cash management agreements are altered infrequently and only after considerable planning, the 10 day notification deadline is reasonable.

44. Any cash management agreements established prior to the effective date of the rule must be filed within 10 days of the effective date of the rule.

45. With regard to the concern that the filing of cash management agreements will generate protests and complaints, these filings are for informational purposes and the Commission will not entertain public comments on them.

E. Notification Requirements

46. The Interim Rule proposed that FERC-regulated entities participating in cash management programs notify the Commission when their proprietary capital ratios fall below 30 percent and when they subsequently return to or exceed 30 percent. The Interim Rule also required that FERC-regulated entities compute their proprietary capital ratios within 15 days after the end of each month and notify the commission within 5 days after making the calculation. In the Final Rule, the Commission is adopting the notification requirement, but is allowing FERC-regulated entities to compute their proprietary capital ratios quarterly and to notify the Commission within 45 days after the end of each calendar quarter if their proprietary capital ratios fall below 30 percent and when they subsequently return to or exceed 30 percent.

Comments Received:

47. Virtually all commenters expressed concerns about the Interim Rule's proposal that FERC-regulated entities notify the Commission when their proprietary capital ratios fall below 30 percent. Several commenters [26] argue that the choice of 30 percent seemed arbitrary, and that the 30 percent threshold was not necessarily an accurate indication of a company's health. Rather, the commenters argue, the 30 percent threshold has been overemphasized in the Interim Rule, since it is only one of many possible gauges of the financial health of a FERC-regulated entity. Gulf South adds that establishing a minimum equity threshold is inconsistent with the NGA since pipelines are not required to maintain any minimum capitalization level.

48. Cinergy, Duke Energy, Gulfterra and PacifiCorp expressed concerns about the requirement that the ratio be computed within 15 days after the end of the monitoring period. For example, Duke Energy argues that 15 days is insufficient to compute the proprietary capital ratio. Cinergy suggests that the Commission revise the date by which the ratio must be determined to the 15th business day rather than the 15th calendar day. Also, Gulfterra and PacifiCorp suggest extending the time period to 45 days.

49. Numerous commenters [27] object to the monthly monitoring requirement, stating that complying with the requirement would be unworkable or burdensome, and that calculations completed in such a short timeframe may be unreliable. PSEG Companies and FirstEnergy note that their capitalization reviews are not prepared on a monthly basis. FirstEnergy explains that while books are maintained on a monthly basis, utilities do not and are not required to close their books at the end of the month in a manner that would enable them to calculate their proprietary capital ratios.

50. EEI and Exelon ask that the Commission allow utilities to calculate the 30 percent equity ratio with transition bonds and other non-recourse debt eliminated from the calculation. They argue that these bonds were issued pursuant to state enabling legislation that allows the bonds to be repaid through a specifically authorized retail rate and, as such, the bonds are not the obligation of the utility or parent company but instead are non-recourse.

51. Also, EEI, Sierra Southwest Cooperative Services, Inc. and the PSEG Companies ask that the Commission clarify that 18 CFR part 141.500 B, C and D applies only to public utilities and licensees that are subject to the

[23] *E.g.,* INGAA, Duke Energy, and FirstEnergy.

[24] *E.g.,* EEI, PSEG Companies, and Edison.

[25] *E.g.,* Graham County Electric Cooperative and PSEG Companies.

[26] *E.g.,* Duke Energy, Exelon, AOPL.

[27] *E.g.,* Alliance, Duke Energy, EEI, Gulf South, WPC.

Commission's Uniform System of Accounts.

52. NRECA asserts that the local and continuous control and oversight of member-owners provides far more effective control over potential abuse of an electric cooperative's cash management programs and practices than the Commission could accomplish. It asks that the Commission give careful consideration to any request for waiver from the final rule.[28]

Commission Response:

53. Although a 30 percent proprietary capital threshold was not adopted as a prerequisite for participation in a cash management arrangement, the threshold remains a reasonable and important indicator of a company's financial health and the extent to which a FERC-regulated entity has taken on debt to finance its assets or operations. We considered the application of various proprietary capital percentages. Our analyses indicate that over 90 percent of FERC-regulated entities have at least 30 percent proprietary capital. In addition, the SEC utilizes a 30 percent proprietary capital percentage for its evaluations, albeit for broader purposes than monitoring a specific company's financial health.

54. The Commission agrees that a quarterly reporting requirement of proprietary capital ratios, rather than a monthly one as proposed in the Interim Rule, would be more appropriate since many companies do not currently prepare monthly financial analyses. Adopting a quarterly requirement would also ease the administrative burden of complying with the reporting requirement. Additionally, this will make the reporting requirement more consistent with the quarterly financial reports required by the SEC.

55. The Commission also agrees that it would be more consistent to require notification within 45 days after the end of each calendar quarter that a company's proprietary capital ratio has dropped below or subsequently exceeded 30 percent, rather than allowing only 15 days to make the computation and 5 days to make the filing as proposed in the Interim Rule. Changing the notification requirement to 45 days is more consistent with the SEC's requirement that financial information be disclosed 45 days after the end of each fiscal quarter, as well as with the change in the Final Rule from a monthly to a quarterly monitoring requirement. Lengthening the notification period will also ease the administrative burden on affected companies.

56. Additionally, the Commission will continue to require transition bonds and other non-recourse debt to be included in the proprietary capital ratio computation. If the proprietary capital ratio drops below 30 percent because of this inclusion, the documentation notifying the Commission may include a description of this fact.

57. The Commission is also revising parts 141.500 B, C and D, 260.400 B, C and D, and 357.5(b), (c) and (d) to apply only to public utilities and licensees, natural gas or oil pipeline companies that are subject to the Commission's Uniform Systems of Accounts. The language is revised to read, ''Public utilities and licensees or natural gas or oil pipeline companies subject to the provisions of the Commission's Uniform System of Accounts in part 101 and § 141.1 or § 141.2 or part 201 and § 260.1 or § 260.2, or part 352 and § 357.2 of this title that participate in cash management programs and are not electric cooperatives must determine, on a quarterly basis, the percentage of their capital structures that constitute proprietary capital.''

58. Parts 141.500 C, 260.400 C and 357.5(c) are revised to read, ''In the event that the proprietary capital ratio is less than 30 percent, public utilities and licensees, natural gas or oil pipeline companies subject to the provisions of the Commission's Uniform System of Accounts in part 101 and § 141.1 or § 141.2, or part 201 and § 260.1 or § 260.2 or part 352 and § 357.2 of this title that participate in cash management programs and are not electric cooperatives must notify the Commission within 45 days after the end of each calendar quarter.''

59. Parts 141.500 D, 260.400 D and 357.5(d) are revised to read, ''In the event that the proprietary capital ratio subsequently meets or exceeds 30 percent, public utilities and licensees, natural gas or oil pipeline companies subject to the provisions of the Commission's Uniform System of Accounts in part 101 and § 141.1 or § 141.2 or part 201 and § 260.1 or § 260.2 or part 352 and § 357.2 of this title that participate in cash management programs and are not electric cooperatives must notify the Commission within 45 days after the end of each calendar quarter.''

60. The Commission recognizes that electric cooperatives operate as not-for-profit organizations collecting only enough revenues in excess of operating expenses to meet mortgage requirements and would, therefore, not be able to meet the 30 percent proprietary capital requirement. It also recognizes that electric cooperatives generally do not accumulate profits for shareholders as in the case of investor owned utilities. After careful consideration of the comments and the structure of electric cooperatives, the Final Rule is revised to exempt electric cooperatives from the requirement to notify the Commission when their proprietary capital ratios drop below 30 percent and when their proprietary capital ratios subsequently return to or exceed 30 percent. However, the Commission is aware that electric cooperatives have themselves established subsidiaries that are engaged in diversified non-electric business activities. Placing cash management agreements in writing contributes to a stable environment in which rates are just and reasonable, and filing those agreements provides needed transparency for the Commission to understand the financial arrangements of the cooperatives it regulates.

61. The final rule applies to all FERC-regulated entities that have not been granted waivers of the Commission's accounting regulations and the FERC Annual Report Forms 1, 1–F, 2, 2–A or 6 filing requirements. Electric cooperatives must comply with the Final Rule except for the notification requirements related to the 30 percent proprietary capital ratio.

F. Public Disclosure of Information

62. The interim rule explained that all of the information contained in the required filings will be made public to provide for greater transparency of the cash management program activities of FERC-regulated entities.

Comments Received:

63. Several commenters[29] object to public disclosure of their cash management agreements. They claim that such agreements may contain competitively sensitive or proprietary information and urge the Commission to protect from disclosure agreements or supporting documents that contain competitively sensitive information. Gulf South argues that making cash management agreements public is anticompetitive because pipelines would be required to disclose their internal costs of capital, and that disclosure of sensitive proprietary information would create an uneven competitive playing field among regulated and unregulated market participants. AOPL, Duke Energy, and Edison suggest that the Commission should grant the agreements confidential treatment under the

[28] Graham County Electric Cooperative requested a waiver from the rule on August 7, 2003. Its request will be addressed in a separate order.

[29] *E.g.,* INGAA, AOPL, Edison, Gulfterra and Duke Energy.

Freedom of Information Act's confidential business information exemption.

64. The commenters also object to public notification when their proprietary capital ratios fall below 30 percent. Gulfterra and INGAA argue that such notifications should also be kept confidential to avoid stock volatility.

Commission Response:

65. As noted in the Interim Rule, the Commission considers the information to be collected to be non-confidential in nature and therefore it will be made available to the public. The Commission has determined that release of the information is ''necessary to carry out its jurisdictional responsibilities.'' *See* 18 CFR 388.112(c)(2003). The information will provide the Commission with relevant and accurate information on which to make decisions.

66. Allowing only the Commission and not the public to review the cash management agreements would not meet the goal of providing greater transparency for the protection of ratepaying customers. This transparency, in turn, will lessen the chance of an acute financial reversal that would harm utility ratepaying customers and energy markets. Entities that believe the information they submit should be withheld from public view on account of unique circumstances may still request confidential treatment pursuant to § 388.112 of our regulations, stating the rationale for their requests. However, general, unsubstantiated assertions that future harm will occur if information contained in cash management agreements is released will be insufficient for a specific company to acquire confidential status.

G. Clarification of Documentation Requirements

67. In the interim rule, the Commission implemented documentation requirements for cash management programs that became effective August 7, 2003. The regulations require that cash management agreements be in writing, that the agreements specify the duties and responsibilities of cash management program participants and administrators, specify the methods for calculating interest and for allocating interest income and expenses, and specify any restrictions on deposits or borrowings by participants. The regulations also require FERC-regulated entities to maintain documentation of all deposits into and borrowings from cash management programs, including the amount of the deposit or borrowing, the maturity date, if any, of the deposit or borrowing, and the interest earning rate on the deposit or borrowing, and the daily balance of the cash management program.

Comments Received:

68. Generally, commenters support the requirement to put all cash management agreements in writing. Exelon asserts that it continues to support the Commission's desires to protect customers of FERC-jurisdictional utilities from misuse of cash management accounts. INGAA agrees that cash management agreements should be documented and that FERC-regulated entities should maintain documentation as specified by the regulatory text of Account 146.

69. On the other hand, many commenters, including AOPL, EEI, INGAA and PacifiCorp seek clarification of the documentation requirements. Specifically, AOPL, INGAA, El Paso and PacifiCorp seek clarification of the requirements to document the duties and responsibilities of the administrator and the non-FERC-regulated participants in the program.

70. AOPL and El Paso argue that the regulated entity cannot be called upon to maintain documentation on third party participants. AOPL asserts that the terms of the cash management agreement between the administrator and individual participants can vary and are kept confidential. Cash management programs in which AOPL's member companies participate can have more than a thousand participants and that maintaining this information would prohibit some regulated entities from participating in a cash management program. INGAA also asserts that the regulated entity will not necessarily know the restrictions on deposits or borrowings by each of the other participants in the cash management agreement. PacifiCorp is unclear whether the Commission is also creating a requirement for regulated utilities to amend their existing cash management agreements.

71. Gulf South asks that the Commission clarify that the documentation requirement only applies to monies contributed into the cash management program by the pipeline and not by other participants. It argues that to require pipelines to maintain records on the activities of all cash management participants is not only burdensome, but requires pipelines to be more involved in its affiliates' daily businesses than traditionally has either been required or desired by the Commission.

72. AOPL and EEI urge the Commission to reconsider the requirement to document the interest rates on each deposit into or withdrawal from a cash management program. Both commenters assert that interest earnings on deposits or charges on borrowings typically cannot be determined for an individual deposit or borrowing; rather, interest rates fluctuate based on the average balance for the month or other relevant time period. AOPL also argues that the interest earned on a deposit or charged on a borrowing is both documented in the cash management agreement and reported on a monthly basis in the current statements.

73. Gulf South asks for clarification of what documentation would be required when a program is based solely upon bilateral loan agreements. It asserts that this arrangement is not a traditional money pooling or cash management arrangement and does not have an administrator, but appears to be subject to the requirements of the Final Rule.

Commission Response:

74. The Commission agrees that documentation related to the other participants might be unduly burdensome for FERC-regulated entities to maintain. Therefore, the Commission is requiring that FERC-regulated entities only maintain documentation related to the administrator and the FERC-regulated entity. To reflect this change, the Commission is revising the language in 18 CFR parts 101 and 201, Account 146 C and part 352, Account 13(c) to read, ''the public utilities or licensee, natural gas or oil pipeline company must maintain documents authorizing the establishment of cash management programs including the duties and responsibilities of the administrator and the public utility or licensee, natural gas or oil pipeline company in the cash management program.''

75. The Commission agrees that it may be difficult for some FERC-regulated entities to maintain documentation that includes the interest rate on each deposit, withdrawal and borrowing from the cash management program and to maintain records showing the daily balance of the cash management program. Therefore, the Commission is requiring that the documentation authorizing the cash management program include the interest rate but that the documentation supporting deposits, withdrawals and borrowings from the cash management program need not show the interest rate for each transaction. The Commission is modifying the daily balance documentation requirement of the Interim Rule. Rather than require daily balance documentation, the Final Rule is requiring FERC-regulated entities subject to the rule to maintain monthly

balances of their cash management program.

76. To reflect these changes, parts 101 and 201, Account 146 B(1), (2) and (4), and part 352, Account 13(b)(1), (2) and (4) are revised to read, ''the written documentation must include (1) For deposits with and withdrawals from the cash management program: the date of the deposit or withdrawal, the amount of the deposit or withdrawal, and the maturity date, if any, of the deposit; (2) For borrowings from a cash management program: the date of the borrowing, the amount of the borrowing, and the maturity date, if any, of the borrowing; * * * and (4) The monthly balance of the cash management program.''

77. Parts 101 and 201, Account 146 C(3), and part 352, Account 13(c)(3) are also revised to read, ''The interest rate, including the method used to determine the interest earning rates and interest borrowing rates for deposits into and borrowings from the program.''

78. For cash management programs that are based upon bilateral loan agreements, documentation supporting the programs should include the documentation requirements adopted here. To the extent that certain information is not applicable to the arrangement, the FERC-regulated entity should so state in the information maintained by the entity and filed with the Commission.

IV. Regulatory Flexibility Act Statement

79. The Regulatory Flexibility Act (RFA) [30] requires agencies to prepare certain statements, descriptions, and analyses of proposed rules that will have a significant economic impact on a substantial number of small entities. The Commission is not required to make such analyses if a rule would not have such an effect.

80. The Commission concludes that this Final Rule would not have such an impact on small entities. Most companies regulated by the Commission do not fall within the RFA's definition of a small entity, and the data required by this rule are already being captured by their accounting systems. However, if the recordkeeping requirements represent an undue burden on small businesses, the entity affected may seek a waiver of the requirements from the Commission.

V. Environmental Analysis

81. 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.[31] The Commission excludes certain actions not having a significant effect on the human environment from the requirement to prepare an environmental impact statement.[32] No environmental consideration is raised by the promulgation of a rule that is procedural or does not substantially change the effect of legislation or regulations being amended.[33] This Final Rule updates parts 101, 141, 201, 260, 352 and 357 of the Commission's regulations and does not substantially change the effect of the underlying legislation or the regulations being revised or eliminated. Accordingly, no environmental consideration is necessary.

VI. Information Collection Statement

82. The Office of Management and Budget's (OMB) regulations at 5 CFR 1320.11 require that it approve certain reporting and recordkeeping requirements (collections of information) imposed by an agency. Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the information collection requirements of this Final Rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

83. In accordance with Section 3507(d) of the Paperwork Reduction Act of 1995,[34] the information collection requirements in the subject rulemaking were submitted to OMB for review.

84. *Public Reporting Burden:* FERC-regulated entities must file their cash management agreements and notify the Commission when their proprietary capital ratios fall below 30 percent and when their proprietary capital ratios subsequently return to or exceed 30 percent. In the Interim Rule the Commission estimated that 602 FERC-regulated entities will be submitting documents describing their cash management agreements and 34 will be submitting notifications. For each entity, the Interim Rule estimated it would require an average of 1.5 hours to file its cash management agreement and .75 hours to submit the notification for a total of burden estimate of 903 hours and 51 hours, respectively. The burden estimates below reflect the reporting requirements.

85. The Commission received over twenty-five comments on the Interim Rule. Several commenters [35] have indicated that the Interim Rule's proposed requirements would place a significant burden upon them. In particular, Edison asserts that the implementation of any rule takes much longer than the time it takes to file the document and/or notify FERC of any changes under the rule.

86. Companies were already familiar with the documentation and reporting requirements proposed by the Commission in the Interim Rule. The Commission is responding to comments and modifying what the Interim Rule proposed to ameliorate any additional burden. Sound business practices already require companies to keep adequate internal controls over cash management practices. Such internal controls include documenting and maintaining information to support cash management programs.

87. To reduce the burden on companies, the Commission has changed the reporting requirement in the Final Rule to quarterly and has extended the notification period. The Commission finds the burden associated with complying with this Final Rule is minimal and that its previous estimate was a reasonable one.

88. *Reporting Requirements:*

[30] 5 U.S.C. 601–612 (2000).

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

[32] 18 CFR 380.4 (2003).

[33] 18 CFR 380.4(a)(2)(ii) (2003).

[34] 44 U.S.C. 3507(d) (2000).

[35] Alliance Pipeline, Gulf South, NRECA, Gulfterra, First Energy, Graham County, NRECA, Chevron, Williams, Exelon, PSEG, EEI, AOPL, INGAA, Southern California Edison (Edison) and Duke.

Data collection	Number of respondents	Number of responses per respondent	Hours per response	Total annual hours
FERC–555:				
(cash management agreement)	*602	1	1.5	903
(Notification)	34	2	.75	51
Totals				954

*(The number of respondents as identified in the Interim Rule that will be subject to submitting documents describing their cash management agreements.)

The total annual hours for reporting requirements for this rule are 954.

89. *Information Collection Costs:* The Commission estimates the costs associated with submitting cash management program documents and notifying the Commission when the proprietary capital ratio of a FERC-regulated entity subject to the rule falls below 30 percent and when its proprietary capital ratio subsequently returns to or exceeds 30 percent to be $53,681.[36]

90. The Commission has assured itself by means of its internal review that there is specific, objective support for the burden estimates associated with the information requirements.

Title: FERC–555 ''Records Retention Requirements'';

Action: Proposed information collection requirements.

OMB Control No.: 1902–0098.

Respondents: Public utilities and licensees; natural gas companies; oil pipeline companies (Business or other for profit, including small businesses.)

Frequency of the information: On occasion.

Necessity of the information: The final rule amends the Commission's regulations to revise parts 101, 141, 201, 260, 352 and 357 to provide information collection requirements for cash management activities.

91. The implementation of these requirements will help the Commission carry out its responsibilities under the FPA, the NGA and the ICA to protect ratepaying customers of FERC-regulated entities by providing greater transparency of cash management activities.

92. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, ED–30, (202) 502–8415, or *michael.miller@ferc.gov*] or by sending comments on the collections of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Federal Energy Regulatory Commission, 725 17th Street, NW, Washington, DC 20503. The Desk Officer can also be reached by phone at (202) 395–7856, or fax: (202) 395–7285.

VII. Document Availability

93. 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.

94. From FERC's Home Page on the Internet, this information is available in the eLibrary (formerly FERRIS). The full text of this document is available on eLibrary in PDF and MSWord 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.

95. User assistance is available for eLibrary and the FERC's web site during normal business hours by contacting FERC Online Support by telephone at (866) 208–3676 (toll free) or for TTY, (202) 502–8659, or by e-mail at *FERCOnlineSupport@ferc.gov.*

VIII. Effective Date and Congressional Notification

96. These regulations are effective December 1, 2003. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this final rule is not a ''major rule'' as defined in Section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.[37] The Commission will submit the final rule to both houses of Congress and the General Accounting Office.[38]

[36] (954 hours for collection ÷ 2,080 hours) × $117,041 = $53,681.

[37] 5 U.S.C. 804(2) (2002).

[38] 5 U.S.C. 801(a)(1)(A) (2002).

List of Subjects

18 CFR Part 101

Electric power, Electric utilities, Reporting and recordkeeping requirements, Uniform System of Accounts.

List of Subjects

18 CFR Part 141

Electric power, Reporting and recordkeeping requirements.

18 CFR Part 201

Natural gas, Reporting and recordkeeping requirements, Uniform System of Accounts.

18 CFR Part 260

Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 352

Pipelines, Reporting and recordkeeping requirements, Uniform System of Accounts.

18 CFR Part 357

Pipelines, Reporting and recordkeeping requirements.

By the Commission.

Magalie R. Salas,

Secretary.

■ Accordingly, the Interim Rule amending parts 101, 141, 201, 260, 352, and 357 in Title 18 of the *Code of Federal Regulations*, which was published at 68 FR 40500 on July 8, 2003 is adopted as a final rule with the following changes:

PART 101—UNIFORM SYSTEM OF ACCOUNTS PRESCRIBED FOR PUBLIC UTILITIES AND LICENSEES SUBJECT TO THE PROVISIONS OF THE FEDERAL POWER ACT

■ 1. The authority citation for part 101 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, 7651–7651o.

■ 2. In part 101, Balance Sheet Accounts, account 146, paragraphs B(1), B(2) and B(4) and C(1) through C(4) are revised to read as follows:

Balance Sheet Accounts

* * * * *

146 *Accounts receivable from associated companies.*

* * * * *

B. * * *

(1) For deposits with and withdrawals from the cash management program: the date of the deposit or withdrawal, the amount of the deposit or withdrawal, and the maturity date, if any, of the deposit;

(2) For borrowings from a cash management program: the date of the borrowing, the amount of the borrowing, and the maturity date, if any, of the borrowing;

* * * * *

(4) The monthly balance of the cash management program.

C. * * *

(1) The duties and responsibilities of the administrator and the public utilities or licensees in the cash management program;

(2) The restrictions on deposits or borrowings by public utilities or licensees in the cash management program;

(3) The interest rate, including the method used to determine the interest earning rates and interest borrowing rates for deposits into and borrowings from the program; and

(4) The method used to allocate interest income and expenses among public utilities or licensees in the program.

* * * * *

PART 141—STATEMENTS AND REPORTS (SCHEDULES)

■ 3. The authority citation for part 141 continues to read:

Authority: 15 U.S.C. 79, 16 U.S.C. 791a–828c, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 4. Section 141.500 is revised to read as follows:

§ 141.500 Cash management programs and financial condition reports.

(a) Public utilities and licensees subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 101 and § 141.1 or § 141.2 of this title that participate in cash management programs must file these agreements with the Commission. The documentation establishing the cash management program and entry into the program must be filed within 10 days of the effective date of the rule or entry into the program. Subsequent changes to the cash management agreement must be filed with the Commission within 10 days of the change.

(b) Public utilities and licensees subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 101 and § 141.1 or § 141.2 of this title that participate in cash management programs and are not electric cooperatives must determine, on a quarterly basis, the percentage of their capital structure that constitutes proprietary capital. The proprietary capital ratio must be computed using a formula in which the total of the balances in the Proprietary Capital Accounts; Account 201, Common stock issued, through Account 219, Accumulated other comprehensive income, in part 101 of this title is the numerator and the total proprietary capital plus the total of the Long-Term Debt Accounts; Account 221, Bonds, through Account 226, Unamortized discount on long-term debt—Debit, in part 101 of this title, is the denominator.

(c) In the event that the proprietary capital ratio is less than 30 percent, the public utilities or licensees subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 101 and § 141.1 or § 141.2 of this title that participate in cash management programs and are not electric cooperatives must notify the Commission within 45 days after the end of each calendar quarter, and must describe the significant events or transactions causing their proprietary capital ratios to be less than 30 percent. The extent to which the public utilities or licensees have amounts loaned or money advanced to their parent, subsidiary, or affiliated companies through their cash management program(s) should also be reported, along with plans, if any, to regain at least a 30 percent proprietary capital ratio.

(d) In the event that the proprietary capital ratio subsequently meets or exceeds 30 percent, public utilities or licensees subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 101 and § 141.1 or § 141.2 of this title that participate in cash management programs and are not electric cooperatives must notify the Commission within 45 days after the end of each calendar quarter.

PART 201—UNIFORM SYSTEM OF ACCOUNTS PRESCRIBED FOR NATURAL GAS COMPANIES SUBJECT TO THE PROVISIONS OF THE NATURAL GAS ACT

■ 5. The authority citation for part 201 continues to read as follows:

Authority: 15 U.S.C.717–717w, 3301–3432; 42 U.S.C. 7101–7352, 7651–7651o.

■ 6. In part 201, Balance Sheet Accounts, account 146, paragraphs B(1), B(2) and B(4) and C(1) through C(4) are revised to read as follows:

Balance Sheet Accounts

* * * * *

146 *Accounts receivable from associated companies.*

* * * * *

B. * * *

(1) For deposits with and withdrawals from the cash management program: the date of the deposit or withdrawal, the amount of the deposit or withdrawal, and the maturity date, if any, of the deposit;

(2) For borrowings from a cash management program: the date of the borrowing, the amount of the borrowing, and the maturity date, if any, of the borrowing;

* * * * *

(4) The monthly balance of the cash management program.

C. * * *

(1) The duties and responsibilities of the administrator and the natural gas companies in the cash management program;

(2) The restrictions on deposits or borrowings by natural gas companies in the cash management program;

(3) The interest rate, including the method used to determine the interest earning rates and interest borrowing rates for deposits into and borrowings from the program; and

(4) The method used to allocate interest income and expenses among natural gas companies in the program.

* * * * *

PART 260—STATEMENTS AND REPORTS (SCHEDULES)

■ 7. The authority citation for part 260 continues to read:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352.

■ 8. Section 260.400 is revised to read as follows:

§ 260.400 Cash management programs and financial condition reports.

(a) Natural gas companies subject to the provisions of the Commission's

Uniform System of Accounts prescribed in part 201 and § 260.1 or § 260.2 of this title that participate in cash management programs must file these agreements with the Commission. The documentation establishing the cash management program and entry into the program must be filed within 10 days of the effective date of the rule or entry into the program. Subsequent changes to the cash management agreement must be filed with the Commission within 10 days of the change.

(b) Natural gas companies subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 201 and § 260.1 or § 260.2 of this title that participate in cash management programs must determine, on a quarterly basis, the percentage of their capital structure that constitutes proprietary capital. The proprietary capital ratio must be computed using a formula in which the total of the balances in the Proprietary Capital Accounts; Account 201, Common stock issued, through Account 219, Accumulated other comprehensive income, in part 201 of this title is the numerator and the total proprietary capital plus the total of the Long-Term Debt Accounts; Account 221, Bonds, through Account 226, Unamortized discount on long-term debt—Debit, in part 201 of this title, is the denominator.

(c) In the event that the proprietary capital ratio is less than 30 percent, natural gas companies subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 201 and § 260.1 or § 260.2 of this title that participate in cash management programs must notify the Commission within 45 days after the end of each calendar quarter, and must describe the significant events or transactions causing their proprietary capital ratios to be less than 30 percent. The extent to which the natural gas companies have amounts loaned or money advanced to their parent, subsidiary, or affiliated companies through their cash management program(s) should also be reported, along with plans, if any, to regain at least a 30 percent proprietary capital ratio.

(d) In the event that the proprietary capital ratio subsequently meets or exceeds 30 percent, natural gas companies subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 201 and § 260.1 or § 260.2 of this title that participate in cash management programs must notify the Commission within 45 days after the end of each calendar quarter.

PART 352—UNIFORM SYSTEMS OF ACCOUNTS PRESCRIBED FOR OIL PIPELINE COMPANIES SUBJECT TO THE PROVISIONS OF THE INTERSTATE COMMERCE ACT

■ 9. The authority citation for part 352 continues to read as follows:

Authority: 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

■ 10. In part 352, Balance Sheet Accounts, account 13, paragraphs (b) introductory text, (b)(1), (b)(2) and (b)(4) and (c)(1) through (c)(4) are revised to read as follows:

Balance Sheet Accounts

* * * * *

13 *Receivables from affiliated companies.*

* * * * *

(b) An oil pipeline company participating in a cash management program must maintain supporting documentation for all deposits into, borrowings from, interest income from, and interest expense to such program. Cash management programs include all agreements in which funds in excess of the daily needs of the oil pipeline company along with the excess funds of the oil pipeline company's parent, affiliated and subsidiary companies are concentrated, consolidated, or otherwise made available for use by other entities within the corporate group. The written documentation must include the following information:

(1) For deposits with and withdrawals from the cash management program: The date of the deposit or withdrawal, the amount of the deposit or withdrawal, and the maturity date, if any, of the deposit;

(2) For borrowings from a cash management program: The date of the borrowing, the amount of the borrowing, and the maturity date, if any, of the borrowing;

* * * * *

(4) The monthly balance of the cash management program.

(c) * * *

(1) The duties and responsibilities of the administrator and the oil pipeline company in the cash management program;

(2) The restrictions on deposits or borrowings by oil pipeline companies in the cash management program;

(3) The interest rate, including the method used to determine the interest earning rates and interest borrowing rates for deposits into and borrowings from the program; and

(4) The method used to allocate interest income and expenses among oil pipeline companies in the program.

* * * * *

PART 357—ANNUAL SPECIAL OR PERIODIC REPORTS: CARRIERS SUBJECT TO PART I OF THE INTERSTATE COMMERCE ACT

■ 11. The authority citation for part 357 continues to read:

Authority: 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1998).

■ 12. Section 357.5 is revised to read as follows:

§ 357.5 Cash management programs and financial condition reports.

(a) Oil pipeline companies subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 352 and § 357.2 of this title that participate in cash management programs must file these agreements with the Commission. The documentation establishing the cash management program and entry into the program must be filed within 10 days of the effective date of the rule or entry into the program. Subsequent changes to the cash management agreement must be filed with the Commission within 10 days of the change.

(b) Oil pipeline companies subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 352 and § 357.2 of this title that participate in cash management programs must determine, on a quarterly basis, the percentage of their capital structure that constitutes proprietary capital. The proprietary capital ratio must be computed using a formula in which the total of the balances in the Proprietary Capital Accounts; Account 70, Capital stock, through Account 77, Accumulated other comprehensive income, in part 352 of this title, is the numerator and the total proprietary capital plus the total of the Long-Term Debt Accounts; Account 60, Long-term debt payable after one year, through Account 62, Unamortized discount and interest on long-term debt, in part 352 of this title, is the denominator.

(c) In the event that the proprietary capital ratio is less than 30 percent, oil pipeline companies subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 352 and § 357.2 of this title that participate in cash management programs must notify the Commission within 45 days after the end of each calendar quarter and must describe the significant events or transactions

causing their proprietary capital ratios to be less than 30 percent. The extent to which the oil pipeline company has amounts loaned or money advanced to its parent, subsidiary, or affiliated companies through its cash management program(s) should also be reported, along with plans, if any, to regain at least a 30 percent proprietary capital ratio.

(d) In the event that the proprietary capital ratio subsequently meets or exceeds 30 percent, oil pipeline companies subject to the provisions of the Commission's Uniform System of Accounts prescribed in part 352 and § 357.2 of this title that participate in cash management programs must notify the Commission within 45 days after the end of each calendar quarter.

Note: This appendix will not be published in the *Code of Federal Regulations.*

Appendix

LIST OF COMMENTERS ON THE INTERIM RULE

Respondent	Abbreviation
Alliance Pipeline, LP	Alliance.
American Public Gas Association	APGA.
Association of Oil Pipe Lines	AOPL.
Chevron Pipe Line Company	CPL.
Cinergy Corporation	Cinergy.
Duke Energy Corporation	Duke Energy.
Edison Electric Institute	EEI.
El Paso Corporation's Pipeline Group	El Paso.
Exelon Corporation	Exelon.
First Energy Corporation	FirstEnergy.
Graham County Electric Cooperative, Inc	GCEC.
Gulf South Pipeline Company, LP	Gulf South.
Gulfterra Energy Partners, LP	Gulfterra.
Interstate Natural Gas Association of America	INGAA.
National Rural Electric Cooperative Association	NRECA.
National Grid USA	National Grid.
National Association of Regulatory Utility Commissioners	NARUC (late comment).
NiSource Inc	NiSource.
OKTex Pipe Line Co	OKTex.
PacifiCorp	PacifiCorp.
The PSEG Companies.	
Shell Pipeline Company LP	Shell.
Sierra Southwest Cooperative Services, Inc	SSW.
Southern California Edison Company	Edison.
Tucson Electric Power Company	Tucson.
Williams Pipe Line Company, LLP	WPL.

[FR Doc. 03–27410 Filed 10–30–03; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510 and 522

Implantation or Injectable Dosage Form New Animal Drugs; Sometribove Zinc Suspension

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Monsanto Co. The supplemental NADA provides for revised wording of the indication and precautionary labeling for sometribove zinc suspension used to increase the production of marketable milk in healthy lactating dairy cows. The regulations are also being amended to reflect a different drug labeler code (DLC) for Monsanto Co.

DATES: This rule is effective October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Suzanne J. Sechen, Center for Veterinary Medicine (HFV 126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–0221, e-mail: *ssechen@cvm.fda.gov*.

SUPPLEMENTARY INFORMATION: Monsanto Co., 800 North Lindbergh Blvd., St. Louis, MO 63167, filed a supplement to NADA 140–872 that provides for the use of POSILAC (sometribove zinc suspension) to increase the production of marketable milk in healthy lactating dairy cows. The supplemental NADA provides for revised precautionary labeling. The application is approved as of September 11, 2003, and the regulations are amended in 21 CFR 522.2112 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In addition, Monsanto Co. has changed their DLC. At this time, 21 CFR 510.600(c) is being amended to reflect this DLC change.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the

congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510 and 522 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

§ 510.600 [Amended]

■ 2. Section 510.600 *Names, addresses, and drug labeler codes of sponsors of approved applications* is amended in the table in paragraph (c)(1) in the entry for ''Monsanto Co.'' by removing ''059945'' and by adding in its place ''000911''; and in the table in paragraph (c)(2) by removing the entry for ''059945'' and by numerically adding an entry for ''000911'' to read ''Monsanto Co., 800 North Lindbergh Blvd., St. Louis, MO 63167''.

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 4. Section 522.2112 is amended in paragraph (b) by removing ''059945'' and by adding in its place ''000911''; in paragraph (c)(1) by removing ''beginning'' and by adding in its place ''starting''; and by revising paragraphs (c)(2) and (c)(3) to read as follows:

§ 522.2112 Sometribove zinc suspension.

* * * * *

(c) * * *

(2) *Indications for use.* To increase production of marketable milk in healthy lactating dairy cows.

(3) *Limitations.* Use in lactating dairy cows only. Safety to replacement bulls born to treated dairy cows has not been established. Inject subcutaneously. Avoid injections within 2 weeks of expected slaughter to minimize injection site blemishes on carcass. There is no milk discard or preslaughter withdrawal period. Use may reduce pregnancy rates and increase days open. Treated cows are at an increased risk for mastitis and higher milk somatic cell counts. Use care to differentiate increased body temperature due to use of this product from an increased body temperature that may occur due to illness. Cows treated with this product may have more enlarged hocks and disorders of the foot region. Use may reduce hemoglobin and hematocrit values during treatment. Human warning: Avoid prolonged or repeated contact with eyes and skin.

Dated: October 10, 2003.

Steven D. Vaughn,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 03–27395 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 520 and 556

New Animal Drugs; Altrenogest

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Intervet, Inc. The NADA provides for use of an altrenogest oral solution in gilts for synchronization of estrus.

DATES: This rule is effective October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Charles J. Andres, Center for Veterinary Medicine (HFV 128), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301 827–1600, *e-mail: candres@cvm.fda.gov.*

SUPPLEMENTARY INFORMATION: Intervet, Inc., P.O. Box 318, 405 State St., Millsboro, DE 19966, filed NADA 141–222 for the oral use of MATRIX (altrenogest) 0.22% Solution for synchronization of estrus in sexually mature gilts that have had at least one estrous cycle. The NADA is approved as of September 30, 2003, and the regulations are amended in 21 CFR 520.48 and in part 556 (21 CFR part 556) by adding § 556.36 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has carefully considered the potential environmental impact of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. FDA's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Division of Dockets Management (address above) between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(ii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(ii)), this approval qualifies for 3 years of marketing exclusivity beginning September 30, 2003.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 520

Animal drugs.

21 CFR Part 556

Animal drugs, Foods.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 520 and 556 are amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. Section 520.48 is amended by revising paragraphs (c) and (d) to read as follows:

§ 520.48 Altrenogest solution.

* * * * *

(c) *Tolerances.* See § 556.36 of this chapter.

(d) Conditions of use—(1)*Horses*—(i)*Amount.* 1.0 mL per 110 pounds body

weight (0.044 mg/kg) daily for 15 consecutive days.

(ii) *Indications for use.* For suppression of estrus in mares.

(iii) *Limitations.* For oral use in horses only; avoid contact with the skin. Do not administer to horses intended for use as food. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

(2) *Swine*—(i) *Amount.* Administer 6.8 mL (15 mg altrenogest) per gilt once daily for 14 consecutive days by top-dressing on a portion of each gilt's daily feed.

(ii) *Indications for use.* For synchronization of estrus in sexually mature gilts that have had at least one estrous cycle.

(iii) *Limitations.* Do not use in gilts having a previous or current history of uterine inflammation (i.e., acute, subacute or chronic endometritis). Gilts must not be slaughtered for human consumption for 21 days after the last treatment.

PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

■ 3. The authority citation for 21 CFR part 556 continues to read as follows:

Authority: 21 U.S.C. 342, 360b, 371.

■ 4. Section 556.36 is added to read as follows:

§ 556.36 Altrenogest.

(a) *Acceptable Daily Intake (ADI).* The ADI for total residues of altrenogest is 0.04 micrograms per kilogram of body weight per day.

(b) *Tolerances*—(1) *Swine*—(i) *Liver (the target tissue).* The tolerance for altrenogest (the marker residue) is 4 parts per billion (ppb).

(ii) *Muscle.* The tolerance for altrenogest (the marker residue) is 1 ppb.

(2) [Reserved].

Dated: October 10, 2003.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 03–27390 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. 2003D–0221]

Medical Devices; Immunology and Microbiology Devices; Classification of the Endotoxin Assay

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the endotoxin assay into class II (special controls). The agency is taking this action in response to a petition submitted under the Federal Food, Drug, and Cosmetic Act (the act) as amended by the Medical Device Amendments of 1976 (the amendments), the Safe Medical Devices Act of 1990 (SMDA), the Food and Drug Administration Modernization Act of 1997 (FDAMA), and the Medical Device User Fee and Modernization Act of 2002 (MDUFMA). The agency is classifying this device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for the device.

DATES: This rule is effective December 1, 2003.

FOR FURTHER INFORMATION CONTACT: Freddie M. Poole, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 301–594–2096.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with section 513(f)(1) of the act (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976, the date of enactment of the amendments, generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to previously marketed devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and 21 CFR part 807 of the FDA regulations.

Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) request FDA to classify the device under the criteria set forth in section 513(a)(1). FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after issuing an order classifying the device, FDA will publish a notice in the **Federal Register** announcing the classification.

On April 14, 2003, FDA received a petition submitted under section 513(f)(2) of the act by the Devices and Diagnostics Consulting Group, Inc., seeking an evaluation of the automatic class III designation of its ''endotoxin activity assay.'' In accordance with section 513(f)(1) of the act, FDA issued an order classifying the device in class III because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device that was subsequently reclassified into class I or II. After reviewing information submitted in the petition, FDA determined that the endotoxin activity assay could be classified in class II under the generic name, endotoxin assay, with the establishment of special controls. This device is intended to measure endotoxin activity as an aid in the risk assessment on the first day of the patient's admission to the intensive care unit (ICU). FDA believes that class II special controls, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the device.

FDA has identified the risk to health associated specifically with this type of device as improper patient management. Therefore, in addition to the general controls of the act, the device is subject to a special controls guidance document entitled ''Class II Special Controls Guidance Document: Endotoxin Assay.'' FDA believes this special controls guidance document will reasonably assure the safety and effectiveness of this type of device.

The class II special controls guidance provides information on how to meet

premarket notification submission (510(k)) requirements for the device, including recommendations for labeling and performance studies. FDA believes manufacturers of the device that adhere to the class II special controls guidance will address the potential risk to health identified in the previous paragraph.

Following the effective date of this final classification rule, any firm submitting a 510(k) for an endotoxin assay will need to address the issues covered in the special controls guidance document. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness.

Section 510(m) of the act provides that FDA may exempt a class II device from the premarket notification requirement under section 510(k) of the act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of safety and effectiveness and, therefore, the device is not exempt from the premarket notification requirements. The endotoxin assay is a device that uses serological techniques in whole blood. The device is intended for use in conjunction with other laboratory findings and clinical assessment of the patient to aid in the risk assessment of critically ill patients for progression to severe sepsis. FDA review of performance characteristics and labeling will ensure that acceptable levels of performance for both safety and effectiveness are addressed before marketing clearance. Thus, persons who intend to market this device must submit to FDA a 510(k) containing information on the endotoxin assay before marketing the device.

On June 16, 2003, FDA issued an order classifying the endotoxin activity assay and substantially equivalent devices of this generic type into class II. FDA identifies this generic type of device as an endotoxin assay, which is intended for the use of serological techniques in whole blood. The device is intended for use in conjunction with other laboratory findings and clinical assessment of the patient to aid in the risk assessment of critically ill patients for progression to severe sepsis. The order also stated the endotoxin activity assay is intended for use only on the first day of admission to the ICU.

FDA is codifying the classification of this device by adding 21 CFR 866.3610. The order also identifies a special control applicable to this device, a guidance document entitled ''Class II Special Controls Guidance Document: Endotoxin Assay.'' Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for the device.

II. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition, the final rule is not a significant regulatory action as defined by the Executive order and so it is not subject to review under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. FDA knows of only one manufacturer of this type of device. Classification of these devices in class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs. The agency, therefore, certifies that the final rule will not have a significant impact on a substantial number of small entities. In addition, this final rule will not impose costs of $100 million or more on either the private sector or State, local, and tribal governments in the aggregate and, therefore, a summary statement of analysis under section 202(a) of the Unfunded Mandates Reform Act is not required.

IV. Federalism

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

V. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

List of Subjects in 21 CFR Part 866

Biologics, Laboratories, Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

PART 866–IMMUNOLOGY AND MICROBIOLOGY DEVICES

■ 1. The authority citation for 21 CFR part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 866.3610 is added to subpart D to read as follows:

866.3610 Endotoxin assay.

(a) *Identification.* An endotoxin assay is a device that uses serological techniques in whole blood. The device is intended for use in conjunction with other laboratory findings and clinical assessment of the patient to aid in the risk assessment of critically ill patients for progression to severe sepsis.

(b) *Classification.* Class II (special controls). The special control for this device is the FDA guidance entitled ''Class II Special Controls Guidance Document: Endotoxin Assay.'' See § 866.1(e) for the availability of this guidance document.

Dated: October 17, 2003.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 03–27392 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Prince William Sound 03–002]

RIN 1625–AA00

Security Zone: Port Valdez and Valdez Narrows, Valdez, AK

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone encompassing the Trans-Alaska Pipeline (TAPS) Valdez Terminal Complex, Valdez, Alaska and TAPS Tank Vessels and a security zone in the Valdez Narrows, Port Valdez, Alaska. These security zones are necessary to protect the Alyeska Marine Terminal and Vessels from damage or injury from sabotage, destruction or other subversive acts. Entry of vessels into these security zones is prohibited unless specifically authorized by the Captain of the Port, Prince William Sound, Alaska.

DATES: This rule is effective from September 12, 2003, until March 12, 2004. Comments and related material must reach the Coast Guard on or before December 31, 2003.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket COTP Prince William Sound 03–002 and are available for inspection or copying at U.S. Coast Guard Marine Safety Office, PO Box 486, Valdez, Alaska 99686, between 7:30 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LT Catherine Huot, U.S. Coast Guard Marine Safety Office Valdez, Alaska, (907) 835–7222.

SUPPLEMENTARY INFORMATION:

Regulatory History

A notice of proposed rulemaking (NPRM) was not published for this regulation. In accordance with 5 U.S.C. 553 (b)(B), the Coast Guard finds good cause exists for not publishing an NPRM. The Coast Guard is taking this action for the continued protection of national security interests in light of terrorist acts perpetrated on September 11, 2001 and the continuing threat that remains from those who committed those acts. Also, in accordance with 5 U.S.C. 553(d)(3), the Coast Guard finds good cause to exist for making this regulation effective less than 30 days after publication in the **Federal Register**. Publication of a notice of proposed rulemaking and delay of effective date would be contrary to the public interest because immediate action is necessary to provide for the safety of the TAPS terminal and TAPS tank vessels. On November 7, 2001, we published three temporary final rules in the **Federal Register** (66 FR 56208, 56210, 56212) that created security zones effective through June 1, 2002. The section numbers and titles for these zones are—

Section 165.T17–003—Security zone; Trans-Alaska Pipeline Valdez Terminal Complex, Valdez, Alaska,

Section 165.T17–004—Security zone; Port Valdez, and

Section 165.T17–005—Security zones; Captain of the Port Zone, Prince William Sound, Alaska.

Then on June 4, 2002, we published a temporary final rule (67 FR 38389) that established security zones to replace these security zones that expired June 1, 2002. That rule issued in June, which expired July 30, 2002, created temporary § 165.T17–009, entitled ''Port Valdez and Valdez Narrows, Valdez, Alaska''.

Then on July 30, 2002 we published a temporary final rule (67 FR 19359) that established security zones to extend the temporary security zones that would have expired July 30, 2002. This extension was to allow for a notice of proposed rulemaking process to be completed for permanent security zones to replace the temporary zones. Then on October 23, 2002, we published the notice of proposed rulemaking that sought public comment on establishing the temporary security zones as permanent security zones (67 FR 65074). The comment period for that NPRM ended December 23, 2002. Although no comments were received that would result in changes to the proposed rule an administrative omission was found that resulted in the need to issue a supplemental notice of proposed rulemaking (SNPRM) to address the ''Collection of Information'' section of the proposed rule (68 FR 14935, March 27, 2003). Then, on December 30, 2002, we issued a temporary final rule (68 FR 26490, May 16, 2003) that established security zones to extend the temporary security zones through June 30, 2003. This extension was to allow for a rulemaking for the permanent security zones to be completed. This temporary final rule resumes the temporary security zones to allow for the SNPRM process to be completed.

Discussion of This Temporary Rule

This temporary final rule establishes three security zones. The Trans-Alaska Pipeline (TAPS) Valdez Marine Terminal Security zone encompasses the waters of Port Valdez between Allison Creek to the east and Sawmill Spit to the west and offshore to marker buoys A and B (approximately 1.5 nautical miles offshore from the TAPS Terminal). The Tanker Moving Security Zone encompasses the waters within 200 yards of a TAPS Tanker within the Captain of the Port, Prince William Sound Zone. The Valdez Narrows Security Zone encompasses the waters 200 yards either side of the Tanker Optimum Trackline through Valdez Narrows between Entrance Island and Tongue Point. This zone is active only when a TAPS Tanker is in the zone.

This temporary final rule reflects the proposed changes to 33 CFR 165.1701 published in an NPRM in the **Federal Register** (67 FR 65074, October 23, 2002). The Coast Guard has worked closely with local and regional users of Port Valdez and Valdez Narrows waterways to develop these security zones and the NPRM in order to mitigate the impact on commercial and recreational users. This temporary final rule establishes a uniform transition from the temporary operating zones while the NPRM and SNPRM process is completed.

Request for Comments

Although the Coast Guard has good cause in implementing this regulation without a notice of proposed rulemaking, we want to afford the maritime community the opportunity to participate in this rulemaking by submitting comments and related material regarding the size and boundaries of these security zones in order to minimize unnecessary burdens. If you do so, please include your name and address, identify the docket number for this rulemaking, COTP Prince William Sound 03–002, indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8.5 by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this temporary final rule in view of them.

Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). The Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Economic impact is expected to be minimal because there are alternative routes for vessels to use when the zone is enforced, permits to enter the zone are available, and the Tanker Moving Security Zone is in effect for a short duration.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. The number of small entities impacted by this rule is expected to be minimal because there are alternative routes for vessels to use when the zone is enforced, permits to enter the zone are available, and the Tanker Moving Security Zone is in effect for a short duration. Since the time frame this rule is in effect may cover commercial harvests of fish in the area, the entities most likely affected are commercial and native subsistence fishermen. The Captain of the Port will consider applications for entry into the security zone on a case by-case basis; therefore, it is likely that very few, if any, small entities will be impacted by this rule. Those interested may apply for a permit to enter the zone by contacting Marine Safety Office, Valdez at the above contact number.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

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

Federalism

The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 13132 and has determined that this temporary final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under Figure 2–1 paragraph 34(g) of Commandant Instruction M16745.1D, this rule is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Safety measures, Vessels, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. A new temporary § 165.T17–016 is added to read as follows:

§ 165.T17–020 Port Valdez and Valdez Narrows, Valdez, Alaska-security zones.

(a) The following areas are security zones —

(1) *Trans-Alaska Pipeline (TAPS) Valdez Terminal complex (Terminal), Valdez, Alaska and TAPS Tank Vessels.* All waters enclosed within a line beginning on the southern shoreline of Port Valdez at 61°04′25″ N, 146°26′18″ W; thence northerly to 61°06′25″ N, 146°26′18″ W; thence east to 61°06′25″ N, 146°21′20″ W; thence south to 61°04′25″ N, 146°21′20″ W; thence west along the shoreline and including the area 2000 yards inland along the shoreline to the beginning point. This security zone encompasses all waters approximately 1 mile north, east and west of the TAPS Terminal between Allison Creek (61°05′08″ N, 146°21′15″ W) and Sawmill Spit (61°05′08″ N, 146°26′19″ W).

(2) *Tank Vessel Moving Security Zone.* All waters within 200 yards of any TAPS tank vessel maneuvering to approach, moor, unmoor or depart the TAPS Terminal or transiting, maneuvering, laying to or anchored within the boundaries of the Captain of the Port, Prince William Sound Zone described in 33 CFR 3.85(b).

(3) *Valdez Narrows, Port Valdez, Valdez, Alaska.* All waters within 200 yards of the Valdez Narrows Tanker Optimum Track line bounded by a line beginning at 61°05′15″ N, 146°37′18″ W; thence south west to 61°04′00″ N, 146°39′52″ W; thence southerly to 61°02′32.5″ N, 146°41′25″ W; thence north west to 61°02′40.5″ N, 146°41′47″ W; thence north east to 61°04′07.5″ N, 146°40′15″ W; thence north east to 61°05′22″ N, 146°37′38″ W; thence south east back to the starting point at 61°05′15″ N, 146°37′18″ W.

(i) The Valdez Narrows Tanker Optimum Track line is a line commencing at 61°05′23″ N, 146°37′22.5″ W; thence south westerly to 61°04′03.2″ N, 146°40′03.2″ W; thence southerly to 61°03′00″ N, 146°41′12″ W.

(ii) This security zone encompasses all waters approximately 200 yards either side of the Valdez Narrows Optimum Track line.

(b) *Effective period.* This section is effective from September 12, 2003, through March 12, 2004.

(c) *Authority.* In addition to 33 U.S.C. 1231, the authority for this section includes 33 U.S.C. 1226.

(d) *Regulations.* (1) The general regulations governing security zones contained in 33 CFR 165.33 apply.

(2) Tank vessels transiting directly to the TAPS terminal complex, engaged in the movement of oil from the terminal or fuel to the terminal, and vessels used to provide assistance or support to the tank vessels directly transiting to the terminal, or to the terminal itself, and that have reported their movements to the Vessel Traffic Service may operate as necessary to ensure safe passage of tank vessels to and from the terminal.

(3) All persons and vessels must comply with the instructions of the Coast Guard Captain of the Port and the designated on-scene patrol personnel. These personnel comprise commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a vessel displaying a U.S. Coast Guard ensign by siren, radio, flashing light, or other means, the operator of the vessel shall proceed as directed. Coast Guard Auxiliary and local or state agencies may be present to inform vessel operators of the requirements of this section and other applicable laws.

Dated: September 12, 2003.

M.A. Swanson,

Commander, United States Coast Guard, Captain of the Port, Prince William Sound, Alaska.

[FR Doc. 03–27465 Filed 10–30–03; 8:45 am]

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LIBRARY OF CONGRESS

37 CFR Part 201

[Docket No. RM 2002–4E]

Copyright Office; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: This rule provides that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of four classes of copyrighted works.

EFFECTIVE DATE: October 28, 2003.

FOR FURTHER INFORMATION CONTACT: Robert Kasunic, Office of the General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024–0400. Telephone: (202) 707–8380; telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

In this document, the Librarian of Congress, upon the recommendation of the Register of Copyrights, announces that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of four classes of copyrighted works. This announcement is the culmination of a year-long rulemaking proceeding conducted by the Register. A more comprehensive statement of the background and legal requirements of the rulemaking, a discussion of the record and the Register's analysis may be found in the Register's memorandum of October 27, 2003 to the Librarian, which contains the full explanation of the Register's recommendation.[1] This notice summarizes the Register's recommendation and publishes the regulatory text codifying the four exempted classes of works.

I. Background

A. Legislative Requirements for Rulemaking Proceeding

Section 1201 of title 17, United States Code, prohibits circumvention of technological measures employed by or on behalf of copyright owners to protect their works (hereinafter ''access controls''). In order to ensure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use, subparagraph (B) limits this prohibition, exempting noninfringing uses of any ''particular class of works'' when users are (or in the next 3 years are likely to be) adversely affected by the prohibition in their ability to make noninfringing uses of that class of works. Identification of such classes of works is made in a rulemaking proceeding conducted by the Register of Copyrights, who is to provide notice of the rulemaking, seek comments from the public, consult with the Assistant Secretary for Communications and Information of the Department of Commerce, and recommend final regulations to the Librarian of Congress. The regulations, to be issued by the Librarian of Congress, announce ''any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such

[1] A copy of the Register's memorandum may be found at *http://www.copyright.gov/1201.*

class of works for the ensuing 3-year period.'' [2]

The first section 1201 rulemaking took place three years ago, and on October 27, 2000, the Librarian announced that noninfringing users of two classes of works would not be subject to the prohibition on circumvention of access controls.[3] Exemptions to the prohibition on circumvention remain in force for a three-year period and expire at the end of that period. The Librarian is required to make a determination on potential new exemptions every three years.

B. Responsibilities of Register of Copyrights and Librarian of Congress

The purpose of the rulemaking proceeding conducted by the Register is to determine whether users of particular classes of copyrighted works are, or in the next three years are likely to be, adversely affected by the prohibition in their ability to make noninfringing uses of copyrighted works. In making her recommendation to the Librarian, the Register must carefully balance the availability of works for use, the effect of the prohibition on particular uses and the effect of circumvention on copyrighted works.

C. The Purpose and Focus of the Rulemaking

1. *Purpose of the Rulemaking.* As originally drafted, section 1201(a)(1) provided simply that ''No person shall circumvent a technological measure that effectively controls access to a work protected under this title.'' However, in response to concerns that section 1201, in its original form, might undermine Congress' commitment to fair use if developments in the marketplace relating to use of access controls result in less access to copyrighted materials that are important to education, scholarship, and other socially vital endeavors, it was determined that a triennial rulemaking proceeding should take place to monitor the use of access controls. If the rulemaking record revealed that access was being unduly restricted, *e.g.*, by elimination of print or other hard-copy versions, permanent encryption of all electronic copies or adoption of business models that restrict distribution and availability of works, then users of particular classes of works who are engaging in noninfringing uses of those works would be allowed to circumvent access controls without running afoul of the prohibition in section 1201(a)(1). The rulemaking proceeding, to be conducted by the Register of Copyrights, was considered a ''fail-safe'' mechanism, monitoring developments in the marketplace for copyrighted materials, and would allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.

2. *The Necessary Showing.* Proponents of an exemption have the burden of proof. In order to make a prima facie case for an exemption, proponents must show by a preponderance of the evidence that there has been or is likely to be a substantial adverse effect on noninfringing uses by users of copyrighted works. De minimis problems, isolated harm or mere inconveniences are insufficient to provide the necessary showing. Similarly, for proof of ''likely'' adverse effects on noninfringing uses, a proponent must prove by a preponderance of the evidence that the harm alleged is more likely than not; a proponent may not rely on speculation alone to sustain a prima facie case of likely adverse effects on noninfringing uses. It is also necessary to show a causal nexus between the prohibition on circumvention and the alleged harm.

Proposed exemptions are reviewed *de novo.* The existence of a previous exemption creates no presumption for consideration of a new exemption, but rather the proponent of such an exemption must make a prima facie case in each three-year period.

3. *Determination of ''Class of Works''.* A ''particular class of works'' to be exempted from the prohibition on circumvention must be based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works. The starting point for any definition of a ''particular class'' of works in this rulemaking must be one of the categories of works set forth in section 102 of the Copyright Act, but those categories are only a starting point and a ''class'' will generally constitute some subset of a section 102 category. The determination of the appropriate scope of a ''class of works'' recommended for exemption will also take into account the likely adverse effects on noninfringing uses and the adverse effects an exemption may have on the market for or value of copyrighted works.

While starting with a section 102 category of works, or a subcategory thereof, the description of a ''particular class'' of works ordinarily should be further refined by reference to other factors that assist in ensuring that the scope of the class addresses the scope of the harm to noninfringing uses. For example, the class might be defined in part by reference to the medium on which the works are distributed, or even to the access control measures applied to them. But classifying a work solely by reference to the medium on which the work appears, or the access control measures applied to the work, would be beyond the scope of what ''particular class of work'' is intended to be. And it is not permissible to classify a work by reference to the type of user or use (*e.g.*, libraries, or scholarly research).

D. Consultation With the Assistant Secretary for Communications and Information

As required by section 1201(a)(1)(C), the Register consulted with the Assistant Secretary for Communications and Information of the Department of Commerce, meeting with her at the outset of the rulemaking proceeding and after the record had been compiled, and keeping her and her staff apprised of developments throughout the proceeding. The Assistant Secretary shared her views with the Register orally in July, 2003, and in a letter dated August 11, 2003. Rather than address any particular proposals for exemptions, the Assistant Secretary commented on the rulemaking process itself, focusing exclusively on the Notice of Inquiry (''NOI'') published October 15, 2002.

The Assistant Secretary expressed general agreement with the discussion in the NOI regarding the definition of a ''class of works,'' but added that the intended use of the work or the attributes of the user will sometimes be critical to that determination. She also agreed with the Register that proponents of exemptions have the burden of proof and that and that the assessment of adverse impacts is to be determined *de novo.* However, she expressed some concern that the NOI may have described the proponents' burden of proof as higher than required by the statute.

The Assistant Secretary appears to have misread the NOI, which stated the burden of proof using verbatim quotations from the legislative history of section 1201. In particular, the Assistant Secretary appears to have misunderstood the meaning of the requirement that proponents show that

[2] 17 U.S.C. 1201(a)(1)(D).

[3] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 FR 64556 (October 27, 2000); *http://www.copyright.gov/fedreg/2000/65fr64555.pdf.* The **Federal Register** notice contained the recommendation of the Register of Copyrights and the determination of the Librarian.

the prohibition on circumvention has had a ''substantial'' adverse effect on noninfringing uses of a particular class of work. Use of the term ''substantial'' does not impose a ''heightened'' requirement; it imposes the requirement found throughout the legislative history, which is variously stated as ''substantial adverse impact,'' ''distinct, verifiable, and measurable impacts,'' and more than ''*de minimis* impacts.'' As is apparent from the dictionary definition of ''substantial'' and the Supreme Court's treatment of the term (*e.g.*, in its articulation of the substantial evidence rule), requiring that one's proof be ''substantial'' simply means that it must have substance. The Assistant Secretary's fear that the Register has imposed a heightened burden is misplaced. When all is said and done, the Register believes that she and the Assistant Secretary view the burden on proponents in much the same way.

II. Solicitation of Public Comments and Hearings

On October 15, 2002, the Librarian and the Register initiated the second rulemaking proceeding pursuant to section 1201(a)(1)(C) with publication of a NOI.[4] The Copyright Office received 51 written comments proposing a class or classes of works for exemption. Supporters and opponents of these proposals filed 338 reply comments. Six days of public hearings were conducted in Spring 2003 in Washington, D.C., and Los Angeles, California. Following the hearings, the Office sent follow-up questions to some of the hearing witnesses, and responses were received during the summer. The entire record in this and the previous section 1201(a)(1)(C) rulemaking are available on the Office's Web site.[5]

The Register has now carefully reviewed and analyzed the entire record in this rulemaking proceeding to determine whether any class of copyrighted works should be exempt from the prohibition against circumvention during the next three years. The Register recommends that noninfringing users of four classes of works be exempt from the prohibition on circumvention of access controls.

III. Discussion

A. The Four Exempted Classes

Based on the Register's review of the record, the case has been made for exemptions of the following four classes of copyrighted works.

1. Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail. For purposes of this exemption, ''Internet locations'' are defined to include ''domains, uniform resource locators (URLs), numeric IP addresses or any combination thereof.''

This is similar to an exemption made in the previous rulemaking, but with some modifications. The class consists of lists of blocked Web sites that are used in various filtering software programs sometimes referred to as ''censorware.'' These programs are intended to prevent children and other Internet users from viewing objectionable material while online. It was alleged that although the software is intended to serve a useful societal purpose, the emphasis of the programs is on blocking rather than accuracy. Critics contend that the result of this focus is that filtering software used to prevent access to objectionable material tends to over-block, thereby preventing access to legitimate information resources. In order to comment on this software and expose what they claim is the excessive blocking of Web sites, critics claim they need to gain access to the lists of blocked Web sites, which typically are protected by access controls.

Opponents argued that filtering software companies serve a critical societal purpose and that an exemption would undermine the integrity of filtering software. They also argued that filtering software companies provide reasonable means for ascertaining the material or sites that a particular filtering software blocks. They also stated that even if the Register found that an exemption was warranted, the particular class articulated in the previous rulemaking was overly broad and that repeating an exemption for that class could create adverse consequences for other types of software, such as antivirus and spam software.

Although a similar class was exempted in the first rulemaking, proponents are required to make their case anew every three years. The record in the current rulemaking warrants a new exemption. While providers of filtering software offer some information about the Web sites their software blocks, it is too limited to permit comprehensive or meaningful analysis. Persons wishing to review, comment on and criticize this software as part of an ongoing debate on a matter of public interest should be permitted to gain access to the complete lists of blocked Web sites.

The particular class of works designated in this rulemaking covers the lists of websites blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of Web sites. However, the exempted class specifically excludes lists of Internet locations blocked by software designed to protect against damage to computers, such as firewalls and antivirus software, or software designed to prevent receipt of unwanted e-mail, such as anti-spam software.

2. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.

The second exempted class is also similar to a class exempted in 2000, but again the class exempted in this proceeding is somewhat more limited. Many commenters supported a renewal of the previous exemption for ''literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsoleteness.'' Few commenters, however, provided any factual support for such an exemption. The facts that were presented related to a narrower class of works: computer programs using ''dongles,'' or hardware locks, which control access to the programs. Accordingly, the exempted class is limited to such computer programs. When a dongle is damaged or malfunctions in such as way that the authorized user of the software cannot gain access to the software, the authorized user should be given a means to make the software work. The exempted class includes only that software that actually cannot be accessed due to a damaged or malfunctioning dongle, and only when the dongle cannot be replaced or repaired. The class is formulated as including ''computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.'' Copyright law already provides a definition of obsolete, found in section 108(c) of the Copyright Act, which captures the circumstances under which an exemption is justified: ''a [dongle] shall be considered obsolete if [it] is no longer manufactured or is no longer reasonably available in the commercial marketplace.'' For purposes of this exemption, a dongle would be

[4] 67 FR 63578; *http://www.copyright.gov/fedreg/2002/67fr63578.html.*

[5] *http://www.copyright.gov/1201/index.html.*

considered ''obsolete'' if replacement or repair are not reasonably available in the marketplace. In addition to encouraging reasonable support to be made available to users, the exemption will allow users who are denied access as a result of a damaged or malfunctioning dongle to circumvent when repair or a replacement are unavailable. This exemption minimizes the adverse effects on noninfringing uses by users of software protected by these access control measures while also minimizing the adverse effects on copyright owners.

3. Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access.

This is a new exemption, in response to a proposal by The Internet Archive for ''[l]iterary and audiovisual works embodied in software whose access control systems prohibit access to replicas of the works.'' The Internet Archive, a non-profit library that maintains a collection of websites, software and other works in digital formats in a digital archive, migrates such works to modern storage systems (*e.g.*, by transferring a computer program from a floppy diskette to a hard drive) that are more stable and that will ensure continuing access to the works.

The Internet Archive stated that works distributed in digital formats on physical media (such as floppy diskettes, CD–ROMs, etc.) have sometimes been accompanied by ''original only'' access controls, technological measures that, while technically permitting copies to be made, prevent those copies from functioning (so that, for example, a copy of a computer program made from the original floppy diskette will not run, or a copy of an audiovisual game made from the original CD–ROM cannot be played). This prevents the Internet Archive from migrating those works to its modern storage system.

The problem is particularly compelling when the physical format in which the copy was originally marketed has become obsolete. If the Internet Archive is given computer software that was marketed on 5¼-inch floppy diskettes, it will not even be able to access the work in its original format on the typical computer sold in the marketplace today, because computers sold today are not equipped with 5¼-inch floppy drives. However, Internet Archive also desires an exemption that addresses the ''original only'' problem even when the medium on which the original copy was marketed (*e.g.*, CD–ROM) is not yet obsolete, noting that it is crucial to archive digital works before they become inaccessible and before the information on the medium has degraded.

The Register has concluded that to the extent that libraries and archives wish to make preservation copies of published software and video games that were distributed in formats that are (either because the physical medium on which they were distributed is no longer in use or because the use of an obsolete operating system is required), such activity is a noninfringing use covered by section 108(c) of the Copyright Act. The exempted class is therefore limited to works distributed in such now-obsolete formats. Again, ''obsolete'' has the same meaning that is set forth in section 108(c). A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace. The class is also limited to computer programs and video games because the evidence in the record of this rulemaking does not support a broader class of works.

4. Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a ''specialized format.'' For purposes of this exemption, ''specialized format,'' ''digital text'' and ''authorized entities'' shall have the same meaning as in 17 U.S.C. 121.

The final exempted class is based upon proposals by the American Foundation for the Blind and five major library associations. It is in response to problems experienced by the blind and visually impaired in gaining meaningful access to literary works distributed as ebooks. Ebooks can offer accessibility to the blind and the visually impaired that is otherwise not available from a print version. Ebooks may allow the user to activate a ''read-aloud'' function offered by certain ebook readers. Ebooks may also permit accessibility to the work by means of screen reader software, a separate program for the blind and visually impaired that interacts with an ebook reader and that is capable of converting the text into either synthesized speech or braille.

By using digital rights management tools that implicate access controls, publishers of ebooks can disable the read-aloud function of an ebook and may prevent access to a work in ebook form by means of screen reader software. The record indicates that many ebooks are distributed with these two functions disabled. The disabling of these functions is alleged to prevent the blind and visually impaired from engaging in particular noninfringing uses such as private performance, and to prevent access to these works by blind and visually impaired users altogether. The uses that such persons make by using the ''read-aloud'' function and screen readers are noninfringing, and are likely to be the most reasonable means of meaningful access for such persons to works that are published in ebook format.

To be included in the exempted class, a literary work must exist in ebook format. Moreover, the exemption is not available if any existing edition of the work permits the ''read-aloud'' function or is screen reader-enabled. Thus, a publisher may avoid subjecting any of its works to this exemption simply by ensuring that for each of its works published in ebook form, an edition exists which is accessible to the blind and visually impaired in at least one of these two ways.

B. Other Exemptions Considered, But Not Recommended

A number of other proposed exemptions were considered, but rejected. They are briefly discussed below. Similar proposed exemptions are discussed together.

1. Proposed class: All works should be exempt for noninfringing uses, *e.g.*, fair use and private uses, and other use-based proposals.

Many comments declined to specify a ''class of works'' and instead designated the ''class'' to be exempted as ''all works.'' Because the proponents of an exemption for ''all works'' have utterly failed to propose ''a particular class of copyrighted works,'' but have simply asked, in effect, for a blanket exemption for all works—in effect, an administrative abrogation of section 1201(a)(1)—these proposals must be rejected.

2. Proposed classes: Several, including ''Per se Educational Fair Use Works'' and ''Fair Use Works.''

Another group of proposals defined the class of works primarily by reference to the type of use of works or the nature of the users, *e.g.*, fair use works. A ''use-based'' or ''user-based'' classification is not permitted. The statutory exemptions in section 1201 contain carefully crafted, use-based and user-based exemptions. Congress considered and declined to enact certain use-based exemptions similar to some of the proposals raised in this rulemaking. The statutory text and the legislative history

provide no evidence that Congress intended this rulemaking to second-guess congressional determinations. Rather, Congress created this rulemaking as a ''fail-safe'' mechanism to focus on evidence of adverse effects in particular sub-categories of works that could be ameliorated by appropriately crafted, short-term exemptions.

3. Proposed classes: (1) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project where the granted exemption applies only to acts of circumvention whose primary purpose is to further a legitimate research project; and (2) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project.

These two related classes were proposed by one commenter. Each proposed class consists of ''musical recordings and audiovisual works,'' apparently occupying virtually the entire field of works in the category of audiovisual works (section 102(6)) and a substantial part of the categories of sound recordings (section 102(7)) and musical works (section 102(2)). The proposed class is further narrowed only by reference to the necessary or intended use by persons wishing to circumvent the access controls. Because each of these proposed classes is defined largely in terms of the purpose of the circumvention, they cannot be considered. They are simply variants of the type of use-based class that is beyond the scope of this proceeding.

4. Proposed class: Any work to which the user had lawful initial access (and variations).

This proposal also failed to propose ''a particular class of copyrighted works.'' Moreover, commenters proposed this class without providing any factual support whatsoever. Proponents failed to specify particular access controls that have caused adverse effects on noninfringing uses, and have failed to describe what noninfringing uses have been adversely affected.

5. Proposed class: Copies of audiovisual works, including motion pictures, and phonorecords of musical sound recordings that have been previously licensed for reproduction but can no longer be reproduced for private performance after the lawful conditions for prior reproduction have been met.

This class was proposed by a commenter seeking an exemption to permit persons who have obtained digital copies of motion pictures or sound recordings, under agreements that limit the circumstances (typically, a time limitation) under which they may view or hear them, to circumvent access controls that enforce those agreements. The examples cited by the commenter relate primarily to online services that deliver music or movies to subscribers under an agreement that permits the subscriber to obtain access to the work only so long as the subscriber continues to subscribe to the service. The commenter seeks to exempt such works from the prohibition on circumvention so that users of such works would be able to continue to play them even when the agreed-on conditions for their use no longer apply.

A consumer who enters into an agreement to pay a particular sum for the right to listen to or view a copyrighted work for a limited period of time can have no reasonable expectation of continued access once that time has expired. Especially when the works that are the subject of this proposed exemption—motion pictures and sound recordings—are widely available for purchase in formats that have no time restrictions on use, the case for an exemption has not been made. In fact, the DMCA was intended to encourage such use-facilitating services that give consumers the option to pay lower prices for more limited uses of copyrighted works.

6. Proposed class: ''Thin copyright'' works.

The proposed exemption for ''thin copyright works'' suffers from the same flaws as the proposals to exempt classes such as ''fair use works.'' Although it was stated that these ''thin copyright'' works contain ''limited copyrighted subject material,'' there was no showing of any present or likely harm to users wishing to engage in noninfringing uses. There was no showing that any such works were unavailable in an alternative, unprotected format. Without any demonstration of an adverse effect, any specific allegation of any particular technological measure protecting access to works, or any discussion of the unavailability of the material cited in unprotected formats, there is little basis for consideration.

7. Proposed class: Public domain works or works distributed without restriction.

Several comments sought an exemption for works that are either public domain, open source or ''open access,'' but to which access controls are applied. The commenters addressing open source and open access works provided absolutely no information in support of their requests. Aside from a proposal relating to public domain material on DVDs, there was a paucity of information relating to other public domain works. These commenters have overlooked that if a work that is entirely in the public domain is protected by an access control measure, the prohibition on circumvention will not be applicable. Therefore, no exemption is needed.

In the DVD context, a proponent provided a series of lists of audiovisual works that it contended are in the public domain, some of which it alleged are distributed bundled with copyrighted material. However, opponents of the proposed exception indicated that many if not all the works named by the proponent are available in unencrypted (VHS) format, are not bundled with copyrighted material, are themselves still subject to copyright protection, or are not encrypted by the Content Scrambling System (''CSS'') or otherwise subject to an access control, effectively rebutting the proponent's showing.

8. Proposed class: Musical works, sound recordings, and audiovisual works embodied in media that are or may become inaccessible by possessors of lawfully-made copies due to malfunction, damage, or obsoleteness.

Supporters of this proposed class wanted to be able to transfer sound recordings and musical works from one medium to another. Some commenters also believe that they should be able to convert these works to new or different formats or to back up the works for archival purposes, *e.g.*, to ''refresh'' the media from time to time to ensure that the works are available both for their use and for future generations. However, these proponents have not clearly stated or demonstrated that access controls are preventing these activities.

In the case of audiovisual works on DVDs, the proponents desire to make backup copies of their DVDs for a variety of purposes: They claim that DVDs are inherently fragile and subject to damage; they are concerned about loss or theft of the original during travel; they wish to duplicate collections to avoid the burdens and risks of transporting DVDs; they assert that some titles are out of print and cannot be replaced in case of damage; and they claim that the duration of a DVD's lifespan is limited. The Register concludes that the proponents have not made the case with respect to fragility of DVDs, nor have they shown that the making of backup copies of DVDs is a noninfringing use.

9. Proposed class: Audiovisual works released on DVD that contain access control measures that interfere with the ability to defeat technology that prevents users from skipping promotional materials.

As the proponent of this proposed class states the problem, ''[m]ovie studios are able to make certain DVD content ''unskippable'' during playback. Some studios have abused this feature by preventing the skipping of advertising shown prior to the start of the feature presentation.'' The technology which deactivates the fast-forward function of DVD players (UOP blocking) does not appear to be an access control. Nor does the record show that the ''CSS, an access control used on motion pictures on DVDs, prevents the deactivation of UOP blocking. Therefore, an exemption does not appear warranted since it does not appear that access controls are preventing users from fast-forwarding on DVDs. Moreover, although the objections to DVDs which have the fast forwarding feature disabled with respect to advertising are understandable, the problem appears to be no more than *de minimis* and a mere inconvenience experienced with an unknown—but apparently small—quantity of available DVD titles.

10. Proposed class: Ancillary audiovisual works distributed on DVDs encrypted by CSS.

It is virtually uncontested that there are ancillary works on DVDs that are not available in another, unprotected format. Such ancillary material includes matter that is available along with the motion picture in DVD format but not available in videotape format, such as outtakes, interviews with actors and directors, additional language features, etc. The proponent of an ''ancillary works'' exemption asserts that the use of CSS on DVDs prevents ''quotation [*i.e.*, reproduction], for purposes of commentary and criticism, of ancillary audiovisual works.''

While there is little doubt that the desired use for comment and criticism by weblog critics can be within the fair use exception, such critics have a number of options available for such ''quotation.'' Because users have means of making analog copies of the material on DVDs without circumventing access controls (and of redigitizing those analog copies), there is no need to permit them to circumvent. The desire to make a digital-to-digital copy, while understandable, does not support an exemption in this case. Existing case law is clear that fair use does not guarantee copying by the optimum method or in the identical format of the original. On balance, an exemption, which would permit circumvention of CSS, could have an adverse effect on the availability of such works on DVDs to the public, since the motion picture industry's willingness to make audiovisual works available in digital form on DVDs is based in part on the confidence it has that CSS will protect it against massive infringement.

11. Proposed class: Audiovisual works stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures.

Many motion pictures distributed on DVDs are ''region coded.'' A region coded DVD may only be played on a DVD player that is set to play DVDs bearing the code for a particular region of the world. Proponents of an exemption included individuals who had acquired DVDs from a region outside the U.S. and then encountered difficulty in playing those DVDs on devices purchased in the U.S. Because such consumers have a number of options that will permit them to view such region coded DVDs, the need for an exemption that would permit circumvention of region coding has not been demonstrated.

12. Proposed class: Video games stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures.

A similar issue was raised with respect to region coding on video games. However, supporters came forward with virtually no evidence relating to problems with region coding of video games. In the previous rulemaking, the Register noted that there was not enough evidence to support an exemption. Thus, the proponents were on notice that they needed to supply more and better evidence in order to sustain the proposed exemption. Such evidence has not been produced in this rulemaking.

13. Proposed class: Audiovisual works embodied in DVDs encrypted by CSS.

The comments in support of this exemption sought to engage in a variety of sometimes unspecified claimed fair uses with respect to audiovisual works on DVDs that do not necessarily appear to fall within the scope of the proposed exemptions discussed above. However, they failed to provide evidence of actual or likely harm and, therefore, the Register cannot recommend such an exemption. While some commenters mentioned uses that may theoretically qualify as a fair use, specific facts were not provided and it was not shown that the works were unavailable in an unprotected format.

14. Proposed class: Software designed for use on dedicated video game players.

This proponent of this exemption provided almost no evidence in support of his proposal, failing to identify a technological measure that controls access to copyrighted works and failing sufficiently to identify what noninfringing activity is adversely affected.

15. Proposed class: Literary works (including ebooks), sound recordings, and audiovisual works protected by access controls that prevent post-sale uses of works; ''tethered'' works.

A number of commenters proposed exemptions for works that are tethered to particular devices, *i.e.*, works that cannot be copied to and used on other devices. The purpose of limiting access to particular devices or hardware is to enable varying degrees of control over certain uses. Many of these commenters focused on ebooks. An exemption for tethered ebooks cannot be sustained. The consumer often has choices between various ebook formats as well as between ebook formats and alternative formats for books, *e.g.*, hard copies or audio versions. Commenters who believe that users should be able to ''space-shift'' any work they purchase in order to access this work on any device of their choosing did not make a persuasive case that such ''space-shifting,'' involving reproduction of the work, is a noninfringing use. The purpose of tethering is to limit subsequent reproduction and distribution of the reproductions. While this may limit a user's options, such user limitations would appear to represent only an inconvenience as long as alternative formats of the work are available for noninfringing uses.

Similar arguments were made with respect to tethering of motion pictures and of sound recordings of musical works. As with the space-shifting of ebooks, commenters seek to ''platform-shift'' their sound recordings or motion pictures. However, tethering and DRM policies serve a legitimate purpose for limiting access to certain devices in order to protect the copyright owners from digital redistribution of their works. Moreover, consumers have choices of formats and may decide whether their intended use is best served by a digital online version or by another available version of a work. While availability for use has been restricted in certain digital formats, the overall availability for use of these works has not been adversely affected. The effect of circumvention of the protection measures employed on these works would likely decrease the digital offerings for these classes of works, reduce the options for users, and decrease the value of these works for copyright owners.

16. Proposed class: Audiovisual works, including motion pictures, the DVD copies of which are tethered to operating systems that prevent rendering on alternative operating systems.

A number of commenters sought exemption of a class of works consisting of motion pictures on DVDs playable on computers only when the computers have particular operating systems, *e.g.*, Windows or Macintosh, and that cannot be played on alternative systems, such as Linux.

Because there are a variety of devices that will play DVDs, the inability to play a DVD on a particular device or with a particular operating system is simply a matter of preference and inconvenience. Persons wishing to play CSS-protected DVDs on computers with the Linux operating system have the same options that other consumers have. As a general proposition, the DVD medium has increased the availability of motion pictures for sale and rental by the general public, and the motion picture studios' willingness to distribute their works in this medium is due in part to the faith they have in the protection offered by CSS. The balancing of the incremental benefit of allowing circumvention for the purposes of watching a movie on a Linux-based computer is outweighed by the threat of increased piracy that underlies Congress' motivation for enacting section 1201.

17. Proposed class: Sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms that require assent to End-User License Agreements as a condition of gaining access.

One commenter proposed an exemption for sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms employed by or at the request of the copyright holder which require, as a condition of gaining access, that the prospective user agree to contractual terms which restrict or limit any of the limitations on the exclusive rights of the copyright holder. Little evidence was offered in support of this proposed class. The proponent's complaint appears to be with the practice of requiring users of certain works to enter into End User License Agreements (EULAs) rather than with access controls as such. While technological measures may prevent access unless a user signals assent to the terms of a contract, the prohibition on circumvention does not appear to enforce the terms of a contract.

18. Proposed class: published sound recordings of musical works on compact discs that use technological measures that prevent access on certain playback devices.

One commenter proposed a class of ''Sound recordings released on compact disc (''CDs'') that are protected by technological protection measures that malfunction so as to prevent access on certain playback devices.'' In part, this proposal relates to copy controls that malfunction and inadvertently restrict access to sound recordings on CDs. The proponent itself expressed doubt whether these are actually access controls subject to the prohibition in section 1201(a)(1); opponents said they are not and the Register agrees. However, in some cases the technologies in question are intended to deny access to particular copies of sound recordings under certain circumstances, *e.g.*, CDs distributed with two sessions: a ''first session'' that is not accessible on certain devices and a compressed digital file of a ''second session'' that is accessible on those devices but which is protected from certain uses. The purpose of the second session is to permit playability on devices such as computers, but to hinder the ability of computer users to reproduce and disseminate the copies, *e.g.*, in a peer-to-peer network. In those cases, users have access to the work. The comments provided insufficient information to conclude that access controls have caused users to be denied access to a sound recording. Moreover, thus far the deployment of CDs protected by any technological measures in the United States has been minimal. The record does not support a conclusion that at present, access controls on CDs have had a substantial adverse effect on noninfringing uses of sound recordings on CDs.

19. Proposed class: Sound recordings on copy-protected Red Book Audio format compact discs.

The Digital Media Association (''DiMA''), on behalf of webcasters operating under a statutory license to transmit performances of sound recordings, sought an exemption that would permit circumvention of access controls in order to make ephemeral copies (as permitted in section 112 of the Copyright Act) of sound recordings on CDs protected by access controls. In particular, they wish to make server copies of the higher quality ''first session'' on CDs using the ''second session'' technology. Because section 112(e)(8) already provides licensed webcasters with a mechanism for circumventing access controls that prevent webcasters from making ephemeral copies, there is no need for an exemption here, especially when webcasters thus far do not appear to have experienced actual problems.

20. Proposed exemption: Broadcast news monitoring.

A group of broadcast monitors, businesses that tape television news programs off the air for their customers, sought an exemption that would ''exempt news and public affairs programming from the scope of the broadcast flag.'' This was a reference to a proposal pending before the Federal Communications Commission that would require certain consumer electronic devices to respond to a ''broadcast flag'' in television programming which would place certain limits on how digital broadcasts can be redistributed after receipt by a consumer. The broadcast monitors seek an exemption that would allow them to bypass the broadcast flag for the purpose of making copies of news segments for their customers.

The Register cannot recommend such an exemption. The ''limited purpose'' for which the broadcast monitors seek an exemption does not appear to constitute a noninfringing use. Moreover, the broadcast monitors' fears relating to the broadcast flag, which at this point is simply a proposal before another federal agency, are speculative. Even if the speculative adverse effects were to become a reality, such adverse effects would only cause an inconvenience with respect to the intended use, since broadcast monitors have other means to go about their business.

21. Proposed exemption: Reverse engineering for interoperability and the Static Control proposals.

Static Control Components, Inc. proposed exemptions to permit circumvention of access controls on computer programs embedded in computer printers and toner cartridges and that control the interoperation and functions of the printer and toner cartridge. Static Control is in litigation with computer printer manufacturer Lexmark, which sells laser printer toner cartridges that cannot be refilled by third-party remanufacturers because a technological measure contained on a microchip in those cartridges renders those cartridges useless when they are refilled by third-party remanufacturers. The Register concludes that an existing exemption in section 1201(f) addresses the concerns of remanufacturers, making an exemption under section 1201(a)(1)(D) unnecessary.

22. Proposed exemption: Computer issues: encryption research, data file formats, recovery of passwords, personally identifying material.

A number of commenters raised issues relating to encryption and security research and to access controls that permit the privacy of users of works to be compromised. These proposals, in effect, sought broadening of statutory exemptions enacted as part of the DMCA such as section 1201(d)–(g) and (i)–(j). In some cases, the commenters failed to explain why the existing exemptions are insufficient. Most commenters also failed to provide specific examples of problems leading to the alleged need for an exemption and, therefore, the Register cannot recommend exemptions in these cases.

23. Proposed exemption: Conversion of data file formats and source code.

A few commenters submitted comments relating to source code or data file formats, but insufficient information was provided to understand the nature of the problem, or even whether the prohibition against circumvention contained in section 1201(a)(1) is implicated.

24. Proposed exemption: Privacy and personally identifying information.

Two comments addressed issues relating to privacy and the protection of personally identifying information. However, insufficient information was provided to ascertain the nature and extent of the problem, or the degree to which access controls were involved. To the extent that the concern relates to disclosure of personally identifying information, the commenters did not explain why the existing statutory exemption in section 1201(i) does not adequately address the problem.

25. Other comments beyond the scope of the rulemaking: Webcasting, Limitations of Liability for Online Service Providers and the Antitrafficking provisions of the DMCA.

A number of comments discussed issues unrelated to the anticircumvention provision that are beyond the scope of this rulemaking. Some of these comments consisted of criticisms of the DMCA generally, without citing any particular facts to support such criticism.[6] Other comments attacked particular aspects of the DMCA, *e.g.*, criticism of the rate established for the statutory license for the webcasting of sound recordings, alleged adverse effects of section 512 relating to limitations on liability for online service providers, and the antitrafficking provisions of section 1201(a)(2) and 1201(b).

[6] *See, e.g.* C43 and C44.

IV. Conclusion

Having considered the evidence in the record, the contentions of the parties, and the statutory objectives, the Register of Copyrights recommends that the Librarian of Congress publish the four classes of copyrighted works designated above, so that the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of those particular classes of works.

Dated: October 27, 2003.

Marybeth Peters,

Register of Copyrights.

Determination of the Librarian of Congress

Having duly considered and accepted the recommendation of the Register of Copyrights that the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of the four classes of copyrighted works designated above, the Librarian of Congress is exercising his authority under 17 U.S.C. 1201(a)(1)(C) and (D) and is publishing as a new rule the four classes of copyrighted works that shall be subject to the exemption found in 17 U.S.C. 1201(a)(1)(B) from the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) for the period from October 28, 2003 through October 27, 2006, as follows:

List of Subjects in 37 CFR Part 201

Cable television, Copyright, Exemptions to prohibition against circumvention, Literary works, Recordings, Satellites.

Final Regulations

■ For the reasons set forth in the preamble, 37 CFR part 201 is amended as follows:

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. Section 201.40 is amended by revising paragraph (b) and by adding new paragraph (c).

The revisions and additions to § 201.40 read as follows:

§ 201.40 Exemption to prohibition against circumvention.

* * * * *

(b) *Classes of copyrighted works.* Pursuant to the authority set forth in 17 U.S.C. 1201(a)(1)(C) and (D), and upon the recommendation of the Register of Copyrights, the Librarian has determined that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to persons who engage in noninfringing uses of the following four classes of copyrighted works:

(1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail.

(2) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.

(3) Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(4) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.

(c) *Definitions.* (1) ''Internet locations'' are defined to include domains, uniform resource locators (URLs), numeric IP addresses or any combination thereof.

(2) ''Obsolete'' shall mean ''no longer manufactured or reasonably available in the commercial marketplace.''

(3) ''Specialized format,'' ''digital text'' and ''authorized entities'' shall have the same meaning as in 17 U.S.C. 121.

Dated: October 28, 2003.

James H. Billington,

The Librarian of Congress.

[FR Doc. 03–27537 Filed 10–30–03; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MI83–02–7292; FRL–7581–9]

Approval and Promulgation of Air Quality Implementation Plans; Michigan; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to the receipt of an adverse comment, the EPA is withdrawing the direct final rule approving a revision to Michigan's definition of volatile organic compound. The approval would have revised Michigan's State Implementation Plan (SIP) for ozone. In the direct final rule published on September 2, 2003 (68 FR 52104), EPA stated that if EPA receives adverse comment by October 2, 2003, the rule would be withdrawn and not take effect. On September 2, 2003, EPA subsequently received one comment. We believe this comment is adverse and, therefore, we are withdrawing the direct final rule. EPA will address the comment received in a subsequent final action based on the proposed action published on September 2, 2003.

DATES: The direct final rule published at 68 FR 52104 on September 2, 2003, is withdrawn as of October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Telephone: (312) 886–1767. E-Mail Address: *dagostino.kathleen@epa.gov*

List of Subjects in 40 CFR Part 52

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

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

Dated: October 23, 2003.

Bharat Mathur,

Acting Regional Administrator, Region 5.

PART 52—[AMENDED]

■ Accordingly, the addition of 40 CFR 52.1170(c)(119) is withdrawn as of October 31, 2003.

[FR Doc. 03–27549 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[Region 2 Docket No. PR11–267a; FRL–7581–1]

Approval and Promulgation of State Plans for Designated Facilities; Puerto Rico

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action on the ''State Plan'' submitted by the Commonwealth of Puerto Rico to fulfill the requirements of sections 111(d)/129 of the Clean Air Act for Commercial and Industrial Solid Waste Incineration (CISWI) units. Puerto Rico's State Plan provides for the implementation and enforcement of the Emissions Guidelines, as promulgated by EPA on December 1, 2000, applicable to existing CISWI units for which construction commenced on or before November 30, 1999. Specifically, the State Plan that EPA is approving today, establishes emission limits for organics, carbon monoxide, metals, acid gases and particulate matter and compliance schedules for the existing CISWI units located in the Commonwealth of Puerto Rico which will reduce the designated pollutants.

DATES: This rule is effective on December 30, 2003, without further notice, unless EPA receives adverse comment by December 1, 2003. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Comments may be submitted either by mail or electronically. Written comments should be mailed to Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866. Electronic comments could be sent either to *Werner.Raymond@epa.gov* or to *http://www.regulations.gov,* which is an alternative method for submitting electronic comments to EPA. Go directly to *http://www.regulations.gov,* then select ''Environmental Protection Agency'' at the top of the page and use the ''go'' button. Please follow the on-line instructions for submitting comments.

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, Region 2, Caribbean Environmental Protection Division, Centro Europa Building, Suite 417, 1492 Ponce De Leon Avenue, Stop 22, San Juan, Puerto Rico 00907–4127.

Puerto Rico Environmental Quality Board, National Plaza Building, 431 Ponce De Leon Avenue, Hato Rey, Puerto Rico.

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

FOR FURTHER INFORMATION CONTACT: Kirk J. Wieber, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3381 or *Wieber.Kirk@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Sections 111(d) and 129 of the Clean Air Act (CAA) require states to submit plans to control certain pollutants (designated pollutants) at existing solid waste combustor facilities (designated facilities) whenever standards of performance have been established under section 111(b) for new sources of the same type, and EPA has established emission guidelines (EG) for such existing sources. A designated pollutant is any pollutant for which no air quality criteria have been issued, and which is not included on a list published under section 108(a) or section 112(b)(1)(A) of the CAA, but emissions of which are subject to a standard of performance for new stationary sources. However, section 129 of the CAA, also requires EPA to promulgate EG for Commercial and Industrial Solid Waste Incineration (CISWI) units that emit a mixture of air pollutants. These pollutants include organics (dioxins/furans), carbon monoxide, metals (cadmium, lead, mercury), acid gases (hydrogen chloride, sulfur dioxide, and nitrogen oxides) and particulate matter (including opacity). On December 1, 2000 (65 FR 75338), EPA promulgated CISWI unit new source performance standards and the EG, 40 CFR part 60, subparts CCCC and DDDD, respectively. The designated facility to which the EG apply is each existing CISWI unit, as defined in subpart DDDD, that commenced construction on or before November 30, 1999.

Section 111(d) of the CAA requires that ''designated'' pollutants, regulated

under standards of performance for new stationary sources by section 111(b) of the CAA, must also be controlled at existing sources in the same source category to a level stipulated in an EG document. Section 129 of the CAA specifically addresses solid waste combustion and emission controls based on what is commonly referred to as ''maximum achievable control technology'' (MACT). Section 129 requires EPA to promulgate a MACT based emission guidelines document for CISWI units, and then requires states to develop plans that implement the EG requirements. The CISWI EG under 40 CFR part 60, subpart DDDD, establishes emission and operating requirements under the authority of the CAA sections 111(d) and 129. These requirements must be incorporated into a state plan that is ''at least as protective'' as the EG, and is Federally enforceable upon approval by EPA. The procedures for adoption and submittal of state plans are codified in 40 CFR part 60, subpart B.

II. Puerto Rico's Submittal

On May 20, 2003, the Puerto Rico Environmental Quality Board (PREQB) submitted to EPA a section 111(d)/129 plan to implement 40 CFR part 60, subpart DDDD—Emission Guidelines, for existing CISWI units located in the Commonwealth of Puerto Rico. PREQB's submittal included: Enforceable mechanisms; the necessary legal authority; inventory of CISWI units; emissions inventory; enforceable compliance schedules; testing, monitoring, recordkeeping, and reporting requirements; record of public hearing; and a provision for annual state progress reports.

III. Review of Puerto Rico's Submittal

A. Identification of Enforceable Mechanism for Implementing the EG

40 CFR 60.24(a) requires that a section 111(d) plan include emissions standards, defined in 40 CFR 60.21(f) as ''a legally enforceable regulation setting forth an allowable rate of emissions into the atmosphere, or prescribing equipment specifications for control of air pollution emissions.''

On June 4, 2003, Puerto Rico adopted revisions to Rule 102 and Rule 405 of the Puerto Rico Regulations for the Control of Atmospheric Pollution (PRRCAP), entitled ''Definitions'' and ''Incineration'', respectively. Revised rules 102 and 405 became effective on July 4, 2003, and are intended to control air emissions from existing CISWI units located in Puerto Rico.

B. Demonstration of the State's Legal Authority to Carry Out the Section 111(d) State Plan as Submitted

40 CFR 60.26 requires that a section 111(d) plan demonstrate that the state has the necessary legal authority to adopt and implement the plan. In order to make this demonstration, the plan must show that the state has the legal authority to adopt emission standards and compliance schedules for the designated facilities; enforce the applicable laws, regulations, emission standards and compliance schedules, including the ability to obtain injunctive relief; the authority to obtain information from the designated facilities in order to determine compliance, including the authority to require recordkeeping from the facilities, to make inspections and to conduct tests at the facilities; the authority to require designated facilities to install, maintain and use emission monitoring devices; the authority to require periodic reporting to the state on the nature and amounts of emissions from the facility; and the authority for the state to make such emissions data available to the public. Puerto Rico has demonstrated all these elements. As a result, Puerto Rico has demonstrated that it has sufficient authority to adopt rules governing existing CISWI units and that the PREQB has sufficient legal authority to enforce these rules and to develop and administer this CISWI plan.

C. Inventory, Including Emissions, of Existing CISWI Units in Puerto Rico Affected by the State Plan

40 CFR 60.25(a) requires that a section 111(d) plan include a complete source inventory of all existing CISWI units (*i.e.*, those CISWI units that commenced construction on or before November 30, 1999) in Puerto Rico that are subject to the plan. 40 CFR 60.25(a) also requires an estimate of the regulated pollutants. A list of the existing CISWI units in Puerto Rico and emission estimates for organics (dioxins/furans), carbon monoxide, metals (cadmium, lead, mercury), acid gases (hydrogen chloride, sulfur dioxide, and nitrogen oxides) and particulate matter (including opacity) for each existing CISWI unit located in Puerto Rico, has been submitted as part of Puerto Rico's CISWI plan.

D. Emission Limitations for CISWI Units

40 CFR 60.24(c) specifies that a state plan must include emission standards that are no less stringent than the EG (except as specified in 40 CFR 60.24(f) which allows for less stringent emission limitations on a case-by-case basis if certain conditions are met). 40 CFR 60.2875 contains the emissions standards applicable to existing CISWI units. Subsection 405(c)(2) of the PRRCAP includes emission limitation requirements consistent with 40 CFR 60.2875.

E. Compliance Schedules

A state's section 111(d) plan must include a compliance schedule that owners and operators of affected CISWI units must meet in complying with the requirements of the plan. 40 CFR 60.2535 indicates that final compliance should be achieved as expeditiously as practicable after EPA approval of the state plan but no later than December 1, 2005 or three years after the effective date of the state plan approval, whichever is sooner. If the owner or operator of a CISWI unit plans to achieve compliance more than one year following the effective date of the state plan approval, then two increments of progress must be met, which are; submit a final control plan; and achieve final compliance.

Subsection 405(c)(8) of the PRRCAP includes the increments of progress and the dates by which those increments must be met, which are, submit final control plan six months after the effective date of EPA plan approval and achieve final compliance 18 months after the effective date of EPA plan approval, or by December 1, 2005, whichever date is earlier.

F. Testing, Monitoring, Recordkeeping and Reporting Requirements

Subsection 405(c)(5) of the PRRCAP includes the performance testing requirements and testing methods. Subsection 405(6) includes the monitoring requirements including the monitoring equipment and parameters to be used. Subsection 405(c)(7) requires that all designated CISWI facilities subject to the rule keep appropriate records of the operation and maintenance of the CISWI units. Subsection 405(c)(7) also includes the reporting requirements.

G. Record of the Public Hearing on the State Plan

On January 15, 2003, Puerto Rico held a public hearing on its CISWI plan, including the revisions to Rules 102 and 405 of the PRRCAP. PREQB included in its May 20, 2003, submittal to EPA, copies of the public notices and public hearing record.

H. Submittal of Annual State Progress Reports to EPA

40 CFR 60.25(e) and (f) requires states to submit to EPA annual reports on the

progress of plan enforcement. Puerto Rico has acknowledged this requirement and will submit to EPA annual reports on the progress in the implementation of its CISWI plan.

IV. Conclusion

EPA has evaluated the CISWI plan submitted by Puerto Rico for consistency with the CAA, EPA emission guidelines and policy. EPA has determined that Puerto Rico's Plan meets all requirements and, therefore, EPA is approving Puerto Rico's Plan to implement and enforce subpart DDDD, as promulgated on December 1, 2000, applicable to existing CISWI units that have commenced construction on or before November 30, 1999. EPA is also approving revisions to Rule 102 and Rule 405 of the Puerto Rico Regulations for the Control of Atmospheric Pollution, entitled, ''Definitions'' and ''Incineration'', respectively.

The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the State Plan revision should adverse comments be filed. This rule will be effective December 30, 2003, without further notice unless the Agency receives adverse comments by December 1, 2003.

If the EPA receives adverse comments, then EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

V. Statutory and Executive Order Reviews

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 (Pub. L. 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). Puerto Rico's State plan applies to all affected sources regardless of whether it has been identified in its plan. Therefore, EPA has concluded that this rulemaking action does not have federalism implications nor does it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). 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 CAA. 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 state plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. 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 state plan 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 state plan submission that otherwise satisfies the provisions of the CAA. 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 30, 2003. 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 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: October 14, 2003.

Jane M. Kenny,

Regional Administrator, Region 2.

■ Part 62, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart BBB—Puerto Rico

■ 2. Subpart BBB is amended by adding a new undesignated center heading and § 62.13108 to read as follows:

Control of Air Emissions of Designated Pollutants From Existing Commercial and Industrial Solid Waste Incineration Units

§ 62.13108 Identification of plan.

(a) The Puerto Rico Environmental Quality Board submitted to the Environmental Protection Agency on May 20, 2003, a ''State Plan'' for implementation and enforcement of 40 CFR part 60, subpart DDDD, Emission Guidelines and Compliance Times for Commercial and Industrial Solid Waste Incineration Units.

(b) Identification of sources: The plan applies to all applicable existing Commercial and Industrial Solid Waste Incineration Units for which construction commenced on or before November 30, 1999.

[FR Doc. 03–27484 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

OFFICE OF PERSONNEL MANAGEMENT

48 CFR Part 1733

RIN 3206–AK07

Protests, Disputes, and Appeals

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final rule to reflect a change of address for the Interior Board of Contract Appeals (IBCA). IBCA has moved to a new building in Arlington, Virginia.

DATES: This rule is effective October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Henry Wong, Contracting Officer, Office of Personnel Management, Contracting Branch, Room 1342, 1900 E Street, NW., Washington, DC 20415–7710. Telephone: 202–606–1598 Fax number: 202–606–1464, e-mail: *hlwong@opm.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Procedural Requirements

I. Background

In 48 CFR part 1733, OPM has promulgated regulations concerning disputes and appeals involving OPM contracting officer decisions. Pursuant to a designation by the Director of OPM, appeals under the Contract Disputes Act, 41 U.S.C. 601 *et. seq.,* are handled by IBCA. Since 1970, IBCA has been located at 4015 Wilson Boulevard, and that address is included in two sections within 48 CFR part 1733.

IBCA has relocated to 801 North Quincy Street, Arlington, Virginia. OPM is revising its administrative appeals regulations to reflect IBCA's new street address.

II. Procedural Requirements

A. Determination To Issue Final Rule Effective in Less Than 30 Days

OPM has determined that the general notice of proposed rulemaking and comment provisions of the Administrative Procedures Act, 5 U.S.C. 553(b), do not apply to this rulemaking because the changes being made relate solely to matters of agency organization, procedure, and practice. They therefore satisfy the exemption from notice and comment rulemaking in 5 U.S.C. 553 (b)(A).

B. Review Under Procedural Statutes and Executive Orders

OPM has reviewed this rule under the following statutes and executive orders governing rulemaking procedures: The Unfunded Mandates Reform Act of 1995,2 U.S.C.1501 *et. seq.;* the Regulatory Flexibility Act, 5 U.S.C. 601 *et. seq.;* the Small Business. Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et. seq.;* the Paperwork Reduction Act, 44 U.S.C. 3501 *et. seq.*; the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et. seq.;* Executive Order 12630 (Takings); Executive Order 12866 (Regulatory Planning and Review); Executive Order 12988 (Civil Justice Reform); Executive Order 13132 (Federalism); Executive Order 13175 (Tribal Consultation); and Executive Order 13211 (Energy Impacts). OPM has determined that this rule does not trigger any of the procedural requirements of those statutes and executive orders, since this rule merely changes the street address for IBCA.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

Executive Order 12860, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

List of Subjects in 48 CFR Part 1733

Administrative practices and procedures, Government procurement.

U.S. Office of Personnel Management.

Kay Coles James,

Director.

■ For reasons stated in the preamble, OPM amends its regulations in 48 CFR part 1733 as follows:

PART 1733—[AMENDED]

■ 1. The authority citation for part 1733 continues to read as follows:

Authority: 40 U.S.C 486(c); 48 CFR 1.301.

■ 2. In part 1733 of 48 CFR, remove all references to ''4015 Wilson Boulevard'' and add in its place ''801 North Quincy Street''.

[FR Doc. 03–27381 Filed 10–30–03; 8:45 am]

BILLING CODE 6325–44–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1805, 1823, 1825, and 1852

RIN 2700–AC92

Conformance With Federal Acquisition Circulars 2001–15 and 2001–14

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: This final rule revises the NASA FAR Supplement (NFS) to conform to changes made to the Federal Acquisition Regulation (FAR) by Federal Acquisition Circular (FAC) 2001–15 by providing guidance to contracting officers for use of clause alternates to implement environmental management system (EMS) requirements on NASA facilities and removing the requirement for submission of SF 129, Solicitation Mailing List Application. Additional changes are made to conform to the revised definition of ''United States'' contained in FAC 2001–14 and to update the designated NASA ombudsman.

EFFECTIVE DATE: October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Celeste Dalton, NASA, Office of Procurement, Contract Management Division (Code HK); (202) 358–1645; e-mail: *Celeste.M.Dalton@nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Item I of FAC 2001–15 eliminated the SF 129, Solicitation Mailing List Application and the need to maintain paper-based sources of contractor information. As a result, a change to NFS Part 1805 is required. FAC 2001–15, item number V, Leadership in

Environmental Management (E.O. 13148), requires insertion of Alternates I or II to FAR clause 52.223–5, Pollution Prevention and Right-to-Know Information, in certain contracts that provide for performance on a Federal facility if an Environmental Management System (EMS) is being implemented. NASA is implementing an EMS. This NFS change implements FAC 2001–15 item number V by providing guidance on when to use the alternates. FAC 2001–14, clarified the use of the term ''United States.''

NFS section 1825.7001 is amended to remove the phrase ''its possessions, and Puerto Rico'' since it is no longer necessary based on the definition of ''United States'' contained in FAR Part 25. Lastly, this change to the NFS updates the designated NASA ombudsman.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This final rule does not constitute a significant revision within the meaning of FAR 1.501 and Pub. L. 98–577, and publication for public comment is not required. However, NASA will consider comments from small entities concerning the affected NFS Parts 1805, 1823, 1825 and 1852 in accordance with 5 U.S.C. 610.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes do not impose recordkeeping or information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 1805, 1823, 1825, and 1852

Government Procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

■ Accordingly, 48 CFR Parts 1805, 1823, 1825, and 1852 is amended as follows:

■ 1. The authority citation for 48 CFR Parts 1805, 1823, 1825, and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1)

PART 1805—PUBLICIZING CONTRACT ACTIONS

■ 2. Remove section 1805.205

PART 1823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 3. Add Subpart 1823.10 to read as follows:

Subpart 1823.10—Federal Compliance With Right-to-Know Laws and Pollution Prevention Requirements

1823.1005 Contract clause.

(b) Use the clause with its Alternate I if the contract provides for contractor (1) Operation or maintenance of a NASA facility at which NASA has implemented or plans to implement an EMS, including, but not limited to the Jet Propulsion Laboratory and Michoud Assembly Facility; or

(2) Activities and operations—

(ii) The contracting officer and the procurement request initiator shall determine whether the contractor's activities or operations are covered within the EMS, in cooperation with the facility's environmental office, and in accordance with NPG 8553.1, ''NASA Environmental Management System (EMS)'' paragraph 1.2.c, and the local EMS documented procedures.

(c) Use the clause with its Alternate II whenever Alternate I is used.

PART 1825—FOREIGN ACQUISITION

1825.7001 [Amended]

■ 4. Amend section 1825.7001 by removing '', its possessions, and ''Puerto Rico''.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend the clause at section 1852.215–84 by—

■ (a) Revising the date to read (OCT 2003, and

■ (b) In the second sentence of paragraph (b) removing ''202–358–0422, facsimile 202–358–3083, e-mail *sthomps1@hq.nasa.gov''* and adding ''202–358–0445, facsimile 202–358–3083, e-mail *james.a.balinskas@nasa.gov''* in its place.

[FR Doc. 03–27491 Filed 10–30–03; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1845 and 1852

RIN 2700–AC73

Government Property—Instructions for Preparing NASA Form 1018

AGENCY: National Aeronautics and Space Administration.

ACTION: Interim rule.

SUMMARY: This interim rule amends the NASA Federal Acquisition Regulation Supplement (NFS) to provide a definition of obsolete property, to address contractor validation of 1018 data, to clarify reporting of software to which NASA has title, to clarify other property classifications, and to revise the date for submission of annual property reports. NASA uses the data contained in contractor reports for annual financial statements and property management. This change will provide for consistent reporting of NASA property by contractors.

DATES: *Effective Date:* This interim rule is effective October 31, 2003.

Comment Date: Comments should be submitted to NASA on or before December 30, 2003.

ADDRESSES: Lou Becker, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Lou Becker, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546, telephone: (202) 358–4593, e-mail to: *lou.becker@nasa.gov.*

SUPPLEMENTARY INFORMATION

A. Background

Each year, NASA's financial statements are audited in accordance with generally accepted government auditing standards. NASA must maintain adequate controls to reasonably assure that property, plant and equipment and materials are presented fairly in its financial statements. Since contractors maintain NASA's official records for its assets in their possession, NASA uses the data contained in contractor reports for annual financial statements and property management. This interim rule provides policies and procedures related to obsolete property, contractor validation of 1018 data, and proper reporting of software to which NASA has title. This change will provide for consistent reporting of NASA property by contractors. It also reflects the need to change the date of submission for

annual property reports from October 31st to October 15th.

B. Regulatory Flexibility Act

NASA certifies that this interim rule will not have a significant economic impact on a substantial number of small businesses within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because it clarifies existing property reporting policies and procedures contractors must follow when accounting for and reporting assets.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the NFS do not impose new recordkeeping or information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue an Interim Rule

In accordance with 41 U.S.C. 418(d), NASA has determined that urgent and compelling reasons exist to promulgate this interim rule. The basis for this determination is that the clarifications contained in this interim rule are needed to ensure consistent reporting of NASA assets in contractor annual reports to be submitted for Fiscal Year 2003. Public comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 1845 and 1852

Government procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

■ Accordingly, 48 CFR Parts 1845 and 1852 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 1845 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1845—GOVERNMENT PROPERTY

■ 2. Revise section 1845.7101 to read as follows:

1845.7101 Instructions for preparing NASA Form 1018.

NASA must account for and report assets in accordance with 31 U.S.C. 3512 and 31 U.S.C. 3515, Federal Accounting Standards, and Office of Management and Budget (OMB) instructions. Since contractors maintain NASA's official records for its assets in their possession, NASA must obtain periodic data from those records to meet these requirements. Changes in Federal Accounting Standards and OMB reporting requirements may occur from year to year, requiring contractor submission of supplemental information with the NASA Form (NF) 1018. The specific Statements of Federal Financial Accounting Standards (SFFAS) to be used for property records are SFFAS No. 3 ''Accounting for Inventory and Related Property'', SFFAS No. 6 ''Accounting for Property, Plant and Equipment'', SFFAS No. 10 ''Accounting for Internal Use Software'', and SFFAS No. 11 ''Amendments to PP&E: Definitions'' issued by the Federal Accounting Standards Advisory Board. Classifications of property, related costs to be reported, and other reporting requirements are discussed in this subpart. NF 1018 (see 1853.3) provides critical information for NASA financial statements and property management. Accuracy, completeness, and timeliness of the report are critical to many aspects of NASA's operations.

■ 3. Amend section 1845.7101–1 by revising paragraph (a), the introductory text of paragraphs (g) and (k) and paragraph (l) to read as follows:

1845.7101–1 Property classification.

(a) *General.* (1) Contractors shall report costs in the classifications on NF 1018, as described in this section. The cost of heritage assets and obsolete property will be reported on the NF 1018 under the appropriate classification. Supplemental reporting may also be required.

(2)(i) Heritage assets are property, plant and equipment that possess one or more of the following characteristics:

(A) Historical or natural significance;

(B) Cultural, educational or artistic importance; or

(C) Significant architectural characteristics.

(ii) Examples of NASA heritage assets include buildings and structures designated as National Historic Landmarks as well as aircraft, spacecraft and related components on display to enhance public understanding of NASA programs. Heritage assets which serve both a heritage and government operation function are considered multi-use when the predominant use is in general government operations. Multi-use heritage assets will not be considered heritage assets for NF 1018 supplemental reporting purposes.

(3) Obsolete property is property for which there are no current plans for use in its intended purpose (*i.e.,* it no longer provides service to NASA operations). Examples of obsolete property are items in configurations which are no longer required or used by NASA or items held for engineering evaluation purposes only. NASA may have approved the retention of these items for programmatic reasons even though they have no current plans for use.

* * * * *

(g) *Equipment.* Includes costs of commercially available personal property capable of stand-alone use in manufacturing supplies, performing services, or any general or administrative purpose (for example, machine tools, furniture, vehicles, computers, software, test equipment, including their accessory or auxiliary items). Software integrated into and necessary to operate another item of Government property is considered to be an auxiliary item (see FAR 45.501) and should be considered part of the item of which it is an integral part. Other software to which NASA has title shall be classified as an individual item of equipment for reporting purposes if it has a useful life of 2 years or more and acquisition cost of $1,000,000 or more (also see 1845.7101–3(g)). Enhancement costs for existing software should be added to the software acquisition cost if the enhancement results in significant additional capability beyond that for which the software was originally developed (*i.e.,* a capability that was not included in the original software specifications, the total cost of the enhancement is $1,000,000 or more, or the expected useful life of the enhanced software is 2 years or more). Software licenses are excluded. Contractors shall separately report:

* * * * *

(k) *Agency-Peculiar Property.* Includes costs of completed items, unique to NASA aeronautical and space programs, which are capable of stand-alone operation. Examples include research aircraft, reusable space vehicles, ground support equipment, prototypes, and mock-ups. The amount of property, title to which vests in NASA as a result of progress payments to fixed price subcontractors, shall be included to reflect the pro rata cost of undelivered agency-peculiar property. Completed end items not related to the International Space Station or the Space Shuttle program which otherwise meet the definition of Agency-Peculiar Property, and are destined for permanent operation in space, such as satellites and space probes, shall not be reported. Contractors shall separately report:

* * * * *

(l) *Contract Work-in-Process.* Work-in-process (WIP) consists of property items under construction (*i.e.,* not complete).

It includes costs of all work-in-process regardless of value, and excludes costs of completed items reported in other categories. While the costs of WIP for International Space Station and Space Shuttle components should be included as WIP, satellites and space probes and their components should be excluded from WIP as those items will be accounted for by NASA.

■ 4. Amend section 1845.7101–2 by revising the introductory text and paragraphs (a) and (c) to read as follows:

1845.7101–2 Transfers of property.

A transfer is a change in accountability between and among prime contracts, NASA Centers, and other Government agencies (*e.g.*, between contracts of the same NASA Center, contracts of different NASA Centers, a contract of one NASA Center to another, a NASA Center to a contract of another NASA Center, and a contract to another Government agency or its contract). To enable NASA to properly control and account for all transfers, they shall be adequately documented. Adequate documentation includes the appropriate dollar amount of the asset(s) transferred (as prescribed in 1845.7101–3) and the formal, signed NASA or contractor authorization approving the transfer. In addition, procurement, property, and financial organizations at NASA Centers must effect all transfers of accountability, although physical shipment and receipt of property may be made directly by contractors. The procedures described in this section shall be followed to provide an administrative and audit trail, even if property is physically shipped directly from one contractor to another. Property shipped between September 1 and September 30, inclusively, shall be accounted for and reported by the shipping contractor, regardless of the method of shipment, unless written evidence of receipt at destination has been received. Repairables provided under fixed price repair contracts that include the clause at 1852.245–72, Liability for Government Property Furnished for Repair or Other Services, remain accountable to the cognizant NASA Center and are not reportable on NF 1018; repairables provided under a cost-reimbursement contract, however, are accountable to the contractor and reportable on NF 1018. All materials provided to conduct repairs are reportable, regardless of contract type.

(a) *Approval and notification.* The contractor must obtain approval of the contracting officer or designee for transfers of property off the prime contract before shipment. Each shipping document must be signed by the contracting officer or designee demonstrating such approval. Each shipping document must contain contract numbers, shipping references, property classifications in which the items are recorded (including Federal Supply Classification group (FSC) codes for equipment), unit acquisition costs (as defined in 1845.7101–3, Unit Acquisition Cost), original Government acquisition dates for items with a unit acquisition cost of $100,000 or more and a useful life of two years or more, and any other appropriate identifying or descriptive data. Where the DD Form 250, Material Inspection and Receiving Report, is used, the FSC code will be part of the national stock number (NSN) entered in Block 16 or, if the NSN is not provided, the FSC alone shall be shown in Block 16. The original Government acquisition date shall be shown in Block 23, by item. Other formats, such as the DD Form 1149, Requisition and Invoice/Shipping Document, should be clearly annotated with the required information. Unit acquisition costs shall be obtained from records maintained pursuant to FAR Part 45 and this Part 1845, or, for uncompleted items where property records have not yet been established, from such other record systems as are appropriate such as manufacturing or engineering records used for work control and billing purposes. Shipping contractors shall furnish a copy of the formally approved shipping document to the cognizant property administrator. Shipping and receiving contractors shall promptly submit copies of shipping and receiving documents to the Center Deputy Chief Financial Officer, Finance, responsible for their respective contracts when accountability for NASA property is transferred to, or received from, other contracts, contractors, NASA Centers, or Government agencies.

* * * * *

(c) *Incomplete documentation.* If contractors receive transfer documents having insufficient detail to properly record the transfer (*e.g.*, omission of property classification, FSC, unit acquisition cost, Government acquisition date, required signatures, etc.) they shall request the omitted data directly from the shipping contractor or through the property administrator as provided in FAR 45.505–2. The contracting officer shall assist the Government Property Administrator and the receiving contractor to obtain all required information for the receiving contractor to establish adequate property records.

■ 5. Amend section 1845.7101–3 by—

■ (a) Redesignating paragraphs (c), (d), (e), and (f) as (d), (e), (f) and (h) respectively;

■ (b) Adding a new paragraph (c);

■ (c) Adding a new paragraph (g); and

■ (d) Revising the redesignated paragraph (h).

Paragraphs (c), (g) and (h) read as follows:

1845.7101–3 Unit acquisition cost.

* * * * *

(c) Acquisition cost shall be developed using actual costs to the greatest extent possible, especially costs directly related to fabrication such as labor and materials. Where estimates are used, there must be a documented methodology based on a historical basis. All acquisition costs shall be properly documented, supported and retained. Supporting documentation shall be made available upon request.

* * * * *

(g) Software acquisition costs include software costs incurred up through acceptance testing and material internal costs incurred to implement the software and otherwise make the software ready for use. Costs incurred after acceptance testing are excluded. License, maintenance, training, and data conversion costs are also excluded. If the software is purchased as part of a package, the costs will need to be segregated in such manner as to ensure that the excluded costs (maintenance, training, etc.) are not reported as part of the software's acquisition cost. Enhancement costs for existing software should be added to the acquisition cost if the enhancement results in significant additional capability beyond that for which the software was originally developed (*i.e.* a capability that was not included in the original software specifications), the total cost of the enhancement is $1,000,000 or more, and the expected useful life of the enhanced software is 2 years or more. Include the same types of cost as indicated above under new software. Costs incurred solely to repair a design flaw or perform minor upgrades should not be included.

(h) The computation of work in process (WIP) shall include all direct and indirect costs of fabrication, including associated systems, subsystems, and spare parts and components furnished or acquired and charged to work in process pending incorporation into a finished item. These types of items make up what is sometimes called production inventory and include programmed extra units to cover replacement during the fabrication process (production spares). Also included are deliverable items on which the contractor or a subcontractor

has begun work, and materials issued from inventory. The computation of WIP shall incorporate the other requirements for unit acquisition cost as outlined in paragraphs (a) through (e) of this section. In addition, acquisition cost of property furnished by the Government, which has been incorporated in the property item under construction or in process of fabrication, should be included. Do not include costs for operation or repairing existing completed property items. Once the property is complete, include all the costs outlined above in its acquisition value in the property record. The WIP values are inception to date until such time as the WIP is completed. It does not include future costs.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend the clause at section 1852.245–73 by revising the date of the clause and revising paragraph (c) to read as follows:

1852.245–73 Financial Reporting of NASA Property in the Custody of Contractors.

* * * * *

Financial Reporting of NASA Property in the Custody of Contractors (Oct 2003)

* * * * *

(c)(1) The annual reporting period shall be from October 1 of each year through September 30 of the following year. The report shall be submitted in time to be received by October 15. The information contained in these reports is entered into the NASA accounting system to reflect current asset values for agency financial statement purposes. Therefore, it is essential that required reports be received no later than October 15. Some activity may be estimated for the month of September, if necessary, to ensure the NF 1018 is received when due. However, contractors procedures must document the process for developing these estimates based on planned activity such as planned purchases or NASA Form 533 (NF 533 Contractor Financial Management Report) cost estimates. It should be supported and documented by historical experience or other corroborating evidence, and be retained in accordance with FAR Subpart 4.7, Contractor Records Retention. Contractors shall validate the reasonableness of the estimates and associated methodology by comparing them to the actual activity once that data is available, and adjust them accordingly. In addition, differences between the estimated cost and actual cost must be adjusted during the next reporting period. Contractors shall have formal policies and procedures, which address the validation of NF 1018 data, including data from subcontractors, and the identification and timely reporting of errors. The objective of this validation is to ensure that information reported is accurate and in compliance with the NASA FAR Supplement. If errors are discovered on NF 1018 after submission, the contractor shall contact the cognizant NASA Center Industrial Property Officer (IPO) within 30 days after discovery of the error to discuss corrective action.

(2) The Contracting Officer may, in NASA's interest, withhold payment until a reserve not exceeding $25,000 or 5 percent of the amount of the contract, whichever is less, has been set aside, if the Contractor fails to submit annual NF 1018 reports in accordance with 1845.505–14 and any supplemental instructions for the current reporting period issued by NASA. Such reserve shall be withheld until the Contracting Officer has determined that NASA has received the required reports. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Government right.

* * * * *

[FR Doc. 03–27490 Filed 10–30–03; 8:45 am]

BILLING CODE 7510–01–P

Proposed Rules

Federal Register
Vol. 68, No. 211
Friday, October 31, 2003

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AK06

Prevailing Rate Systems; Change in the Survey Month for the Bureau of Reclamation Mid-Pacific Region Survey

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing a proposed rule that would change the timing of annual wage surveys conducted by the Bureau of Reclamation (BOR), Department of the Interior, to determine prevailing rates of pay for supervisors of negotiated rate wage employees in the Mid-Pacific Region. BOR would conduct annual wage surveys in February in the Bureau's Mid-Pacific Region beginning in calendar year 2004. This change is proposed because February represents the best timing in relation to wage adjustments in the surveyed local private enterprise establishments and would improve the quality of data BOR collects during local wage surveys in the Mid-Pacific Region.

DATES: We must receive comments on or before December 1, 2003.

ADDRESSES: Send or deliver comments to Donald J. Winstead, Deputy Associated Director for Pay and Performance Policy, Strategic Human Resources Policy Division, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415–8200, or FAX: (202) 606–4264.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez at (202) 606–2838; FAX at (202) 604–4264; or e-mail at *mxgonzal@opm.gov.*

SUPPLEMENTARY INFORMATION: The Department of the Interior (DOI) requested that the Office of Personnel Management (OPM) change the timing of annual wage surveys conducted by the Bureau of Reclamation (BOR) to determine prevailing rates of pay for supervisors of negotiated rate wage employees in the Bureau's Mid-Pacific Region. Currently, BOR conducts wage surveys in the region in October each year. Wage surveys would be conducted in the future in February.

DOI asked OPM to change the survey month for local wage surveys in the Mid-Pacific Region because February represents the best timing in relation to wage adjustments in the surveyed local private enterprise establishments and would improve the quality of data BOR collects during local wage surveys in this special wage area. Local private industry establishments surveyed by BOR in the Mid-Pacific Region typically make their wage adjustments effective in January of each year. Since DOI implements the results of the wage surveys on the month following the survey month, wage adjustments for supervisors of negotiated rate wage employees would become effective in March. Thus, they would more closely coincide with local prevailing rates. BOR would conduct wage surveys in February in the Mid-Pacific Region beginning in February 2004.

Regulatory Flexibility Act

I certify that this regulation would not have a significant economic impact on a substantial number of small entities because it would affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, the Office of Personnel Management proposes to amend 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

§ 532.285 [Amended]

2. In § 532.285 paragraph (d), amend the special wage area listing for the mid-Pacific Region by removing from beginning month of survey, ''October'' and adding in its place ''February.''

[FR Doc. 03–27382 Filed 10–30–03; 8:45 am]

BILLING CODE 6325–39–M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1124 and 1131

[Docket No. AO–368–A32, AO–271–A37; DA–03–04]

Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Reconvening of Hearing on Proposed Amendments to Tentative Marketing Agreements and Orders

7 CFR Part	Marketing area	AO Nos.
1124	Pacific Northwest	AO–368–A32
1131	Arizona-Las Vegas	AO–271–A37

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; notice of reconvened public hearing on proposed rulemaking.

SUMMARY: This notice announces the reconvening of the hearing which began on September 23, 2003, in Tempe, Arizona, to consider proposals to amend the producer-handler provisions of the Arizona-Las Vegas and Pacific Northwest orders and to consider elimination of the ability to simultaneously pool the same milk on the Arizona-Las Vegas milk order and on a State-operated order that provides for marketwide pooling. The proposals

seek to, among other things, end the regulatory exemption of producer-handlers from the pooling and pricing provisions of these two milk marketing orders if their Class I route distribution exceeds three million pounds of milk per month in either order.

DATES: The hearing will reconvene at 8:30 a.m. on Monday, November 17, 2003.

ADDRESSES: The reconvened hearing will be held at the Doubletree Hotel, Seattle Airport, 18740 Pacific Highway S., Seattle, Washington 98188, telephone: (206) 246–8600.

FOR FURTHER INFORMATION CONTACT: Jack Rower, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231–Room 2971, 1400 Independence Avenue, Washington, DC 20250–0231, (202) 720–2357, e-mail address *jack.rower@usda.gov.*

Persons requiring a sign language interpreter or other special accommodations should contact Gary Jablonski at (425) 487–6009 or *gjablonski@fmmaseattle.com* before the hearing begins.

SUPPLEMENTARY INFORMATION:

Prior documents in this proceeding:

Notice of Hearing: Issued July 31, 2003; published August 6, 2003 (68 FR 46505).

Correction to Notice of Hearing: Issued August 20, 2003; published August 26, 2003 (68 FR 51202).

Notice is hereby given that the hearing which was adjourned in Tempe, Arizona, on September 25, 2003, by the Administrative Law Judge designated to hold said hearing and preside thereof, will reconvene in session at 8:30 a.m., November 17, 2003, at the Doubletree Hotel, Seattle Airport, 18740 Pacific Highway S., Seattle, Washington 98188. At the reconvened hearing, additional testimony will be received on proposed amendments 1 through 5, listed in the initial hearing notice (68 FR 46505) as corrected (68 FR 51202) to the tentative marketing agreements and to the orders regulating the handling of milk in the Arizona-Las Vegas and Pacific Northwest marketing areas.

List of Subjects in 7 CFR Parts 1124 and 1131

Milk marketing orders.

Authority: 7 U.S.C. 601–674.

Dated: October 27, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03–27413 Filed 10–30–03; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1135

[Docket No. AO–380–A18; DA–01–08–W]

Milk in the Western Marketing Area; Referendum Order and Extension of Time for Filing Comments; Determination of Representative Period and Designation of Referendum Agent

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Referendum Order and extension of time for filing comments.

SUMMARY: This notice orders that a referendum be conducted to determine whether producers favor issuance of the order regulating the handling of milk in the Western marketing area, as amended in the tentative final decision issued by the Administrator on August 8, 2003, and published in the **Federal Register** on August 18, 2003 (68 FR 49375). Producer approval could not be determined by a polling of cooperatives. Additionally, this document extends the time for filing comments to the tentative final decision for the Western marketing area until April 1, 2004.

DATES: The referendum is to be completed on or before 30 days after publication in the **Federal Register** and comments on the Western order are now due on April 1, 2004.

ADDRESSES: Comments (six copies) should be filed with the Hearing Clerk, Room 1083–STOP 9200, 1400 Independence Avenue, SW., South Building, United States Department of Agriculture, Washington, DC 20250–9200.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, Room 2971—Stop 0231, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–1366, e-mail address: *gino.tosi@usda.gov.*

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding:

Notice of Hearing: Issued February 26, 2002; published March 4, 2002 (67 FR 9622).

Tentative Final Decision: Issued on August 8, 2003; published August 18, 2003 (68 FR 49375).

On August 8, 2003, the Administrator issued a tentative final decision on proposed amendments to the Pacific Northwest and Western milk marketing orders. Comments on the tentative final decision were requested by October 17, 2003, and producer approval was to be determined through a polling of cooperatives. The polling of cooperatives was completed on October 6, 2003, for the Western milk marketing order and producer approval could not be ascertained.

Notice is hereby given that the time for filing comments to the Western milk marketing order as amended by the tentative final decision is hereby extended from October 17, 2003, to April 1, 2004, and that a referendum will be conducted to determine producer approval of the Western order as amended.

Several parties requested that the filing of comments on the Western order be extended indefinitely because producer approval could not be ascertained based on the polling of cooperatives that was held for the Western milk marketing order as amended by the tentative final decision. Requesters stated that submission of comments by the October 17, 2003, date would be premature.

Since a referendum is being conducted to determine producer approval of the Western order as amended, it is appropriate to delay comment submissions on the Western milk marketing order. Comments are now due on April 1, 2004. This extension of time for filing comments only applies to the Western order and comments on the tentative final decision amendments to the Pacific Northwest milk marketing order must be postmarked on or before October 17, 2003, as stated in the tentative final decision.

This notice is issued 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).

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Western marketing area, as amended by the tentative final decision issued on August 8, 2003, and published on August 18, 2003 (68 FR 49375), is approved by at least two-thirds of the producers, or by producers that represent at least two-thirds of the total milk produced during the representative period.

The month of April 2002 is hereby determined to be the representative period for the conduct of such referendum.

James R. Daugherty is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedures for the conduct of referenda (7 CFR 900.300 *et seq.*).

Such referendum shall be completed on or before 30 days from the publication of this referendum order.

List of Subjects in 7 CFR Part 1135

Milk marketing orders.

Authority: 7 U.S.C. 601–674.

Dated: October 27, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03–27414 Filed 10–30–03; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–321–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. This proposal would require repetitive inspections for cracking of the upper and lower web of the engine support beam at fuselage station 640, and repair if necessary. This proposal also would provide an optional terminating action for the repetitive inspections. This action is necessary to prevent failure of the engine support beam, a principal structural element, which could result in reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by December 1, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–321–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain ''Docket No. 2001–NM–321–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centreville, Montreal, Quebec H3C 3G9, Canada. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 10 Fifth Street, Third Floor, Valley Stream, New York.

FOR FURTHER INFORMATION CONTACT: James Delisio, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 10 Fifth Street, Third Floor, Valley Stream, New York 11581; telephone (516) 256–7521; fax (516) 568–2716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2001–NM–321–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–321–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, notified the FAA that an unsafe condition may exist on certain Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. TCCA advises that cracks have been found on the upper and lower web of the engine support beam (ESB) at fuselage station (FS) 640 on several airplanes. The subject airplanes had more than 19,000 flight hours and 16,000 flight cycles. This condition, if not corrected, could result in failure of the ESB, a principal structural element, which could result in reduced structural integrity of the airplane.

Explanation of Relevant Service Information

Bombardier has issued Alert Service Bulletin A601R–53–059, Revision ''D,'' dated July 2, 2003; including Appendix A, undated; and Appendix B, dated August 6, 2002. That service bulletin describes procedures for performing repetitive external detailed visual inspections for cracking of the upper and lower web of the ESB at FS 640. The service bulletin specifies to contact the manufacturer for repair instructions for any cracking that is found. That service bulletin also describes procedures for modifying the ESB to increase the thickness of the upper and lower webs and to install new angles and intercostals. The procedures for the modification also include an eddy current inspection for damage (*e.g.*, cracking) of the fastener holes in the

flanges that attach the upper and lower forward angles to the upper and lower webs, and repair (oversizing the fastener holes to remove damage) if necessary. This modification, if accomplished, eliminates the need for the repetitive inspections described previously.

Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. TCCA classified this service bulletin as mandatory and issued Canadian airworthiness directive CF–2001–26R1, dated September 20, 2002, to ensure the continued airworthiness of these airplanes in Canada.

FAA's Conclusions

These airplane models are manufactured in Canada 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. Pursuant to this bilateral airworthiness agreement, TCCA has kept the FAA informed of the situation described above. The FAA has examined the findings of TCCA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the repetitive inspections specified in the service bulletin described previously, except as discussed below. The proposed AD also provides for accomplishing the modification specified in the service bulletin described previously, as an optional terminating action for the repetitive inspections. The actions would be required to be accomplished in accordance with the service bulletin described previously, except as discussed below under the heading ''Difference Between Proposed AD, Referenced Service Bulletin, and TCCA Airworthiness Directive.''

Consistent with the findings of TCCA, the proposed AD would allow repetitive inspections per Part A of the Accomplishment Instructions of the service bulletin to continue in lieu of requiring accomplishment of the terminating action per Part B of the Accomplishment Instructions of the service bulletin. In making this determination, we considered that long-term continued operational safety in this case will be adequately ensured by repetitive inspections to detect any cracking of the upper and lower web of the ESB at FS 640 before such cracking represents a hazard to the airplane.

Difference Between Proposed AD, Referenced Service Bulletin, and TCCA Airworthiness Directive

Although the Canadian airworthiness directive specifies that it applies to airplanes having serial numbers 7003 through 7067 inclusive, 7069 through 7208 inclusive, 7210 through 7759 inclusive, and 7761 through 7782 inclusive; this proposed AD would apply to airplanes having serial numbers 7003 through 7067 inclusive, and 7069 through 7782 inclusive. This applicability matches the effectivity listing of Revision ''D'' of the service bulletin.

Although the service bulletin and the Canadian airworthiness directive specify that operators may contact the manufacturer for disposition of certain repair conditions, this proposed AD would require operators to repair those conditions per a method approved by either the FAA or TCCA (or its delegated agent). In light of the type of repair that would be required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that, for this proposed AD, a repair approved by either the FAA or TCCA would be acceptable for compliance with this proposed AD.

Operators also should note that the Accomplishment Instructions of the referenced service bulletin describe procedures for completing a comment sheet related to service bulletin quality, a sheet recording compliance with the service bulletin, and an inspection results reporting form (located in Appendix A of the service bulletin). The Canadian airworthiness directive also specifies to report inspection results to the airplane manufacturer. This proposed AD would not require those actions. We do not need this information from operators.

Cost Impact

We estimate that 150 airplanes of U.S. registry would be affected by this proposed AD.

It would take approximately 1 work hour per airplane to accomplish the proposed inspection, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the proposed inspection on U.S. operators is estimated to be $9,750, or $65 per airplane, per inspection cycle.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed 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.

The optional terminating action, if done, would take approximately 290 work hours, at an average labor rate of $65 per work hour. Required parts would be provided by the manufacturer at no charge. Based on these figures, we estimate the cost of the optional terminating action to be $18,850 per airplane.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this 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) if promulgated, 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 copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 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:

Bombardier, Inc. (Formerly Canadair): Docket 2001–NM–321–AD.

Applicability: Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes; serial numbers 7003 through 7067 inclusive, and 7069 through 7782 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the engine support beam (ESB), a principal structural element, which could result in reduced structural integrity of the airplane, accomplish the following:

Service Bulletin References

(a) The following information pertains to the service bulletin referenced in this AD:

(1) The term ''service bulletin'' as used in this AD, means the Accomplishment Instructions of Bombardier Alert Service Bulletin A601R–53–059, Revision ''D,'' dated July 2, 2003; excluding Appendix A, undated; and including Appendix B, dated August 6, 2002.

(2) Although the service bulletin specifies to complete a comment sheet related to service bulletin quality, a sheet recording compliance with the service bulletin, and an inspection results reporting form (located in Appendix A of the service bulletin), and submit this information to the manufacturer, this AD does not include such a requirement.

Repetitive Inspections

(b) Perform an external detailed inspection for cracking of the upper and lower web of the ESB at fuselage station (FS) 640, according to Part A of the service bulletin. Do the initial inspection at the time specified in paragraph (b)(1), (b)(2), or (b)(3) of this AD, as applicable. Repeat the inspection thereafter at intervals not to exceed 740 flight cycles.

(1) For airplanes with 7,500 total flight cycles or less as of the effective date of this AD: Do the initial inspection prior to the accumulation of 8,000 total flight cycles.

(2) For airplanes with 7,501 total flight cycles or more, but 11,750 total flight cycles or less, as of the effective date of this AD: Do the initial inspection prior to the accumulation of 12,000 total flight cycles, or within 500 flight cycles after the effective date of this AD, whichever is first.

(3) For airplanes with 11,751 total flight cycles or more as of the effective date of this AD: Do the initial inspection within 250 flight cycles after the effective date of this AD.

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.''

Repair

(c) If any crack is found during any inspection performed per paragraph (b) of this AD: Before further flight, repair per a method approved by either the Manager, New York Aircraft Certification Office (ACO), FAA; or Transport Canada Civil Aviation (or its delegated agent).

Optional Terminating Action

(d) Modification of the ESB by accomplishing all actions in paragraphs 2.D. and 2.E., and in steps (1) through (40) inclusive of paragraph 2.F., of the service bulletin (including an eddy current inspection for damage (*e.g.*, cracking) of the fastener holes in the flanges that attach the upper and lower forward angles to the upper and lower webs; and repair (oversizing the fastener holes to remove damage), if necessary) constitutes terminating action for the repetitive inspections required by paragraph (b) of this AD. Any required repair must be accomplished before further flight.

Alternative Methods of Compliance

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

Note 2: The subject of this AD is addressed in Canadian airworthiness directive CF–2001–26R1, dated September 20, 2002.

Issued in Renton, Washington, on October 27, 2003.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–27426 Filed 10–30–03; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1260

RIN 2700–AC63

NASA Grant and Cooperative Agreement Handbook—Research and Development Abstracts

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This is a proposed rule to amend the NASA Grant & Cooperative Agreement Handbook to include a requirement for the electronic submission of abstracts of the planned research to be conducted under grants and cooperative agreements containing research and development (R&D) effort valued at over $25,000. This requirement is being established to support NASA's implementation of the E-Government Act of 2002 that mandates the development and maintenance of a repository that integrates information on research and development funded by the Federal Government. This proposed rule would help improve access to information on NASA-funded research and development activities, thus providing public and private research managers improved capability for R&D program planning.

DATES: Comments should be submitted on or before December 30, 2003.

ADDRESSES: Interested parties should submit written comments to Thomas Sauret, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546. Comments may also be submitted by e-mail to: *Thomas.E.Sauret@nasa.gov.*

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this document. A copy of those comments may also be sent to the Agency representative named in the preceding paragraph.

FOR FURTHER INFORMATION CONTACT: Thomas Sauret, Code HK, (202) 358–1068, email: *Thomas.E.Sauret@nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule would add a new provision, 1260.40, NASA Research and Development (R&D) Abstracts, and related instructions, 1260.18, NASA Research and Development (R&D) Abstract Collection, to the Grant and Cooperative Agreement Handbook. The new provision provides for the collection of abstracts or summaries for NASA-funded awards with R&D effort greater than $25,000. The requirements of section 207(g) of the E-Government Act of 2002 (Pub. L. 107–347) provide the basis for this change. Section 207(g) mandates the development and maintenance of a repository that integrates information on research and development funded by the Federal Government. In furtherance of that requirement, NASA has developed a Web-based database system to collect abstracts for all NASA's funded R&D efforts valued over $25,000. A NASA website (the Abstract Collection and Transmittal System (ACTS), *http://proposals.hq.nasa.gov/acts/*) has been established for recipients of NASA R&D

grants or cooperative agreements to enter their abstract data. ACTS will transfer submitted abstracts to a government-wide database sponsored by the National Science Foundation (NSF). The NSF sponsored government-wide database is available to other agencies and to the public. NASA's ACTS database is designed only as a collection and transmittal tool and will not be open to the general public.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601, *et. seq.*), because the information that would be required under this proposed rule is typically already developed by grant/cooperative agreement recipients in some form as part of the proposal process, and the administrative costs associated with the one-time submission of the R&D abstract is considered insignificant in relation to the award value.

C. Paperwork Reduction Act of 1995

This proposed rule contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), NASA has submitted a copy of the information collection requirements to the Office of Management and Budget (OMB) for its review and approval. OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB regarding this information collection is best assured of having its full effect if OMB receives it within 30 days of publication of this notice. This does not affect the deadline for the public to comment on the proposed regulations. All comments regarding this information collection should be sent to: Desk Officer for NASA, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10236, New Executive Office Building, Washington, DC, 20503.

Collection of Information: NASA Research and Development Abstracts Collection

The public reporting and recordkeeping burden for this collection of information is estimated to be 1,500 hours. The estimated burden has been calculated as follows:

Responses	3000
Hours per response	×0.5 (30 min.)
Annual reporting burden.	1500 hours.

The estimated number of responses shown above is the total number of NASA research-related awards made through grants and agreements, as well as those made through contract awards. This estimate reflects the combined paperwork clearance request the Agency is submitting to OMB.

List of Subjects in 14 CFR Part 1260

Grants Administration—Research.

Tom Luedtke,

Assistant Administrator for Procurement.

Accordingly, 14 CFR Part 1260 is proposed to be amended as follows:

1. The authority citation for 14 CFR Part 1260 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1), 31 U.S.C. 6301 *et seq.*

PART 1260—GRANTS AND COOPERATIVE AGREEMENTS

2. Section 1260.18 is added to read as follows:

§ 1260.18 NASA Research and Development (R&D) Abstract Collection.

(a) The E-Government Act of 2002 (Public Law No. 107–347) mandates the development and maintenance of a repository that integrates information on research and development funded by the Federal Government. In support of that requirement, NASA will collect research abstracts and forward them to an appropriate central repository where they will be available for use by government agencies and other users.

(b) Information on R&D awards subject to the provision at § 1260.40, NASA Research and Development (R&D) Abstracts, including recipient name and award number, shall be automatically entered by NASA into the NASA R&D Abstract Collection and Transmittal System (ACTS) database on a monthly basis. The database may be accessed via the website listed in the clause. Grant officers shall check the website to determine if the selected recipient is listed as an entity already registered in the ACTS database. If the selected recipient is registered, then no further action by the grant officer is required. If the selected recipient is not already registered in ACTS, the grant officer must obtain from their Center ACTS point of contact a new ACTS user identification and password for the selected recipient. The grant officer shall provide the user identification and password to the award recipient.

§ 1260.20 [Amended]

3. Section 1260.20 is amended by—

a. Removing from the first sentence in paragraphs (a), and (e) ''1260.39'' and adding ''1260.40'' in its place, and removing from the first sentence in paragraph (d) ''1260.38'' and adding ''1260.40'' in its place;

b. Removing from the first sentence of paragraph (c) ''and 1260.37'' and adding '', 1260.37, and 1260.40'' in its place; and

c. Removing from paragraphs (f) and (h) ''1260.39'' and adding ''1260.40'' in its place.

4. Section 1260.40 is added to read as follows:

§ 1260.40 NASA Research and Development (R&D) Abstracts.

(See § 1260.18 for guidance associated with use of this provision.)

NASA Research and Development (R&D) Abstracts

(XX/XX)

(a) The award recipient shall, within 60 days after award (or 30 days after the award information is entered into the NASA R&D Abstract Collection and Transmittal System (ACTS) database, whichever is later), enter a summary or abstract of the research and development activity to be conducted under this award into the ACTS database. The database may be accessed at the following URL: *http://proposals.hq.nasa.gov/acts/.*

(b) The abstract should range from 250 to 500 words in length. The abstract will be made available to the public without restrictions; therefore, caution is advised against inclusion of any material for which dissemination in the public domain may be prohibited, such as trade secrets, proprietary information or export-controlled information.

(c) The abstract and other pertinent award information will be included in a database of R&D abstracts from across the Federal Government. The government-wide database will include abstracts and other information concerning awards, such as the dollar value and estimated completion date. The government-wide database will be accessible to other government agencies and private organizations and will allow entities to search the database for a variety of information regarding current research awards. The NASA ACTS database will not be searchable by the general public.

(d) Access to the NASA ACTS database requires user identification and a password to ensure that only authorized personnel enter abstract information. The Grant Officer will provide instructions regarding user identification and password access if the award recipient does not already possess an ACTS identification and password.

[End of provision]

§ 1260.50 [Amended]

5. In Section 1260.50, amend the first sentence of paragraph (a) by removing

''1260.38'' and adding ''1260.40'' in its place.

[FR Doc. 03–27489 Filed 10–30–03; 8:45 am]
BILLING CODE 7510–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 031001243–3243–01]

RIN 0648–AQ41

Gray's Reef National Marine Sanctuary Regulations

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Proposed rule; notice of public availability of draft management plan/ draft environmental impact statement.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is proposing a draft revised management plan and revised regulations for the Gray's Reef National Marine Sanctuary (GRNMS or Sanctuary). The revised regulations would prohibit anchoring in the Sanctuary and would restrict all fishing except that conducted by rod and reel and handline gear. NOAA is issuing this proposed rule to provide notice to the public and invite advice, recommendations, information, and other comments from interested parties on the proposed rule and Draft Management Plan/Draft Environmental Impact Statement (DMP/DEIS). Public hearings will be held as detailed below:

(1) Monday, November 17, 2003, 6:30 p.m. in Charleston, SC.

(2) Tuesday, November 18, 2003, 6:30 p.m. in Savannah, GA.

(3) Wednesday, November 19, 2003, 6:30 p.m. in Savannah, GA.

(4) Thursday, November 20, 2003, 6:30 p.m. in Statesboro, GA.

(5) Monday, December 1, 2003, 6:30 p.m. in Kingsland, GA.

(6) Tuesday, December 2, 2003, 6:30 p.m. in Brunswick, GA.

(7) Wednesday, December 3, 2003, 6:30 p.m. in Midway, GA.

DATES: Comments will be considered if received by December 31, 2003.

ADDRESSES: Written comments should be sent by mail to Reed Bohne, Manager, Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, Georgia, 31411, by e-mail to *graysreefcomments@noaa.gov,* or by fax to (912) 598–2367. Copies of the DMP/ DEIS are available from the same address. Public hearings will be held at:

(1) Town and Country Inn and Conference Center, 2008 Savannah Highway, Charleston, SC 29407.

(2) Coastal Georgia Center, 305 Fahm Street, Savannah, GA 31401.

(3) Quality Inn Savannah South, I–95 and Highway 204, Savannah, GA 31419.

(4) Outreach Center, 515 Denmark Street, Statesboro, GA 30458.

(5) Holiday Inn Express, 1375 Hospitality Ave., Kingsland, GA 31548.

(6) Coastal Georgia Community College, 3700 Altama Avenue, Brunswick, GA 31520.

(7) Coastal Electric Cooperative, 1265 South Coastal Highway, Midway, GA 31320.

FOR FURTHER INFORMATION CONTACT: Becky Shortland at (912) 598–2381 or *becky.shortland@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

Pursuant to section 304(e) of the National Marine Sanctuaries Act (16 U.S.C. 1434(e)) the National Marine Sanctuary Program (NMSP) has completed its review of the management plan for the Gray's Reef National Marine Sanctuary (GRNMS or Sanctuary), located 17.5 nautical miles off the coast of Georgia. The review has resulted in a proposed new management plan for the Sanctuary, several proposed revisions to existing regulations and several proposed new regulations. The new regulations would restrict fishing at GRNMS to use of rod and reel and handline gear by prohibiting the injuring, catching, harvesting, or collecting of any marine organism or part thereof in the Sanctuary except by these gear types. All other forms of fishing gear would have to be stowed when a vessel is in the Sanctuary. The regulations would also prohibit anchoring vessels in the Sanctuary. These measures would afford better protection to the nationally significant marine resources and habitats at GRNMS.

Existing regulations would also be revised to address placing or abandoning structures on the submerged lands; using underwater explosives or devices generating electrical current; and moving or damaging historical resources. The permit regulations for the Sanctuary are also being revised and clarified. The following requirements are proposed for issuance of permits: Prior to permit issuance, the Director of the NMSP would be required to consider the duration of the activity and its effects; the cumulative effects; and whether it is necessary to conduct the proposed activity in the Sanctuary. Permit holders would also be required to display a copy of the permit on board any vessel or aircraft used in the permitted activity.

The new management plan for the Sanctuary contains a series of action plans that outline management, research, and education activities that are planned for the next five years. The activities are designed to address specific issues facing the Sanctuary and in doing so, help achieve the management objectives of the GRNMS and the larger mandates of the NMSP.

This document publishes the proposed regulations and the proposed revisions to existing regulations, publishes the text of the proposed Revised Designation Document for the Sanctuary, and announces the availability of the draft management plan and the draft environmental impact statement (DMP/DEIS). The draft management plan details the proposed goals and objectives, management responsibilities, research and monitoring activities, outreach and educational programs, and enforcement activities.

Grays' Reef National Marine Sanctuary, which was designated on January 16, 1981 (46 FR 7942), consists of approximately 16.68 square nautical miles of ocean waters and hard bottom located 17.5 nautical miles off Sapelo Island, Georgia. It is one of the largest nearshore rocky reefs off the southeastern United States and is in a transition zone between temperate and tropical waters. Some reef fish populations and plant communities change seasonally, while others are year-round residents. Migratory fish move through the Sanctuary, using the reef for food and shelter. Loggerhead sea turtles, a threatened species, use GRNMS for foraging and resting. The reef is also close to the only known calving ground for the highly endangered Northern right whale.

The hard bottom habitat at the Sanctuary is composed of marine sediments (mud, sand, and shells) that were deposited between 2–3,000,000 years ago. These marine sediments were consolidated into rock during subsequent glacial periods by numerous changes in sea level that repeatedly exposed and then submerged the areas of GRNMS as the coastline advanced and retreated across the continental shelf.

Recent bottom mapping indicates that the area is a single rock unit. It is made of calcareous sandstone that formed as a result of the compacting marine sediments and aerial exposure. The

irregularities of the bathymetry can be attributed to the easily erodable sandstone that has dissolved and pitted, creating the appearance of isolated ledges and patches of hard bottom.

The exposed rock offers moderate relief (0.5 to 10 feet in height) with sandy, flat-bottomed troughs between. The series of rock ledges and sand expanses has produced a complex habitat of caves, burrows, troughs, and overhangs that provide a solid base on which temperate and tropical marine flora and fauna attach and grow. This rocky platform with its rich carpet of remarkable attached organisms is known locally as a ''live bottom'' habitat.

The Sanctuary is a small but very important part of the broad continental shelf off the southeastern coast sometimes known as the South Atlantic Bight (SAB). The SAB extends from Cape Hatteras, North Carolina to Cape Canaveral, Florida. The outer reaches are dominated by the Gulf Stream flowing northeastward. The inner area is defined by the curve of the coastline between the two capes and is dominated by tidal currents, river runoff, local winds, seasonal storms, hurricanes, and atmospheric changes. While GRNMS lies in the inner-shelf zone of the SAB—which causes great seasonal variations in temperature, salinity, and water clarity—it is also influenced by the Gulf Stream. The Gulf Stream draws deep nutrient-rich water to the region, and carries and supports many of the tropical fish species and other animals found in the Sanctuary. Ocean currents transport fish and invertebrate eggs and larvae from other areas, linking this special place to reefs both north and south. GRNMS is the only protected natural reef area in the SAB.

The 16.68-square nautical miles of the Sanctuary constitute a tiny percentage of the ocean space off the coast, yet the Sanctuary's value as a natural marine habitat is recognized nationally and internationally. The live bottom is a flourishing ecosystem that attracts mackerel, grouper, black sea bass, angelfish, and a variety of other fishes. GRNMS is one of the most popular recreational fishing and sport diving destinations along the Georgia coast. Sport fishing occurs year-round but intensifies in warmer months and with the migration of pelagic game fish.

The Sanctuary is located near an area of Georgia coastline that has experienced a dramatic increase in population. Aerial and on-water surveys indicate that visitation to GRNMS has increased significantly since 1981. With continued technological innovations such as global positioning systems (GPS), electronic fish finders, and improved watercraft design, it is likely that there will be increasing pressure on the resources of the Sanctuary. With its proposed new management plan and proposed regulations, NOAA hopes to continue to protect GRNMS for the continued appreciation and use by the current and future generations.

Because this proposed action includes changes to the Sanctuary's Designation Document, the DMP/DEIS is developed pursuant to section 304(a)(2) of the NMSA, 16 U.S.C. § 1434(a)(2), consistent with, and in fulfillment of, the requirements of the National Environmental Policy Act of 1969.

Proposed Revised Designation Document

NOAA is proposing to specify in the Designation Document that the submerged lands at GRNMS are legally part of the Sanctuary and are included in the boundary description. At the time the Sanctuary was designated in 1981, Title III of the Marine Protection, Research, and Sanctuaries Act (now also known as the National Marine Sanctuaries Act) characterized national marine sanctuaries as consisting of coastal and ocean waters but did not expressly mention submerged lands thereunder. NOAA has consistently interpreted its authority under the NMSA as extending to submerged lands, and amendments to the NMSA in 1984 (Pub. L. 98–498) clarified that submerged lands may be designated by the Secretary of Commerce as part of a national marine sanctuary (16 U.S.C. § 1432(3)). Therefore, to be consistent with the NMSA, NOAA is updating the Designation Document and the boundary description, and is replacing the term ''seabed'' with ''submerged lands of the Sanctuary''. Boundary coordinates in the revised Designation Document and in the Sanctuary regulations will be expressed by coordinates based on the North American Datum of 1983 (NAD 83). Although certain fishing activities have been regulated at GRNMS since 1981, terms are being added to the Designation Document to authorize regulations for use of allowable fishing gear and to prohibit the possession of non-allowed gear. This will allow fishing regulations specifically for GRNMS and approved by the South Atlantic Fishery Management Council to be proposed for the Sanctuary. The Designation Document is also being updated to authorize regulating drilling into the submerged lands of the Sanctuary; constructing, placing or abandoning material or matter; discharging or depositing material or matter outside the Sanctuary that subsequently enters and injures a Sanctuary resource or quality; using explosives or devices that produce electric current underwater; and injuring historical resources.

Proposed Revised Designation Document for the Gray's Reef National Marine Sanctuary

Article 1. Designation and Effect

The Gray's Reef National Marine Sanctuary was designated on January 16, 1981 (46 FR 7942). Section 304 of the National Marine Sanctuaries Act (NMSA, 16 U.S.C. 1431 *et seq.*) authorizes the Secretary of Commerce to issue such regulations as are necessary and reasonable to implement the designation, including managing and protecting the conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological or aesthetic resources and qualities of a national marine sanctuary. Section 1 of Article 4 of this Designation Document lists activities of the type that are presently being regulated or may need to be regulated in the future, in order to protect Sanctuary resources and qualities. Listing in section 1 does not mean a type of activity will be regulated in the future, however, if a type of activity is not listed, it may not be regulated, except on an emergency basis, unless section 1 is amended, following the procedures for designation of a sanctuary set forth in paragraphs (a) and (b) of section 304 of the NMSA, to include the type of activity.

Nothing in this Designation Document is intended to restrict activities that do not cause an adverse effect on the resources or qualities of the Sanctuary or on Sanctuary property or that do not pose a threat of harm to users of the Sanctuary.

Article 2. Description of the Area

The Sanctuary consists of an area of ocean waters and the submerged lands thereunder located 17.5 nautical miles due east of Sapelo Island, Georgia. The exact coordinates are defined by regulation (15 CFR § 922.90).

Article 3. Characteristics of the Area

The Sanctuary consists of submerged calcareous sandstone rock reefs with contiguous shallow-buried hardlayer and soft sedimentary regime which supports rich and diverse marine plants, invertebrates, finfish, turtles, and occasional marine mammals in an otherwise sparsely populated expanse of ocean seabed. The area attracts multiple human uses, including recreational

fishing and diving, scientific research, and educational activities.

Article 4. Scope of Regulation

Section 1. Activities Subject to Regulation

The following activities are subject to regulations under the NMSA, either throughout the entire Sanctuary or within identified portions of it or, as indicated, in areas beyond the boundary of the Sanctuary, to the extent necessary and reasonable. Such regulation may include prohibitions to ensure the protection and management of the conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological or aesthetic resources and qualities of the area. Because an activity is listed here does not mean that such activity is being or will be regulated. All listing means is that the activity can be regulated, after compliance with all applicable regulatory laws, without going through the designation procedures required by paragraphs (a) and (b) of section 304 of the NMSA, 16 U.S.C. 1434(a) and (b).

1. Dredging, drilling into, or otherwise altering the submerged lands of the Sanctuary;

2. Within the boundary of the Sanctuary, discharging or depositing any material or other matter or constructing, placing, or abandoning any structure, material or other matter; or discharging or depositing any material or other matter outside the boundary of the Sanctuary that enters and injures a Sanctuary resource or quality;

3. Vessel operations, including anchoring;

4. Injuring, catching, harvesting, or collecting any marine organism or any part thereof, living or dead, or attempting any of these activities, by any means except by use of rod and reel and handline gear;

5. Possessing fishing gear that is not allowed to be used in the Sanctuary;

6. Using explosives, or devices that produce electric charges underwater; and

7. Removing, injuring, or possessing historical resources.

Section 2. Emergency Regulation

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality; or to minimize the imminent risk of such destruction, loss or injury, any activity, including any not listed in Section 1 of this article, is subject to immediate temporary regulation, including prohibition.

Article 5. Relation to Other Regulatory Programs

Section 1. Defense Activities

The regulation of activities listed in Article 4 shall not prohibit any Department of Defense activity that is essential for national defense or because of emergency. Such activities shall be consistent with the regulations to the maximum extent practical.

Section 2. Other Programs

All applicable regulatory programs will remain in effect, and all permits, licenses and other authorizations issued pursuant thereto shall be valid within the Sanctuary unless authorizing any activity prohibited by a regulation implementing Article 4.

Article 6. Alteration of This Designation

The terms of designation, as defined in paragraph (a) of section 304 of the NMSA, 16 U.S.C. 1434(a), may be modified only by the procedures outlined in paragraphs (a) and (b) of section 304 of the NMSA, 16 U.S.C. 1434(a) and (b), including public hearings, consultation with interested federal, state, and local government agencies, the South Atlantic Fishery Management Council, review by the appropriate Congressional committees, and approval by the Secretary of Commerce, or his or her designee.

Gray's Reef National Marine Sanctuary Boundary Coordinates based on the North American Datum of 1983 (NAD 83).

The boundary of the Gray's Reef National Marine Sanctuary includes all waters and the submerged lands thereunder within a rectangle starting at coordinate north 31.362732 degrees, west 80.921200 degrees; then runs northward to coordinate north 31.421064 degrees, west 80.921201 degrees; then eastward to coordinate north 31.421064 degrees, west 80.828145 degrees; then southward to coordinate north 31.362732 degrees, west 80.828145 degrees; and then back to the point of origin.

Summary of the Proposed Regulatory Amendment

The proposed regulatory changes would clarify that ''submerged lands'' are within the boundary and are part of the Sanctuary. This would update the boundary regulation to make it consistent with the NMSA and its definition of areas of the ''marine environment'' that may be designated as a sanctuary.

The proposed regulations would also modify the Sanctuary fishing regulations that have been in effect since 1981. The current regulations prohibit the use of specific fishing gear within the Sanctuary, particularly wire fish traps and bottom trawls. Pursuant to section 304(a)(5) of the NMSA (16 U.S.C. 1434(a)(5)), the South Atlantic Fishery Management Council (SAFMC) was provided the opportunity to draft fishing regulations for the Sanctuary. During its meeting on March 6, 2003, the Council endorsed Sanctuary fishing regulations that would prohibit the use of all fishing gear in the Sanctuary except rod and reel and handline gear. Unlike the current sanctuary fishing regulations that allow all gear types except those specifically prohibited, this approach specifies the gear types that would be allowed and would prohibit all others. The regulation would prohibit the injuring, catching, harvesting, or collecting of any marine organism by any means except by rod and reel and handline. This would establish a clearer, more enforceable approach for the Sanctuary fishing regulations than those currently in effect. Rod and reel gear is the predominant fishing gear now in use at GRNMS and would continue to be allowed under the regulations recommended by the SAFMC. To facilitate enforcement of the gear restriction, a related regulation would require that all forms of fishing gear other than rod and reel and handline be stowed when vessels are in the Sanctuary.

The SAFMC's recommendation is consistent with public input received by the NMSP during the management plan review, and is supported by the Georgia Department of Natural Resources and NOAA Fisheries (National Marine Fisheries Service) Southeast Region. The SAFMC also recommended that the Sanctuary regulations require that fishing gear other than rods and reels and handlines be stowed when vessels are in the Sanctuary. Therefore, this regulation is also being proposed, as are definitions of ''rod and reel and handline''. The definitions would be based largely on existing definitions adopted by NOAA Fisheries in its regulations for the Fisheries of the Caribbean, Gulf, and South Atlantic, at 50 CFR 622.2. However, the proposed definitions for the Sanctuary regulations would allow only 3 hooks per line. The proposed regulation would apply to ''any marine organism, or any part thereof, living or dead,'' and would encompass the taking of any marine organisms or parts by divers.

The proposed regulations would also prohibit anchoring vessels within the Sanctuary. The unique bottom formations and habitats at GRNMS are

vulnerable to the effects of anchoring. The documented increases of population in the region and of visitor use at GRNMS suggest that the risk from vessel anchoring will also increase and that prohibiting anchoring would help protect the live bottom habitat and the associated living marine resources that GRNMS was designated to protect. This regulation would have little impact on current users of the Sanctuary. Based on findings of a socioeconomic study (Ehler and Leeworthy) conducted in 2002, virtually none of the activities that occur at GRNMS require anchoring. Fishermen routinely allow their boats to drift during bottomfishing or are trolling for migratory species, and divers frequently use a ''live-boat'' for drift diving, due to the strong currents. There is overall support for the ban on anchoring among users surveyed during the socioeconomic study. In an emergency situation, boaters would be allowed to anchor in the Sanctuary and existing boundary marker buoys provide a place for a boat to moor in an emergency as well.

Finally, the regulations for the issuance of permits are being revised to add a new permit category for assisting in managing the Sanctuary. This would authorize NMSP to issue a permit to the Sanctuary manager for activities that otherwise would be prohibited if the activities assist in sanctuary management and if they satisfy permit criteria. The permit criteria are also being revised to allow NMSP or the manager to consider the duration of a proposed activity, its cumulative effects, and whether it is necessary to conduct the proposed activity in the Sanctuary. A permit holder would be required to display a copy of the permit in any vessel or aircraft being used in the permitted activity.

The following regulatory changes are also being proposed by this document: The term ''seabed'' is being replaced with ''submerged lands of the Sanctuary'' to be consistent with usage in the NMSA. The prohibition against dredging, drilling into or altering submerged lands of the Sanctuary specifically includes bottom formations to call attention to one of the critical elements of the ecosystem at GRNMS. The current prohibition against constructing any structure other than a navigation aid would be revised to include constructing, placing, abandoning any structure, or material on the Sanctuary submerged lands. This change would, among other things, prohibit activities that have been identified in the Florida Keys National Marine Sanctuary, where materials are placed on the submerged lands to create lobster habitat. The prohibition against using poisons, electric charges, explosives, or similar methods to take any marine animal not otherwise prohibited from being taken would be revised to prohibit the use underwater of explosives and devices producing electric current while the reference to poisons is being removed because it is already addressed by the prohibition against discharges. Use of these items would be prohibited regardless of whether marine animals are being taken. NOAA is not aware of any non-scientific use of these materials underwater at GRNMS and proposes that their use be completely prohibited. The regulation prohibiting tampering with, damaging or removing historic or cultural resources is being revised to prohibit moving, removing, damaging, or possessing any Sanctuary historical resource, or attempting any of these. This change will better protect these resources from being removed and will facilitate enforcement by prohibiting their possession.

Miscellaneous Rulemaking Requirements

National Marine Sanctuaries Act

Section 304(a)(4) of the National Marine Sanctuaries Act,16 U.S.C. 1434(a)(4), requires that the procedures specified in section 304 for designating a National Marine Sanctuary be followed for modifying any term of designation. Because this action would revise the Sanctuary boundary specifically to include the submerged land, it would revise the boundary terms of designation thus triggering the requirements of section 304. In particular, section 304 requires that the Secretary of Commerce submit to the Committee on Resources of the United States House of Representatives and the Committee on Commerce, Science, and Transportation of the United States Senate, no later than the same day as this notice is published, documents including a copy of this notice, the terms of the proposed designation (or in this case, the proposed changes thereto), the proposed regulations, a draft management plan detailing the proposed goals and objectives, management responsibilities, research activities for the area, and a draft environmental impact statement. In accordance with section 304, the required documents are being submitted to the specified Congressional Committees.

National Environmental Policy Act

When changing a term of designation of a National Marine Sanctuary, section 304 of the NMSA, 16 U.S.C. 1434, requires the preparation of a draft environmental impact statement (DEIS), as provided by the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and that the DEIS be made available to the public. NOAA has prepared a DMP/DEIS on the proposal and copies are available at the address listed in the **ADDRESSES** section of this proposed rule. Responses to comments received on the DMP/DEIS will be published in the FEIS and final rule.

Executive Order 12866: Regulatory Impact

This proposed rule has been determined to be not significant within the meaning of section 3(f) of Executive Order 12866 because it will not result in:

(1) An annual effect on the economy of $100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the environment, or public health and safety;

(2) A serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) A material alteration of the budgetary impact of entitlements, grants, user fees, or loan programs or rights and obligations of such recipients; or

(4) Novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Executive Order 12612: Federalism Assessment

NOAA has concluded that this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the DMP/DEIS for the GRNMS would not have a significant economic impact on a substantial number of small entities, based on the regulatory flexibility analysis as follows:

Initial Regulatory Flexibility Analysis for the Proposed Management Plan and Proposed Rule for the Gray's Reef National Marine Sanctuary

Description of the action being taken: This action involves changes to clarify existing regulations and promulgation of new regulations for the Gray's Reef

National Marine Sanctuary (GRNMS or Sanctuary). This action is being proposed by the National Marine Sanctuary Program (NMSP) of the National Oceanic and Atmospheric Administration (NOAA). A review and revision of the management plan for the GRNMS, located off the coast of Georgia in the federal exclusive economic zone (EEZ), was undertaken starting in 1999. Because the existing management plan for the Sanctuary dates back to 1983, the decision was made to prepare an entirely new management plan for the site. No boundary expansion is being proposed, but several regulatory clarifications and new regulations are included as part of the new management plan. The changes to clarify existing regulations are:

- Including submerged lands in the boundary of the Sanctuary, which is consistent with the National Marine Sanctuaries Act; and
- Revising existing regulations to address placing or abandoning structures on the submerged lands; using explosives or devices generating electrical current underwater; and moving, removing, damaging, or possessing historical resources. The permit regulations for the Sanctuary are also being revised and clarified. Prior to permit issuance, the Director of the NMSP would be required to consider the duration of the activity and its effects; the cumulative effects; and whether it is necessary to conduct the proposed activity in the Sanctuary. Permit holders would also be required to display a copy of the permit on board any vessel or aircraft used in the permitted activity.

The proposed new regulations are:

- Anchoring any vessel in the Sanctuary, except as provided in § 922.92 when responding to an emergency threatening life, property, or the environment, or except as may be permitted by the Director.
- (i) Injuring, catching, harvesting, or collecting, or attempting to injure, catch, harvest, or collect, any marine organism, or any part thereof, living or dead, within the Sanctuary by any means except by use of rod and reel and handline gear. (ii) There shall be a rebuttable presumption that any marine organism or part thereof found in the possession of a person within the Sanctuary has been collected or removed from the Sanctuary.
- Except for possessing fishing gear stowed and not available for use, possessing or using within the Sanctuary any fishing gear or means except rod and reel and handline gear.

The new regulations will help address the increase in fishing activities and gear types that have a strong potential to damage the nationally significant bottom formations and the associated living marine resources at GRNMS that were the basis for the designation of the Sanctuary.

Summary of reasons why the action is being taken: The National Marine Sanctuaries Act (NMSA) requires that management plans for sanctuaries be reviewed every five years and that the management plans and regulations are revised, as necessary. This review provides the opportunity to ensure that management plans and regulations address current issues facing each site. The review undertaken at GRNMS indicates that the regulatory changes should be made.

Statement of the objectives and legal basis for such a rule: The legal basis for this action is the NMSA. The objective of preparing a new management plan, and its accompanying regulatory changes, is to meet the mandates of the NMSA, primarily the protection of the resources of the GRNMS.

Description/Estimate of the number of small entities to which the rule would apply:

Overview of Sanctuary Users

Based on current socioeconomic studies and on-site surveys of visitor use, NOAA has determined that the majority of users in GRNMS are fishing recreationally with rod and reel gear. These recreational fishermen primarily use personal boats originating from various locations along the Georgia coast. There are less than ten fishing charter operations along the Georgia coast that occasionally target GRNMS.

Commercial fishing activity is negligible in GRNMS. Most commercial gear, such as bottom trawls, specimen dredges, explosives, and wire fish traps, are already prohibited in GRNMS by existing Sanctuary and Magnuson-Stevens Act regulations due to the potential for damage to live bottom habitat. Surveys indicate that one charter boat captain may fish commercially on occasion using handline gear. Commercial hook-and-line fishermen targeting reef fish usually bypass the Sanctuary to fish well offshore along or just inside the shelf ''break,'' which is 80 nautical miles off Georgia but much closer to shore off Cape Hatteras, North Carolina, and Cape Canaveral, Florida. Commercial boats typically work north and south along the ''break'' well offshore of GRNMS and normally land most of their catches in Florida and South Carolina since it is a shorter trip to and from the ''break'' to these ports.

While GRNMS is an important recreational fishing destination for Georgia, it has only limited use by SCUBA divers due to the depth, strong currents and frequent turbidity. Only one diving operation has been identified as offering trips to GRNMS (approximately 10 trips per year). This business was found to be the only one that offers diving trips on its own boat; the others simply provide retail services, instruction, and tank fills. Employees of other diving businesses do offer their services as guides on privately owned boats. Spearfishing activities also appear to be very limited at GRNMS for many of the same reasons that limit divers. The one dive operator, who offers trips to GRNMS, reported that spearfishing in the Sanctuary is rare. The new regulations would prohibit spearfishing and the removal of marine organisms or parts (*e.g.*, seashells); all other non-extractive diving related activities such as underwater photography and nature would be unaffected.

Application and Impact of Regulations on Sanctuary Users

The regulations would apply to all users of the Sanctuary, including small entities. However, as described above, nearly all users already conduct their activities in such a manner as to already be in compliance with the proposed regulations (*i.e.*, most fishermen and divers do not anchor within the area, and the large majority of recreational fishermen use rod and reel gear to fish in the area). There is only one known captain who occasionally fishes commercially in GRNMS using handline gear. Handline gear would continue to be authorized for use in the Sanctuary. Spearfishing, an occasional practice at the Sanctuary, is available throughout the EEZ off Georgia, particularly at the artificial reefs and other natural live bottom habitat areas. The protection of Sanctuary waters as the only restricted area for spearfishing in the South Atlantic Bight EEZ may have positive effects in attracting non spearfishing divers to GRNMS. The NMSP therefore expects that this rule would have no significant socioeconomic impacts.

Description of proposed reporting, record keeping and other compliance requirements: There are no new reporting, record keeping, or other compliance requirements proposed.

Identification of relevant federal rules that it may duplicate: The NMSP is not aware of any other duplicative laws. The Sanctuary lies within the South Atlantic Fishery Management Council's (SAFMC) region. The SAFMC develops, and NOAA Fisheries approves and

implements, various fishery management plans addressing specific fish species, groups of species, habitat restrictions, gear types, harvest limits, and closures. The result is a variety of restrictions on size and number of fish caught, type of gear used, category of permits, and time and area closures. The new proposed regulations would simplify the public's understanding of allowable activities in GRNMS, while maintaining SAFMC/NOAA Fisheries restrictions.

Description and analysis of significant alternatives that would accomplish the stated objectives of applicable statutes:

1. Alternatives to the anchoring prohibition:

• Prohibit anchoring and establish a mooring buoy system. This alternative is not preferred primarily because (1) user surveys and discussion with the GRNMS Advisory Council indicate that it is unnecessary for users to anchor or moor in order to fish or dive in the area. In fact, the Advisory Council strongly recommended against deploying a mooring buoy system, because it was not needed, could be a navigational obstacle, and would be an inefficient use of the Sanctuary's limited resources. (2) There are concerns that a mooring buoy system would concentrate activities, leading to overfishing, localized diver impacts, and concentrated marine debris. A secondary consideration was the cost of installing and maintaining a mooring buoy system. Anchoring and mooring to existing boundary markers would be allowed in GRNMS in emergencies.

• Establish and mark an anchoring zone over sandy bottom and prohibit anchoring elsewhere in the Sanctuary.

This alternative is not preferred for the same reasons given for the mooring buoy alternative. Additionally, recent on-water and aerial survey analysis indicates that the majority of anchoring occurs in live bottom areas of GRNMS where users are fishing and sometimes diving. Thus, a designated anchoring zone over sand would provide no real benefit to users because it would distance users from the features that attract both fishermen and divers.

• Take no regulatory action but conduct an extensive research and monitoring program on the impacts of anchoring within GRNMS.

The short-term negative socioeconomic impacts are expected to be negligible. Long-term biological consequences of continued anchoring could be severe and the effects on the economic viability of the natural community for recreational and research purposes could be negative. In addition, design and implementation of the research and monitoring program would incur substantial costs. This alternative would represent a significant commitment of funding and personnel to activities for which the results are already clear. This alternative is not an efficient or productive use of limited Sanctuary resources and is not preferred.

• No Action.

This alternative is not preferred because allowing continued use of anchors at GRNMS would increase the potential for continued damage to the live bottom habitat in the Sanctuary. Given the recent observations by scientific divers of damage to the live bottom, and analysis of anchoring locations in hard bottom areas, continuation of anchoring assures that live bottom resources will be damaged and degraded. Also, as human population increases in the nearby coastal region and the visitor use grows at GRNMS, the damages are likely to increase. The long-term result would be diminished socioeconomic value as the biological communities degrade.

2. Alternatives to the fishing ''allowable gear'' regulation:

• Prohibit use or possession of spearguns, nets, bandit gear, buoy gear, longlines, traps, or pots in GRNMS.

Some gear types not currently prohibited would have negative impacts on habitat and biodiversity. The types of gear include various nets, commercial hook and line, longlines, sea bass pots, and buoy gear. Eliminating use of these gear types would reduce fishing pressure on reef fish stocks and protect vulnerable marine resources, such as invertebrates, marine mammals, sea turtles and sea birds. Also, the South Atlantic Fishery Management Council and NOAA Fisheries have instituted numerous regulations addressing specific fish species, groups of species, habitat restrictions, gear types, harvest limits, and closures. The result is a mosaic of restrictions on size and number of fish caught, type of gear used, category of permits, and time and area closures.

Regulating specific gear types could add more complication and confusion for fishermen by lengthening the list of restricted fishing methods and gear, versus clearly identifying what gear is allowed in GRNMS.

In addition, periodic analysis of new fishing gear, or gear types newly applied in the EEZ off the southeastern United States, would be necessary to keep the regulations current. This would add more cost to GRNMS and could increase the number of regulatory changes for Sanctuary users to adjust to over time. Addressing additional gear prohibitions would incur more costs over time, both to GRNMS and users who may have already invested in fishing gear that is damaging to GRNMS resources, and possibly create more confusion than clarity for users of GRNMS. Thus, this alternative is not preferred.

• Allow fishing in GRNMS only with rod and reel, handline, and spearfishing gear without powerheads.

This alternative is identical to the preferred alternative, except that it would also allow the use of spearfishing gear without powerheads. When GRNMS was designated, spearfishing was identified as an activity that may be regulated at a later time to ''ensure the protection and preservation of the Sanctuary's marine features and the ecological, recreational, and aesthetic value of the area.'' Although spearfishing was listed because of the potential for damage to marine resources, only the prohibition on powerheads (explosives) was promulgated at that time. Given the increasing use by recreational visitors and the lack of individual large fish observed by researchers, GRNMS staff and the GRNMS Advisory Council conclude that spearfishing should be prohibited. A restriction on spearfishing at GRNMS was also supported by the dive charter operators surveyed by NOAA. This alternative is therefore not preferred.

• No Action.

Fishing, specifically recreational fishing with rod and reel gear represents the primary use of GRNMS. With increasing numbers of fishermen accessing the Sanctuary, maintaining the health of the living and non-living resources is a complex challenge. NOAA expects that the continuing and increasing levels of certain activities in GRNMS will result in a degradation of the habitat and living marine resources. This is particularly true given the increase in use, improvements in technology and the variety of new fishing gear not contemplated when the current regulations were adopted 22 years ago. Taking no action would ignore these significant changes over the last 22 years. The conservation standards established for the Sanctuary in 1981 were based on levels of use far lower than today. Recalibration of the conservation measures based on current use is therefore appropriate. Consequently taking the ''no action'' alternative is not preferred.

Paperwork Reduction Act

This proposed rule would not impose an information collection requirement subject to review and approval by OMB

under the Paperwork Reduction Act of 1980, 44 U.S.C. 3500 *et seq.*

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Education, Environmental protection, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research.

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: October 15, 2003.

Richard W. Spinrad,

Assistant Administrator for Ocean Services and Coastal Zone Management.

Accordingly, for the reasons set forth above, 15 CFR Part 922 is proposed to be amended as follows:

PART 922—[AMENDED]

1. The authority citation for Part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 *et seq.*

2. 15 CFR Part 922, Subpart I (the regulations for GRNMS) is revised to read as follows:

§ 922.90 Boundary.

The Gray's Reef National Marine Sanctuary (Sanctuary) consists of approximately 16.68 square nautical miles of ocean waters and the submerged lands thereunder, off the coast of Georgia. The Sanctuary boundary includes all waters and submerged lands within a rectangle marked by the following coordinates:

Datum: NAD83
Geographic Coordinate System
(a) N 31.362732 degrees W 80.921200 degrees
(b) N 31.421064 degrees W 80.921201 degrees
(c) N 31.421064 degrees W 80.828145 degrees
(d) N 31.362732 degrees W 80.828145 degrees
(e) N 31.362732 degrees W 80.921200 degrees

§ 922.91 Definitions.

In addition to those definitions found at § 922.3, the following definitions apply to this subpart:

Handline means a single line with no more than three attached hook(s) that is tended directly by hand.

Rod and reel means a rod and reel unit that is not attached to a vessel, or, if attached, is readily removable, and from which a single line having no more than three hooks attached is deployed. The line is payed out from and retrieved on the reel manually, electrically, or hydraulically. Not more than eight hooks per line may be used to capture bait fish and the hooks must not exceed #8 size category of the ''sabiki'' style bait hooks.

Stowed and not available for immediate use means not readily accessible for immediate use, *e.g.*, by being securely covered and lashed to a deck or bulkhead, tied down, unbaited, unloaded, partially disassembled (such as spear shafts being kept separate from spear guns), or stowed for transit.

§ 922.92 Prohibited or otherwise regulated activities.

(a) Except as may be necessary for national defense (subject to the terms and conditions of Article 5, Section 2 of the Designation Document) or to respond to an emergency threatening life, property, or the environment, or except as may be permitted by the Director in accordance with § 922.48 and § 922.93, the following activities are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(1) Dredging, drilling into, or otherwise altering in any way the submerged lands of the Sanctuary (including bottom formations).

(2) Constructing any structure other than a navigation aid, or constructing, placing, or abandoning any structure, material, or other matter on the submerged lands of the Sanctuary.

(3) Discharging or depositing any material or other matter except:

(i) Fish or fish parts or bait and chumming materials;

(ii) Effluent from marine sanitation devices; and

(iii) Vessel cooling water.

(4) Operating a watercraft other than in accordance with the Federal rules and regulations that would apply if there were no Sanctuary.

(5) (i) Injuring, catching, harvesting, or collecting, or attempting to injure, catch, harvest, or collect, any marine organism, or any part thereof, living or dead, within the Sanctuary by any means except by use of rod and reel and handline gear.

(ii) There shall be a rebuttable presumption that any marine organism or part thereof found in the possession of a person within the Sanctuary has been collected or removed from the Sanctuary.

(6) Except for fishing gear stowed and not available for immediate use, possessing or using within the Sanctuary any fishing gear or means except rod and reel and handline gear.

(7) Using underwater any explosives, or devices that produce electric charges underwater.

(8) Moving, removing, damaging, or possessing, or attempting to move, remove, damage, or possess, any Sanctuary historical resource.

(9) Anchoring any vessel in the Sanctuary, except as provided in this section, when responding to an emergency threatening life, property, or the environment, or except as may be permitted by the Director.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to the prohibitions in this section. The exemption of additional activities having significant impacts shall be determined in consultation between the Director and the Department of Defense.

§ 922.93 Permit procedures and criteria.

(a) A person may conduct an activity prohibited by § 922.92(a)(1) through (9) if conducted in accordance with scope, purpose, manner, terms and conditions of a permit issued under this section and § 922.48.

(b) Applications for such permits should be addressed to the Director, National Marine Sanctuary Program, ATTN: Manager, Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, GA 31411.

(c) The Director, at his or her discretion may issue a permit, subject to such terms and conditions as he or she deems appropriate, to conduct an activity prohibited by § 922.92(a)(1) through (9). The Director must also find that the activity will:

(1) Further research related to the resources and qualities of the Sanctuary;

(2) Further the educational, natural, or historical resource value of the Sanctuary;

(3) Further salvage or recovery operations in connection with a recent air or marine casualty; or

(4) Assist in managing the Sanctuary.

(d) The Director shall not issue a permit unless the Director also finds that:

(1) The applicant is professionally qualified to conduct and complete the proposed activity;

(2) The applicant has adequate financial resources available to conduct and complete the proposed activity;

(3) The duration of the proposed activity is no longer than necessary to achieve its stated purpose;

(4) The methods and procedures proposed by the applicant are appropriate to achieve the proposed activity's goals in relation to the activity's impacts on Sanctuary resources and qualities;

(5) The proposed activity will be conducted in a manner compatible with the primary objective of protection of Sanctuary resources and qualities,

considering the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities, any indirect, secondary or cumulative effects of the activity, and the duration of such effects;

(6) The proposed activity will be conducted in a manner compatible with the value of the Sanctuary as a source of recreation, or as a source of educational or scientific information considering the extent to which the conduct of the activity may result in conflicts between different users of the Sanctuary, and the duration of such effects;

(7) It is necessary to conduct the proposed activity within the Sanctuary to achieve its purposes;

(8) The reasonably expected end value of the activity to the furtherance of Sanctuary goals and purposes outweighs any potential adverse impacts on Sanctuary resources and qualities from the conduct of the activity; and

(9) Other matters deemed appropriate do not make the issuance of a permit for the activity inappropriate.

(e) It shall be a condition of any permit issued that the permit or a copy thereof be displayed on board all vessels or aircraft used in the conduct of the activity.

(f) The Director shall, *inter alia,* make it a condition of any permit issued that any data or information obtained under the permit be made available to the public.

(g) The Director may, *inter alia,* make it a condition of any permit issued to require the submission of one or more reports of the status and progress of such activity.

(h) The Director may, *inter alia,* make it a condition of any permit issued that a NOAA official be allowed to observe any activity conducted under the permit and/or that the permit holder submit one or more reports on the status, progress or results of any activity authorized by the permit.

[FR Doc. 03–27237 Filed 10–30–03; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–128203–02]

RIN 1545–BA81

Partnership Transactions Involving Long Term Contracts; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking.

SUMMARY: This document contains a correction to a proposed regulation that was published in the **Federal Register** on May 15, 2002 (68 FR 46516), relating to partnership transactions involving contracts accounted for under a long term contract method of accounting.

FOR FURTHER INFORMATION CONTACT: Richard Probst (202) 622–3060 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The proposed regulations that are the subject of this correction are under section 460 of the Internal Revenue Code.

Need for Correction

As published, the proposed regulations (REG–128203–02), contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the proposed regulations (REG–128203–02), which are the subject of FR Doc. 03–18484, is corrected as follows:

On page 46518, column 1, in the preamble under the paragraph heading *''1. Contribution of a Contract to a Partnership'',* line 8 from the top of the column, the language ''to the contract, and the contributes the'' is corrected to read ''to the contract, and then contributes the''.

Cynthia E. Grigsby,

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

[FR Doc. 03–27498 Filed 10–30–03; 8:45 am]

BILLING CODE 4830–01–P

POSTAL SERVICE

39 CFR Part 111

Sender-Identified Mail: Enhanced Requirement for Discount Rate Mailings

AGENCY: Postal Service.

ACTION: Proposed rule; withdrawal.

SUMMARY: The proposal to require enhanced sender identification for all discount rate mailings published in the **Federal Register** on October 21, 2003 (Vol. 68, No. 203, pages 60052–60054), is withdrawn.

DATES: This notice is effective upon publication.

FOR FURTHER INFORMATION CONTACT: Joel Walker (703) 292–3652.

SUPPLEMENTARY INFORMATION: The Postal Service will issue a further notice regarding this proposal at a later date.

Neva R. Watson,

Attorney, Legislative, Office of Legal Policy and Ratemaking.

[FR Doc. 03–27466 Filed 10–30–03; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[Region 2 Docket No. PR11–267b; FRL–7580–9]

Approval and Promulgation of State Plans for Designated Facilities; Puerto Rico

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the ''State Plan'' submitted by the Commonwealth of Puerto Rico to fulfill the requirements of sections 111(d)/129 of the Clean Air Act for Commercial and Industrial Solid Waste Incineration (CISWI) units. Specifically, the State Plan that EPA is proposing to approve, establishes emission limits for organics, carbon monoxide, metals, acid gases and particulate matter and compliance schedules for the existing CISWI units located in the Commonwealth of Puerto Rico which will reduce the designated pollutants. In the ''Rules and Regulations'' section of this **Federal Register**, EPA is approving Puerto Rico's State Plan submittal, as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received on or before December 1, 2003.

ADDRESSES: Comments may be submitted either by mail or electronically. Written comments

should be mailed to Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866. Electronic comments could be sent either to *Werner.Raymond@epa.gov* or to *http://www.regulations.gov,* which is an alternative method for submitting electronic comments to EPA. Go directly to *http://www.regulations.gov,* then select ''Environmental Protection Agency'' at the top of the page and use the ''go'' button. Please follow the on-line instructions for submitting comments.

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, Region 2, Caribbean Environmental Protection Division, Centro Europa Building, Suite 417, 1492 Ponce De Leon Avenue, Stop 22, San Juan, Puerto Rico 00907–4127.

Puerto Rico Environmental Quality Board, National Plaza Building, 431 Ponce De Leon Avenue, Hato Rey, Puerto Rico.

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

FOR FURTHER INFORMATION CONTACT: Kirk J. Wieber, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3381 or *Wieber.Kirk@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: October 14, 2003.

Jane M. Kenny,

Regional Administrator, Region 2.

[FR Doc. 03–27483 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[CA 106–FOA; FRL–7580–7]

Approval and Promulgation of Implementation Plans and Determination of Attainment of the 1-Hour Ozone Standard for the San Francisco Bay Area, California, and Determination Regarding Applicability of Certain Clean Air Act Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to determine that the San Francisco Bay Area has attained the 1-hour ozone air quality standard by the deadline required by the Clean Air Act. Based on this proposal, we also propose to determine that the CAA's requirements for reasonable further progress, attainment demonstration, and contingency provisions are not applicable to the area for so long as the Bay Area continues to attain the 1-hour ozone standard.

DATES: Comments on this proposal must be received by December 1, 2003.

ADDRESSES: Please address your comments to:

Ginger Vagenas, Air Planning Office (AIR–2), Air Division, U.S. EPA, Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901 or e-mail to *vagenas.ginger@epa.gov,* or submit comments at *http://www.regulations.gov.*

Copies of the docket for this rulemaking are available for public inspection during normal business hours at EPA's Region 9 office.

FOR FURTHER INFORMATION CONTACT: Ginger Vagenas, U.S. EPA Region 9, at(415) 972–3964, or *vagenas.ginger@epa.gov*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. Attainment Finding

A. Bay Area's Ozone Designations and State Implementation Plans

When the Clean Air Act (CAA) Amendments were enacted in 1990, each area of the country that was designated nonattainment for the 1-hour ozone National Ambient Air Quality Standard (NAAQS), including the San Francisco Bay Area (''Bay Area''), was classified by operation of law as marginal, moderate, serious, severe, or extreme depending on the severity of the area's air quality problem.[1] CAA sections 107(d)(1)(C) and 181(a). The Bay Area was classified as moderate. See 56 FR 56694 (November 6, 1991).

EPA redesignated the Bay Area to attainment in 1995, based on then current air quality data (60 FR 27029, May 22, 1995), and subsequently redesignated the area back to nonattainment without classification on July 10, 1998 (63 FR 37258), following renewed violations of the 1-hour ozone standard. Upon the Bay Area's redesignation to nonattainment, we required the State to submit a state implementation plan (SIP) addressing applicable CAA provisions, including a demonstration of attainment as

[1] The 1-hour ozone nonattainment area is the ''San Francisco-Bay Area,'' which comprises Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, and Santa Clara Counties, and portions of Solano and Sonoma Counties. See 40 CFR 81.305 *(http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr81_00.html).*

EPA's 1-hour ozone standard of 0.12 ppm was promulgated in 1979 (44 FR 8202, February 8, 1979). On July 18, 1997, we promulgated a revised ozone standard of 0.08 ppm, measured over an 8-hour period. In general, the 8-hour standard is more protective of public health and more stringent than the 1-hour standard. This proposed finding addresses only the 1-hour standard. Areas will be designated attainment or nonattainment for the 8-hour standard in 2004.

Ground-level ozone can irritate the respiratory system, causing coughing, throat irritation, and uncomfortable sensations in the chest. Ozone can also reduce lung function and make it more difficult to breathe deeply, thereby limiting a person's normal activity. Finally, ozone can aggravate asthma and can inflame and damage the lining of the lungs, leading to permanent changes in lung function. More details on ozone's health effects and the ozone NAAQS can be found at the following Web site: *http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_index.html.*

expeditiously as practicable but no later than November 15, 2000.

The Bay Area Air Quality Management District (BAAQMD), along with its co-lead agencies—the Metropolitan Transportation Commission and the Association of Bay Area Governments—prepared a 1-hour ozone attainment plan, which was submitted by the California Air Resources Board (CARB) on August 13, 1999. On September 20, 2001 (66 FR 48340), we approved the emissions inventories, reasonable further progress (RFP) provisions, control measure commitments, and contingency measures. In the same rulemaking, we disapproved the remaining portions of the SIP, *i.e.*, the attainment demonstration and reasonably available control measure (RACM) provision, issued a finding that the area failed to attain by the applicable deadline, and set a new attainment deadline of ''as expeditiously as practicable'' but no later than September 20, 2006.

On November 30, 2001, CARB submitted the Bay Area's 2001 Plan, addressing the new attainment deadline.[2] On July 16, 2003 (68 FR 42174), we proposed to approve the following elements of the 2001 Plan: attainment assessment, motor vehicle emissions budgets, and commitments to adopt control measures and to adopt and submit a plan revision by April 15, 2004, based on new modeling. On the same date, we issued an interim final determination that the 2001 Plan corrects the deficiencies in the 1999 Plan, thereby staying the CAA section 179 offset sanction and deferring the imposition of the highway sanction triggered by our September 20, 2001 disapproval. 68 FR 42172.

On October 16, 2003, William C. Norton, Executive Officer of the BAAQMD, sent a letter to Catherine Witherspoon, CARB Executive Officer, reporting that the Bay Area has attained the national 1-hour ozone standard and stating that, based on the monitoring data, a finding of attainment would be appropriate. Mr. Norton also stated that: ''We are continuing our air quality planning and rule development work in order to achieve additional reductions in ozone precursor emissions. We want to reduce local ozone and transport, and to maintain progress toward the state standard. The District's and ARB's staffs have been working intensively on the modeling and rule review phases of our mid-course review for the 2004 ozone planning process.''

On October 21, 2003, CARB formally requested that we make a finding of attainment for the 1-hour ozone NAAQS for the Bay Area (letter from Catherine Witherspoon to Wayne Nastri, Regional Administrator, EPA Region 9). The CARB letter endorsed the BAAQMD's commitment to continue to reduce ozone precursor emissions in order to ensure progress toward attaining the national 8-hour ozone standard in the Bay Area and downwind areas, the more protective State ozone standard, and the national fine particulate matter (PM2.5) standards.

B. Clean Air Act Provisions for Attainment Findings

Under CAA section 181(b)(2)(A), we must determine within six months of the applicable attainment date whether an ozone nonattainment area has attained the standard, basing our determination on the area's design value as of its applicable attainment date. Although the Bay Area is not subject to this provision and the attainment deadline for the area has not yet been reached, we are making an attainment finding based on the Bay Area's current air quality data and design value, which is in attainment of the 1-hour ozone NAAQS.

The 1-hour ozone NAAQS is 0.12 ppm, not to be exceeded on average more than 1 day per year over any 3-year period. 40 CFR 50.9 and appendix H. Under our policies, we determine if an area has attained the 1-hour standard by calculating, at each monitor, the average number of days over the standard per year during the preceding 3-year period.[3] For this proposal, we have based our determination of attainment on both the design value and the average number of exceedance days per year for the period 2001 through 2003.

The design value is an ambient ozone concentration that indicates the severity of the ozone problem in an area and is used to determine the level of emission reductions needed to attain the standard, that is, it is the ozone level around which a state designs its control strategy for attaining the ozone standard. A monitor's design value is the fourth highest ambient concentration recorded at that monitor over the previous 3 years. An area's design value is the highest of the design values from the area's monitors.[4]

We make attainment determinations for ozone nonattainment areas using all available, quality-assured air quality data for the current or applicable 3-year period.[5] Consequently, we used all of the 2001, 2002, and 2003 data available to determine whether the Bay Area attained the 1-hour ozone standard by the end of the 2003 ozone season. From the available air quality data, we have calculated the average number of days over the standard and the design value for each ozone monitor in the Bay Area nonattainment area.

C. Attainment Finding for the Bay Area

1. Adequacy of the Bay Area Ozone Monitoring Network

Determining whether or not an area has attained under CAA section 181(b)(1)(A) is based on monitored air quality data. Thus, the validity of a determination of attainment depends on whether the monitoring network adequately measures ambient ozone levels in the area.

We evaluate 4 basic elements in determining the adequacy of an area's ozone monitoring network. The network needs to meet the design requirements of 40 CFR part 58, appendix D; the network needs to utilize monitoring equipment designated as reference or equivalent methods under 40 CFR part 53; the agency or agencies operating the equipment need to have a quality assurance plan in place that meets the

[2] An electronic copy of the plan is available at *http://www.baaqmd.gov/planning/2001sip/2001sip.htm* and at the BAAQMD offices at 939 Ellis Street, San Francisco, CA 94105.

[3] See generally 57 FR 13506 (April 16, 1992) and Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, EPA, to Regional Air Office Directors; ''Procedures for Processing Bump Ups and Extensions for Marginal Ozone Nonattainment Areas,'' February 3, 1994 *(http://www.epa.gov/ttn/oarpg/t1/memoranda/o_bump.pdf).* While explicitly applicable only to marginal areas, the general procedures for evaluating attainment in this memorandum apply regardless of the initial classification of an area because all findings of attainment are made pursuant to the same procedures.

[4] The fourth highest value is used as the design value because a monitor may record up to 3 exceedances of the standard in a 3-year period and still show attainment, since 3 exceedances over 3 years would average 1 day per year, the maximum allowed to show attainment of the 1-hour ozone standard. If the monitor records a fourth exceedance in that period, it would average more than 1 exceedance day per year and would no longer show attainment. Therefore, if a state can reduce the fourth highest ozone value to below the standard, thus preventing a fourth exceedance, then it will be able to demonstrate attainment.

[5] This includes all data that are available from the state and local/national air monitoring station (SLAMS/NAMS) network as submitted to EPA's Aerometric Information Retrieval System-Air Quality Subsystem (AIRS–AQS) database and certified as final. Also included are all data available to EPA from special purpose monitoring (SPM) sites that meet the requirements of 40 CFR 51.18. See Memorandum dated August 22, 1997, from John Seitz to Regional Air Directors, entitled ''Agency Policy on the Use of Ozone Special Purpose Monitoring Data'' *(http://www.epa.gov/ttn/amtic/files/ambient/criteria/spms3.pdf).* Monitoring data for the 2003 ozone season must be certified by the BAAQMD prior to publication of the final attainment finding.

requirements of 40 CFR part 58, appendix A; and, for urban areas with populations greater than 200,000, at least two monitoring sites must be designated as National Air Monitoring Stations (NAMS). The ozone network in the Bay Area meets or exceeds these requirements and is therefore adequate for use in determining the ozone attainment status of the area.[6]

2. The Bay Area's Ozone Design Value for the 2001–2003 Period

We have listed in Table 1 the design values and the average number of exceedance days per year for the 2001 to 2003 period for each monitoring site in the Bay Area. We calculated the design values following the procedures in the Laxton memo.[7] We have used the established rounding conventions set forth in our guidance documents and regulations.[8]

TABLE 1.—AVERAGE NUMBER OF 1-HOUR OZONE EXCEEDANCE DAYS PER YEAR AND DESIGN VALUES BY MONITOR IN THE BAY AREA, 2001–2003

Site	Average number of exceedance days per year	Site design value (ppm)
Bethel Island (SLAMS)	0.3	0.102
Concord (NAMS)	0.3	0.106
Crockett (SPM)	0	0.081
Fairfield (SLAMS)	0	0.101
Fremont (NAMS)	0	0.106
Gilroy (SLAMS)	0	0.116
Hayward (SLAMS)	0	0.097
Livermore (NAMS)	1.0	0.123
Los Gatos (NAMS)	0	0.113
Napa (SLAMS)	0	0.099
Oakland (SLAMS)	0	0.069
Oakland—Fruitvale (SPM)	0	0.068
Pittsburg (SLAMS)	0	0.103
Redwood City (SLAMS)	0	0.090
San Francisco (SLAMS)	0	0.061
San Jose Central (SLAMS)	0	0.099
San Jose East (SLAMS)	0	0.091
San Leandro (SLAMS)	0	0.093
San Martin (SLAMS)	0	0.115
San Pablo (SLAMS)	0	0.071
San Rafael (SLAMS)	0	0.077
Santa Rosa (SLAMS)	0	0.086
Sunnyvale (SLAMS)	0	0.096
Vallejo (SLAMS)	0	0.091

Note: Each of these sites is operated by BAAQMD. All data are reported to EPA's AIRS–AQS database.

From Table 1, it is apparent that the highest design value at any monitor, and thus the design value for the Bay Area, is 0.123 ppm at the Livermore site. No monitor in the Bay Area recorded an average of more than 1 exceedance of the 1-hour ozone standard per year during the 2001 to 2003 period.

Because the area's design value is below the 0.12 ppm 1-hour ozone standard for the 2001 to 2003 period, we propose to find that the Bay Area has attained the 1-hour ozone standard.

D. Attainment Findings and Redesignations to Attainment

A finding that an area has attained the 1-hour ozone standard does not redesignate the area to attainment for the 1-hour standard nor does it guarantee a future redesignation to attainment.

The redesignation of an area to attainment under CAA section 107(d)(3)(E) is a separate process from a finding of attainment. Unlike an attainment finding where we need only determine that the area has had the pre-requisite number of clean years, a redesignation requires multiple determinations. Under section 107(d)(3)(E), these determinations are:

[6] These requirements are addressed in ''System Audit of the Ambient Monitoring Program of Bay Area Air Quality Management District, November 26–30, 2001.'' The system audit report is included in the docket for this rulemaking.

[7] See memorandum, William G. Laxton, Director, Technical Support Division, Office of Air Quality Planning and Standards to Regional Air Directors, ''Ozone and Carbon Monoxide Design Value Calculations,'' June 18, 1990 *(http://www.epa.gov/oar/oaqps/greenbk/laxton.html).*

[8] Although the 1-hour ozone NAAQS itself includes no discussion of specific data handling conventions, our publicly articulated position and the approach long since universally adopted by the air quality management community is that the interpretation of the 1-hour ozone standard requires rounding ambient air quality data consistent with the stated level of the standard, which is 0.12 parts per million (ppm). 40 CFR 50.9(a) states that: ''The level of the national 1-hour primary and secondary ambient air quality standards for ozone * * * is 0.12 parts per million. * * * The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million * * * is equal to or less than 1, as determined by appendix H to this part.'' *(http://a257.g.akamaitech.net/7/257/2422/08aug20031600/edocket.access.gpo.gov/cfr_2003/julqtr/pdf/40cfr50.9.pdf)* We have clearly communicated the data handling conventions for the 1-hour ozone NAAQS in regulation and guidance documents, as discussed below. In the 1990 CAA Amendments, Congress expressly recognized the continuing validity of EPA guidance.

As early as 1977, EPA issued guidance that the level of our NAAQS dictates the number of significant figures to be used in determining whether the standard was exceeded. Guidelines for the Interpretation of Air Quality Standards, OAQPS No. 1.2–008, February 1977 *(http://www.epa.gov/ttn/amtic/files/ambient/criteria/reldocs/12008–77.pdf).* In addition, the regulations governing the reporting of annual summary statistics from ambient monitoring stations for use by EPA in determining national air quality status clearly indicate the rounding convention to be used for 1-hour ozone data. ''The air quality concentration should be rounded to the number of significant digits used in specifying the concentration intervals. The digit to the right of the last significant digit determines the rounding process. If this digit is greater than or equal to 5, the last significant digit is rounded up. The insignificant digits are truncated. For example, 100.5 ug/m3 rounds to 101 up/m3 and 0.1245 ppm rounds to 0.12 ppm.'' 40 CFR part 58, appendix F, 2 Required Information *(http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr58_00.html).*

1. We must determine, at the time of the redesignation, that the area has attained the relevant NAAQS.

2. The state must have a fully approved SIP for the area.

3. We must determine that the improvements in air quality are due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and applicable federal regulations and other permanent and enforceable reductions.

4. We must have fully approved a maintenance plan for the area under CAA section 175A.

5. The state must have met all the nonattainment area requirements applicable to the area.

It is possible, although not expected, that the Bay Area could violate the 1-hour ozone NAAQS before a maintenance plan is adopted, submitted, and approved, and the area is redesignated to attainment. If such a violation were to occur after our finding of attainment, and if expedited implementation of contingency measures were to prove insufficient to eliminate future violations, we believe that issuance of a SIP call under section 110(k)(5) would be an appropriate response. This SIP call could require the State to submit, by a reasonable deadline not to exceed 18 months, a revised plan demonstrating expeditious attainment and complying with other requirements applicable to the area at the time of this finding.

In proposed implementation guidance for the 8-hour ozone NAAQS, we have also discussed other options for areas that have attained the 1-hour ozone standard but subsequently violate the 1-hour NAAQS in the transition period before implementation of the 8-hour ozone SIP provisions. EPA's final guidance may establish approaches for ensuring continued clean air progress while minimizing any inefficiencies and diversions of air quality planning resources.

II. Applicability of Clean Air Act Planning Requirements

A. EPA's Policy and Its Legal Basis

When we redesignated the Bay Area back to nonattainment, we concluded that the Bay Area became subject to the provisions of subpart 1 rather than subpart 2 of the Clean Air Act. 63 FR 37258 (July 10, 1998). CAA subpart 1 at section 172(c) requires states to submit plans with certain revisions. These provisions include: emissions inventories, attainment demonstration, reasonable further progress (RFP), reasonably available control measures (RACM), contingency measures, and new source review (NSR).

For the reasons described below and discussed in our Ozone Clean Data Policy, we believe that it is reasonable to interpret the CAA not to require the 3 provisions discussed below for ozone nonattainment areas that are determined to be meeting the 1-hour ozone standard.[9]

1. Reasonable Further Progress

CAA Section 171(1) states that, for purposes of part D of Title I, RFP ''means such annual incremental reductions in emissions of the relevant air pollutant as are required by [Part D] or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.'' Thus, the stated purpose of RFP is to ensure attainment by the applicable attainment date. If an area has in fact attained the standard, the stated purpose of the RFP requirement will have already been fulfilled.

Consequently, we do not believe that a state needs to submit revisions providing for the further emission reductions to meet the RFP provisions of section 172(c)(2) for areas meeting the 1-hour ozone standard. We note that we took this view with respect to the general RFP requirement of section 172(c)(2) in our ''General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990'' at 57 FR 13498 (April 16, 1992). In the General Preamble, we stated, in the context of a discussion of the requirements applicable to the evaluation of requests to redesignate nonattainment areas to attainment, that the ''requirements for RFP will not apply in evaluating a request for redesignation to attainment since, at a minimum, the air quality data for the area must show that the area has already attained. Showing that the State will make RFP towards attainment will, therefore, have no meaning at that point.'' (57 FR 13564.) See also ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' from John Calcagni, Director, Air Quality Management Division, to Regional Air Division Directors, September 4, 1992 (''Calcagni memo'') (*http://www.epa.gov/ttn/naaqs/ozone/ozonetech/940904.pdf*). The memo states that the ''requirements for reasonable further progress * * * will not apply for redesignations because they only have meaning for areas not attaining the standard'' (page 6).

2. Attainment Demonstration

Analogous reasoning applies to the attainment demonstration requirement. Section 172(c)(1) requires that a state submit a SIP revision that will provide for attainment of the NAAQS. If an area has in fact monitored attainment of the standard based on existing controls, we believe that it is not necessary for the state to make a further submission containing additional measures or demonstrations to show attainment.

This belief is also consistent with our interpretation of certain section 172(c) requirements in the General Preamble to Title I, where we stated there that no other measures to provide for attainment would be needed by areas seeking redesignation to attainment since ''attainment will have been reached.'' (57 FR 13564; see also Calcagni memo at page 6.)

Upon attainment of the NAAQS, the focus of state planning efforts shifts to the maintenance of the NAAQS and the development of a maintenance plan under section 175A.

3. Contingency Measures

CAA section 172(c)(9) requires a state to submit contingency measures that will be implemented if an area fails to make RFP or fails to attain by the applicable attainment date. We have previously interpreted the contingency measure requirement of section 172(c)(9) as no longer applying once an area has attained the standard since those ''contingency measures are directed at ensuring RFP and attainment by the applicable date.'' See 57 FR 13564; see also the Calcagni memo at page 6.

4. Remaining Nonattainment Area SIP Requirements

A number of CAA subpart 1 SIP requirements for nonattainment areas are not tied to whether the area has attained the 1-hour standard. The State remains obligated to submit these requirements for the Bay Area even if

[9] See memorandum, John S. Seitz, Director, OAQPS, EPA, to Regional Air Directors, ''Reasonable Further Progress, Attainment Demonstrations, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard,'' May 10, 1995 (*http://www.epa.gov/ttn/oarpg/t1/memoranda/clean15.pdf*). We have also explained at length in other actions our rationale for the reasonableness of this interpretation of the Act and incorporate those explanations by reference here. See 61 FR 20458 (May 7, 1996) (Cleveland-Akron-Lorrain, Ohio); 60 FR 36723 (July 18, 1995) (Salt Lake and Davis Counties, Utah); 60 FR 37366 July 20, 1995) and 61 FR 31832–31833 (June 21, 1996) (Grand Rapids, MI); and 65 FR 31859 (May 19, 2000) and 66 FR 29230 (May 30, 2001) (Phoenix, Arizona). Our interpretation has also been upheld by the United States Court of Appeals for the 10th Circuit in Sierra Club v. EPA, 99 F.3d 1551 (10th Cir. 1996) (*http://www.law.emory.edu/10circuit/nov96/95–9541.wpd.html*).

we finalize today's proposed determination that the area has attained the 1-hour standard and that the CAA planning requirements discussed above no longer apply to the area. These requirements include: A current, comprehensive, and accurate emission inventory of actual emissions (section 172(c)(3)); reasonable available control measures (section 172(c)(1)); and an NSR program (sections 172(c)(5) and 173(a). When we take final action on this finding of attainment, we intend to take final action on the 2001 Plan, including whether the emissions inventories and control measures in the plan satisfy the applicable subpart 1 requirements. We have previously acted on the Bay Area's NSR program. See, for example, 65 FR 56284 (September 18, 2000).

B. Effects of the Proposed Determination on the Bay Area and Effects of a Future Violation on This Proposed Determination

If we finalize today's proposed determinations for the Bay Area, then the State will no longer be required to submit an RFP plan, an attainment demonstration, or contingency measures for the area. Any sanction clocks under CAA section 179(a) or requirements that we promulgate a federal implementation plan under CAA section 110(c) for these SIP requirements are suspended.

The suspension of the requirement to submit these SIP revisions and the suspension of sanction clocks/FIP requirements will exist only as long as the Bay Area continues to attain the 1-hour ozone standard. If we subsequently determine that the Bay Area has violated the 1-hour ozone standard (prior to a redesignation to attainment), the basis for the determination that the area need not make these SIP revisions would no longer exist. Thus, a determination that an area need not submit these SIP revisions amounts to no more than a suspension of the requirement for so long as the area continues to attain the standard.

Should the Bay Area begin to violate the 1-hour standard, we will notify the State that we have determined that the area is no longer attaining the 1-hour standard. We also will provide notice to the public in the **Federal Register**, and we will at that time indicate what pertinent SIP provisions apply and when a SIP revision addressing those provisions must be submitted.

California must continue to operate an appropriate air quality monitoring network, in accordance with 40 CFR part 58, to verify the attainment status of the area. The air quality data relied upon to determine that the area is attaining the ozone standard must be consistent with 40 CFR part 58 requirements and other relevant EPA guidance.

C. Effect of the Proposed Determination on Transportation Conformity

CAA section 176(c) requires that federally funded or approved transportation actions in nonattainment areas ''conform'' to the area's air quality plans. Conformity ensures that federal transportation actions do not worsen an area's air quality or interfere with its meeting the air quality standards.

One of the primary tests for conformity is to show that transportation plans and improvement programs will not cause motor vehicle emissions higher than the levels needed to make progress toward and to meet the air quality standards. These motor vehicle emissions levels are set in an area's attainment, maintenance and/or RFP demonstrations and are known as the ''transportation conformity budgets.''

We found the motor vehicle emissions budgets in the 2001 Plan adequate on February 14, 2002. 67 FR 8017 (February 21, 2002). A finding that the Bay Area has attained the 1-hour standard and that the State no longer needs to submit attainment and RFP demonstrations will not affect the continued applicability of these budgets. If the attainment demonstration is withdrawn, however, the continued applicability of the budgets could be affected.

III. Summary of EPA Actions

We are proposing to find that the Bay Area has attained the 1-hour ozone NAAQS. We are also proposing to determine that certain CAA requirements (RFP, attainment assessment, and contingency measures) no longer apply to the Bay Area should the attainment finding be finalized.

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This proposed action merely proposes to find that an area has attained a previously-established national ambient air quality standard based on an objective review of measured air quality data. It also proposed to determine that certain Clean Air Act requirements no longer apply to the Bay Area because of the attainment finding. If finalized, it would not impose any new regulations, mandates, or additional enforceable duties on any public, nongovernmental, or private entity. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this proposed rule does not impose any additional enforceable duty, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed 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 proposes to determine that an area has attained a Federal standard and thus is not subject to certain specific requirements, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''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 proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

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

Dated: October 23, 2003.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 03–27487 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3144, MB Docket No. 03–221, RM–10796]

Television Broadcast Service; Tupelo, MS

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by KB Prime Media and United Television, Inc. requesting the substitution of channel 49 for channel 35+ at Tupelo, Mississippi. TV Channel 49 can be allotted to Tupelo with a plus offset at reference coordinates 33–55–37 N. and 88–33–36 W.

DATES: Comments must be filed on or before December 8, 2003, and reply comments on or before December 23, 2003.

ADDRESSES: The Commission permits the electronic filing of all pleadings and comments in proceeding involving petitions for rule making (*except in broadcast allotment proceedings*). *See Electronic Filing of Documents in Rule Making Proceedings,* GC Docket No. 97–113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. The Commission's contractor, Natek, Inc., Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC. 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: David D. Oxenford, Shaw Pittman, 2300 N Street, NW., Washington, DC 20037–1128 (Counsel for KB Prime Media LLC) and Marvin J. Diamond, Law Offices of Marvin J. Diamond, PMB 365, 464 Common Street, Belmont, Massachusetts 02478 (Counsel for United Television, Inc.).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 03–221, adopted October 9, 2003, and released October 16, 2003. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via-e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.606 [Amended]

2. Section 73.606(b), the Table of Television Allotments under Mississippi, is amended by removing channel 35+ and adding channel 49+ at Tupelo.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–27429 Filed 10–30–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3345, MB Docket No. 03–224, RM–10802]

Digital Television Broadcast Service; Knoxville, TN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Knoxville 25, LLC, an applicant for channel 26 at Knoxville, requesting the substitution of DTV channel 7 for channel 26 at Knoxville. DTV Channel 7 can be allotted to Knoxville at reference coordinates 36–00–36 N. and 83–55–57 W. with a power of 55, a height above average terrain HAAT of 367 meters.

DATES: Comments must be filed on or before December 18, 2003, and reply comments on or before January 2, 2004.

ADDRESSES: The Commission permits the electronic filing of all pleadings and comments in proceeding involving petitions for rule making (except in broadcast allotment proceedings). *See Electronic Filing of Documents in Rule Making Proceedings,* GC Docket No. 97–113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together

with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Edward S. O'Neill, Fletcher, Heald & Hildreth, PLC, 11th Floor, 1300 North 17th Street, Arlington, Virginia 22209–3801 (Counsel for Tribune Broadcast Holdings, Inc.).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 03–224, adopted October 23, 2003, and released October 27, 2003. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via-e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.606 [Amended]

2. Section 73.606(b), the Table of Television Allotments under Tennessee is amended by removing TV channel 26- at Knoxville.

§ 73.622 [Amended]

3. Section 73.622(b), the Table of Digital Television Allotments under Tennessee is amended by adding DTV channel 7 at Knoxville.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–27431 Filed 10–30–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3028, MB Docket No. 03–213, RM–10794]

Television Broadcast Service; Saranac Lake, NY

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Channel 61 Associates, LLC, requesting the substitution of channel 40 for channel 61- at Saranac Lake, New York. TV Channel 40 can be allotted to Saranac Lake with a plus offset at reference coordinates 44–09–35 N. and 74–28–34 W. Since the community of Saranac Lake is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government has been obtained for this allotment.

DATES: Comments must be filed on or before December 1, 2003, and reply comments on or before December 16, 2003.

ADDRESSES: The Commission permits the electronic filing of all pleadings and comments in proceeding involving petitions for rule making (except in broadcast allotment proceedings). *See Electronic Filing of Documents in Rule Making Proceedings,* GC Docket No. 97–113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Lara S. Meisner, Shaw Pittman, 2300 N Street, NW., Washington, DC 20037–1128 (Counsel for Channel 61 Associates, LLC).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 03–213, adopted October 2, 2003, and released October 9, 2003. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.606 [Amended]

2. Section 73.606(b), the Table of Television Allotments under New York, is amended by removing channel 61- and adding channel 40+ at Saranac Lake.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–27430 Filed 10–30–03; 8:45 am]

BILLING CODE 6712–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1835 and 1852

RIN 2700–AC64

Research and Development Abstracts

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This is a proposed rule to amend the NASA FAR Supplement (NFS) to include a requirement for the electronic submission of abstracts of the planned research to be conducted under contracts containing research and development (R&D) effort valued at over $25,000. This requirement is being established to support NASA's implementation of section 207(g) of the E-Government Act of 2002 that mandates the development and maintenance of a repository that integrates information on research and development funded by the Federal Government. This proposed rule would help improve access to information on NASA funded research and development activities, thus providing public and private research managers improved capability for R&D program planning.

DATES: Comments should be submitted on or before December 30, 2003.

ADDRESSES: Interested parties should submit written comments to Thomas Sauret, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546. Comments may also be submitted by e-mail to: *Thomas.E.Sauret@nasa.gov.*

Comments that concern information collection requirements must be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this document. A copy of those comments may also be sent to the Agency representative named in the preceding paragraph.

FOR FURTHER INFORMATION CONTACT: Thomas Sauret, Code HK, (202) 358–1068, e-mail: *Thomas.E.Sauret@nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule would add a new section 1835.003–70, NASA Research and Development (R&D) Abstracts, and a related clause, 1852.235–75, NASA Research and Development (R&D) Abstracts. The new clause provides for the collection of abstracts or summaries for NASA funded awards with R&D effort greater than $25,000. The requirements of section 207(g) of the E-Government Act of 2002 (Pub. L. 107–347) provide the basis for this change. Section 207(g) mandates the development and maintenance of a repository that integrates information on research and development funded by the Federal Government. In furtherance of that requirement, NASA has developed a Web-based database system to collect summaries or abstracts for all the Agency's procurements containing research and development effort valued over $25,000. For procurements that include a combination of R&D with other types of services and supplies, submission of an abstract would be required only when the value of the R&D portion of the acquisition exceeds $25,000. A NASA Web site (Abstract Collection and Transmittal System (ACTS), *http://proposals.hq.nasa.gov/acts/*) has been established for recipients of NASA R&D contracts to enter their abstract data. ACTS will transfer submitted abstracts to a government-wide database sponsored by the National Science Foundation (NSF). The NSF sponsored government-wide database is available to other agencies and to the public. NASA's ACTS database is designed only as a collection and transmittal tool and will not be open to the general public.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601, et. seq.), because the administrative costs associated with the one time submission of the R&D abstract is not expected to exceed the micro-purchase threshold and should be included in the contract price.

C. Paperwork Reduction Act of 1995

This proposed rule contains information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 (d)), NASA has submitted a copy of the information collection requirements to the Office of Management and Budget (OMB) for its review and approval. OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB regarding this information collection is best assured of having its full effect if OMB receives it within 30 days of publication of this notice. This does not affect the deadline for the public to comment on the proposed regulations. All comments regarding this information collection should be sent to: Desk Officer for NASA; Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10236, New Executive Office Building; Washington, DC 20503.

Collection of Information: NASA Research and Development Abstracts Collection

The public reporting and recordkeeping burden for this collection of information is estimated to be 1,500 hours. The estimated burden has been calculated as follows:

Responses	3000
Hours per response	× 0.5 (30 min.)
Annual reporting burden.	1500 hours

The estimated number of responses shown above is the total number of NASA research-related contracts awards, as well as awards made through grants and agreements. This estimate reflects the combined paperwork clearance request the Agency is submitting to OMB.

List of Subjects in 48 CFR Parts 1835 and 1852

Government procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

Accordingly, 48 CFR Parts 1835 and 1852 are proposed to be amended as follows:

1. The authority citation for 48 CFR Parts 1835 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1835—RESEARCH AND DEVELOPMENT CONTRACTING

2. Section 1835.003–70 is added to read as follows:

1835.003–70 NASA Research and Development (R&D) Abstracts.

(a) The E-Government Act of 2002 (Pub. L. No. 107–347) mandates the development and maintenance of a repository that integrates information on research and development funded by the Federal Government. In support of that requirement, NASA will collect research abstracts and forward them to an appropriate central repository where they will be available for use by government agencies and other users.

(b) Information on R&D awards subject to the clause at 1852.235–75, NASA Research and Development (R&D) Abstracts, including contractor name and contract number, shall be automatically entered by NASA into the NASA R&D Abstract Collection and Transmittal System (ACTS) database on a monthly basis. The database may be accessed via the Web site listed in the clause. Contracting officers shall check the Web site to determine if the selected contractor is listed as an entity already registered in the ACTS database. If the contractor is registered, then no further action by the contracting officer is required. If the contractor is not already registered in ACTS, the contracting officer must obtain from their Center ACTS point of contact a new ACTS user identification and password for the selected contractor. The contracting officer shall provide the user identification and password to the contractor.

3. Section 1835.070 is amended by adding paragraph (f) to read as follows:

1835.070 NASA contract clauses and solicitation provision.

* * * * *

(f) The contracting officer shall insert the clause at 1852.235–75, NASA Research and Development (R&D) Abstracts, in all contracts that include research and development effort that exceeds $25,000. This requirement does not apply to intragovernmental transfers.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 1852.235–75 is added to read as follows:

1852.235–75 NASA Research and Development (R&D) Abstracts.

As prescribed in 1835.070(f), insert the following clause:

NASA Research and Development (R&D) Abstracts

(XX/XX)

(a) The Contractor shall, within 60 days after award (or 30 days after the award information is entered into the NASA R&D Abstract Collection and Transmittal System (ACTS) database, whichever is later), enter a summary or abstract of the research and development activity to be conducted under this contract into the ACTS database. The database may be accessed at the following URL: *http://proposals.hq.nasa.gov/acts/.*

(b) The abstract should range from 250 to 500 words in length. The abstract will be made available to the public without restrictions; therefore, caution is advised against inclusion of any material for which dissemination in the public domain may be prohibited such as trade secrets, proprietary information or export controlled information.

(c) The abstract and other pertinent award information will be included in a database of R&D abstracts from across the Federal Government. The government-wide database will include abstracts and other information concerning awards, such as the dollar value and estimated completion date. The government-wide database will be accessible to other government agencies and private organizations and will allow entities to search the database for a variety of information regarding current research awards. The NASA ACTS database will not be searchable by the general public.

(d) Access to the NASA ACTS database requires user identification and a password to ensure that only authorized personnel enter abstract information. The Contracting Officer will provide instructions regarding user identification and password access if the Contractor does not already possess an ACTS identification and password.

[FR Doc. 03–27492 Filed 10–30–03; 8:45 am]

BILLING CODE 7510–01–P

Notices

Federal Register
Vol. 68, No. 211
Friday, October 31, 2003

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Public Meetings of the Black Hills National Forest Advisory Board

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting postponement.

SUMMARY: The November 19 meeting of Black Hills National Forest Advisory Board (NFAB) has been postponed until December 3, 2003. The proposed agenda includes advisement on last month's presentation concerning forest health and fuels and ongoing discussion of fuel-load reduction. The meeting is open, and members of the public may attend any part of the meeting.

DATES: Wednesday, December 3, 2003 from 1 to 5 p.m.

ADDRESSES: SDSU West River Ag Center, 1905 Plaza Boulevard, Rapid City, SD.

FOR FURTHER INFORMATION CONTACT: Frank Carroll, Black Hills National Forest, 25041 North Highway 16, Custer, SD 57730, (605) 673–9200.

Dated: October 22, 2003.

Brad Exton,

Black Hills National Forest Supervisor.

[FR Doc. 03–27427 Filed 10–30–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Madera County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Resource Advisory Committee Meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act of 1972 (Public Law 92–463) and under the secure Rural Schools and Community Self-Determination Act of 2000 (Public Law 106–393) the Sierra National Forest's Resource Advisory Committee for Madera County will meet on Monday, November 10, 2003. The Madera Resource Advisory Committee will meet at the Yosemite Bank, Oakhurst, CA. The purpose of the meeting is: review new RAC proposals, review progress of FY 2002 accounting, review new Forest Service Region 5 RAC website, decision on Madera County RAC Mission Sub-committee proposal, report on trails project field review, and voting procedures proposal update.

DATES: The Madera Resource Advisory Committee meeting will be held Monday, November 10, 2003. The meeting will be held from 7 p.m. to 9 p.m.

ADDRESSES: The Madera County RAC meeting will be held at the Yosemite Bank, 40061 Highway 40, Oakhurst, CA 93644.

FOR FURTHER INFORMATION CONTACT: Dave Martin, U.S.D.A., Sierra National Forest, 57003 Road 225, North Fork, CA 93643, (559) 877–2218 ext. 3100; e-mail: *dmartin05@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Review new RAC proposals, (2) review progress of FY 2002 accounting, (3) review new Forest Service Region 5 RAC website, (4) decision on Madera County RAC Mission Sub-committee proposal, (5) voting procedures proposal update. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: October 24, 2003.

David W. Martin,

District Ranger.

[FR Doc. 03–27425 Filed 10–30–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–930–6333 DT]

Notice of Availability (NOA) of Final Supplemental Environmental Impact Statement (FSEIS) for the Clarification of Language in the 1994 Record of Decision for the Northwest Forest Plan; National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl (Proposal To Amend Wording About the Aquatic Conservation Strategy); Western Oregon and Washington, and Northwestern California

AGENCY: Forest Service, USDA; Bureau of Land Management, USDI.

ACTION: Notice of availability.

SUMMARY: The USDI Bureau of Land Management and the USDA Forest Service have prepared a FSEIS to consider an amendment of selected portions of the Aquatic Conservation Strategy (ACS) (part of the Northwest Forest Plan) to clarify guidance intended to protect and restore watersheds. The Secretaries of Agriculture and the Interior propose limited changes to language about how to demonstrate that projects follow the ACS. Projects needed to achieve Northwest Forest Plan goals have been delayed or stopped due to misapplication of certain passages in the ACS. The agencies are responding to the underlying need for increased agency success in planning and implementing projects, to the extent that the current wording has hindered the agencies' ability to follow Northwest Forest Plan principles and achieve its goals. The goals of the Northwest Forest Plan cannot be achieved without project implementation. Copies of the FSEIS may be requested from the address below or access on line at *http:/// www.reo.gov/acs/.*

DATES: Publication of the Environmental Protection Agency (EPA) Notice of Availability and filing of the FSEIS in the **Federal Register** initiates a 30-day review period. Comments will be accepted at the addresses below. Individual respondents may request confidentiality. If you wish to withhold

your name or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses will be made available for public inspection in their entirety. No public meetings have been scheduled.

ADDRESSES: To request copies of the document, add your name to the mailing list, or submit written comments. Contact: ACS EIS, 333 SW. First Avenue, P.O. Box 3623, Portland, Oregon 97208; FAX: (503) 326–2396 (please address fax to ''ACS EIS'').

FOR FURTHER INFORMATION CONTACT: Joyce Casey; phone (503) 326–2430; E-mail: *jcasey01@fs.fed.us* or Leslie Frewing-Runyon; phone (503) 808–6088; E-mail: *lfrewing@or.blm.gov*.

SUPPLEMENTARY INFORMATION: The proposed amendment would make limited changes to language within Attachment A of the 1994 Record of Decision (ROD) for the Northwest Forest Plan. These changes would amend Forest Service and Bureau of Land Management plans throughout the Northwest Forest Plan area. The limited changes clarify that the proper scale for federal land managers to evaluate progress toward achievement of the ACS objectives is the fifth-field watershed and broader scales. The changes would also document requirements for land managers to demonstrate that projects follow the ACS. It would remove the expectation that all projects must achieve all ACS objectives, but would reinforce the role of watershed analysis in providing context for project planning. Current land allocations, standards and guidelines, and Northwest Forest Plan goals and objectives would be retained.

Three alternatives are considered in the FSEIS: No Action, the Proposed Action, and Alterative A. The No Action Alternative would not change existing language within the ACS. The Proposed Action and Alternative A would make limited changes to clarify documentation requirements. Alternative A is the Preferred Alternative. If the Preferred Alternative is approved, implementation of the range of projects envisioned under the Northwest Forest Plan would be more likely. Land managers would more successfully demonstrate that projects follow the ACS.

The Secretaries of Agriculture and the Interior propose limited changes to language about how to implement the ACS. The ACS is intended to maintain and restore the ecological health of watersheds and aquatic ecosystems within the Northwest Forest Plan area. The ACS includes language that has been interpreted to mean that decision-makers must demonstrate that a proposed project will attain all of the ACS objectives. These objectives were never intended to be site-specific standards; rather, they were intended to be achieved at the fifth-field watershed scale and broader, over the long term. Confusion related to the existing language has hindered federal land managers' ability to plan and implement projects needed to achieve Northwest Forest Plan goals.

Readers should note that the Secretary of Agriculture and the Secretary of the Interior are the responsible officials for this proposed action. Therefore, no administrative review (''appeal'') through the Forest Service will be available on the ROD under 36 CFR 217, and no administrative review (''protest'') through the Bureau of Land Management will be available on the ROD under 43 CFR 1610.5–2. Because there is no administrative review of the decision, the ROD will not be signed until 30 days after the EPA Notice of Availability for the FSEIS appears in the **Federal Register**.

Dated: October 22, 2003.

Charles E. Wassinger,

Associate State Director, Oregon/Washington State Office.

Michael Ash,

Deputy Regional Forester, Pacific Northwest Region.

[FR Doc. 03–27304 Filed 10–30–03; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Brazos Electric Power Cooperative, Inc.; Notice of Availability of a Finding of No Significant Impact

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of availability of a finding of no significant impact.

SUMMARY: Notice is hereby given that the Rural Utilities Service (RUS) has made a finding of no significant impact in connection with possible impacts related to the construction and operation of a 500 megawatt combined-cycle combustion turbine generation facility proposed by Brazos Electric Power Cooperative (Brazos), of Waco, Texas.

FOR FURTHER INFORMATION CONTACT: Dennis E. Rankin, Environmental Protection Specialist, RUS, Engineering and Environmental Staff, Stop 1571, 1400 Independence Avenue, SW., Washington, DC 20250–1571, telephone: (202) 720–1953 or e-mail: *dennis.rankin@usda.gov.*

SUPPLEMENTARY INFORMATION: Brazos is proposing to construct a 500 MW gas-fired combined-cycle electric generation station near Joplin in Jack County, Texas. The project will consist of two combustion turbines and heat recovery steam generators and one steam turbine with a water-cooled steam surface condenser. Associated facilities include the construction of a gas pipeline, water and wastewater pipelines and a 138 kV electric transmission line. Some other transmission facilities in the area will be upgraded. RUS may provide financing assistance for this project.

Based on its environmental and engineering assessment of the project, RUS has concluded that the construction and operation of the proposed facilities would have no significant impact to the quality of the human environment. Therefore, RUS will not prepare an environmental impact statement for its action related to this project.

Copies of the FONSI are available for review at, or can be obtained from, RUS at the address provided herein.

Dated: October 28, 2003.

Blaine D. Stockton,

Assistant Administrator, Electric Program, Rural Utilities Service.

[FR Doc. 03–27473 Filed 10–30–03; 8:45 am]

BILLING CODE 3410–15–U

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from Procurement List.

SUMMARY: This action adds to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List products previously furnished by such agencies.

EFFECTIVE DATE: November 30, 2003.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION:

Additions

On August 9, August 29, and September 5, 2003, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (68 FR 47292, 51961/51962, and 52739/52740) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. The action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

Product/NSN: C Shell CD Cases
7045–00–NIB–0181—Clear
7045–00–NIB–0189—5 Colors
NPA: Wiscraft Inc.—Wisconsin Enterprises for the Blind, Milwaukee, Wisconsin.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.
Product/NSN: Envelope, Inter-Departmental, Colored
7530–01–498–1086—Blue Kraft
7530–01–498–1088—Yellow Kraft
7530–01–498–1089—Red Kraft
NPA: Gateway Community Industries, Inc., Kingston, New York.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, NY.
Product/NSN: H2Orange2
7930–00–NIB–0163—Ultimate Cleaner/Degreaser
7930–00–NIB–0326—Concentrate 117 Cleaner/Degreaser
930–00–NIB–0327—Grout Safe
7930–00–NIB–0341—Crystal Carpet Concentrate
7930–00–NIB–0342—Quick Spot Crystal Carpet Spot Remover
7930–00–NIB–0353—Mineral Shock Cleaner
NPA: Blind Industries & Services of Maryland, Baltimore, Maryland.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.
Product/NSN: Lighted Baton
6260–00–NIB–0005—Amber
6260–00–NIB–0006—InfraRed
6260–00–NIB–0008—Red
6260–00–NIB–0009—Green
6260–00–NIB–0010—Blue
6260–00–NIB–0011—Amber/Red
NPA: L.C. Industries For The Blind, Inc., Durham, North Carolina.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.
Product/NSN: Maritime Load Carriage System Kit (MLCS)
8415–00–NSH–0658
NPA: Chautauqua County Chapter, NYSARC, Jamestown, New York.
Contract Activity: U.S. Army Robert Morris Acquisition Center, Natick, Massachusetts.
Product/NSN: Skilcraft SAVVY Cleaning Products
7930–00–NIB–0080—SKILCRAFT SAVVY Green Plus—1 gallon
7930–00–NIB–0081—SKILCRAFT SAVVY Green Plus—5 gallon
7930–00–NIB–0082—SKILCRAFT SAVVY Green Plus—55 gallon
7930–00–NIB–0152—SKILCRAFT SAVVY Unreal Spot Remover—32 ounce
7930–00–NIB–0153—SKILCRAFT SAVVY Unreal Spot Remover—1 gallon
7930–00–NIB–0154—SKILCRAFT SAVVY Unreal Spot Remover—5 gallon
7930–00–NIB–0155—SKILCRAFT SAVVY Unreal Spot Remover—55 gallon
7930–00–NIB–0156—SKILCRAFT SAVVY Non Acid Bathroom Cleaner—32 ounce
7930–00–NIB–0158—SKILCRAFT SAVVY Non Acid Bathroom Cleaner—5 gallon
7930–00–NIB–0159—SKILCRAFT SAVVY Non Acid Bathroom Cleaner—55 gallon
7930–00–NIB–0173—SKILCRAFT SAVVY Green Plus—32 ounce
7930–00–NIB–0183—SKILCRAFT SAVVY Green—32 ounce
7930–00–NIB–0184—SKILCRAFT SAVVY Green—5 gallon
7930–00–NIB–0185—SKILCRAFT SAVVY Green—1 gallon
7930–00–NIB–0189—SKILCRAFT SAVVY Green—55 gallon
NPA: Susquehanna Association for the Blind and Visually Impaired, Lancaster, Pennsylvania.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.
Product/NSN: Stand Up—Vertical Grip Stapler
7520–00–NSH–0200
NPA: The Arc of Bergen and Passaic Counties, Inc., Hackensack, New Jersey.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.
Product/NSN: Staple Remover
7520–00–162–6177
NPA: The Arc of Bergen and Passaic Counties, Inc., Hackensack, New Jersey.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.

Services

Service Type/Location: Custodial Services
VA Outpatient Clinic, Daytona Beach, Florida
NPA: ACT CORP., Daytona Beach, Florida.
Contract Activity: North Florida/South Georgia Veterans Health System, Gainesville, Florida.
Service Type/Location: Duplication and Copy Machine Operation
GSA 10 Causeway Street, 9th Floor, Boston, Massachusetts
NPA: Morgan Memorial Goodwill Industries, Boston, Massachusetts.
Contract Activity: GSA Region 1, Boston, Massachusetts.
Service Type/Location: Janitorial/Custodial
Leetown Science Center, Kearneysville, West Virginia
NPA: Job Squad, Inc., Clarksburg, West Virginia.
Contract Activity: U.S. Geological Survey, Reston, Virginia.
Service Type/Location: Janitorial/Custodial
Minton-Capehart Federal Building, Indianapolis, Indiana
NPA: GW Commercial Services, Inc., Indianapolis, Indiana.
Contract Activity: GSA, Public Buildings Service (5P), Chicago, Illinois.
Service Type/Location: Storage, Handling & Distribution of Consumer Labeling Initiative, Read the Label First! Promotional Items
Environmental Protection Agency, Washington, DC
NPA: Virginia Industries for the Blind, Charlottesville, Virginia.
Contract Activity: Environmental Protection Agency, Washington, DC.
Service Type/Location: Telephone Switchboard Operations
VA Medical Center, Kansas City, Missouri.
NPA: Alphapointe Association for the Blind, Kansas City, Missouri.
Contract Activity: VA Heartland Network 15, Leavenworth, Kansas.

Deletions

On July 11, 2003, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (68 FR 41298) of proposed deletions to the Procurement List. After consideration of the relevant matter presented, the Committee has determined that the products listed

below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action may not result in any additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products deleted from the Procurement List.

End of Certification

Accordingly, the following products are deleted from the Procurement List:

Products

Product/NSN: Dropcloth
8340–01–444–3652
8340–01–444–3653
NPA: East Texas Lighthouse for the Blind, Tyler, Texas.
Contract Activity: GSA, Southwest Supply Center, Fort Worth, Texas.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 03–27471 Filed 10–30–03; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–813]

Canned Pineapple Fruit From Thailand: Notice of Extension of Time Limit of Final Results of Antidumping Duty Administrative Review

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

EFFECTIVE DATE: October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Marin Weaver at (202) 482–2336 or Charles Riggle at (202) 482–0650, Office of AD/CVD Enforcement 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Statutory Time Limits

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), and section 351.213(h)(2) of the Department's regulations require the Department to complete the preliminary results within 245 days after the last day of the anniversary month of an order/finding for which a review is requested and the final results within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary results to a maximum of 365 days after the last day of the anniversary month of an order/finding for which a review is requested and for the final results to 180 days (or 300 days if the Department does not extend the time limit for the preliminary results) from the date of publication of the preliminary results.

Background

On August 27, 2002, the Department of Commerce (the Department) published a notice of initiation of administrative review of the antidumping duty order on canned pineapple fruit from Thailand, covering the period July 1, 2001, through June 30, 2002 (67 FR 55000). On September 25, 2002, the Department published a correction to the initiation (67 FR 60210). On March 27, 2003 the Department partially extended the preliminary results (68 FR 14941). On June 6, 2003, the Department further extended the preliminary results (68 FR 33910). On June 27, 2003, the Department published the preliminary results for this review. See *Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review, and Preliminary Determination To Not Revoke Order in Part: Canned Pineapple Fruit From Thailand*, 68 FR 38291 (June 27, 2003). In our notice of preliminary results, we stated our intention to issue the final results of this review no later than 120 days after publication of the preliminary results. The final results are currently due on October 27, 2003.

Extension of Time Limit for Final Results of Review

We determine that it is not practicable to complete the final results of this review within the original time limit for the reasons stated in our memorandum from Gary Taverman, Director, Office 5, to Holly Kuga, Acting Deputy Assistant Secretary for AD/CVD Enforcement II, which is on file in the Central Records Unit, Room B–099 of the main Commerce building. Therefore, the Department is extending the time limit for completion of the final results until no later than November 10, 2003.

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

Dated: October 27, 2003.

Holly Kuga,

Acting Deputy Assistant Secretary for AD/CVD Enforcement II.

[FR Doc. 03–27494 Filed 10–30–03; 8:45 am]

BILLING CODE 3570–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–863]

Notice of Final Results of Antidumping Duty New Shipper Review: Honey From the People's Republic of China

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

SUMMARY: On June 2, 2003, the Department published the preliminary results of the new shipper review of the antidumping duty order on honey from the People's Republic of China (68 FR 33099). The review covers one producer/exporter, Wuhan Bee Healthy Co., Ltd. (Wuhan), and exports of the subject merchandise to the United States during the period December 1, 2001, through May 31, 2002.

Based on our analysis of the record, including factual information obtained since the preliminary results, we have made changes to Wuhan's margin calculations to adjust the Indian surrogate values used to value the raw honey input, and to adjust our calculation of the financial ratios and their application in our normal value calculation. We also adjusted the cost of manufacture (COM) to offset for Wuhan's by-product revenues. Therefore, the final results differ from the preliminary results. See ''Final Results of Review'' section below.

EFFECTIVE DATE: October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Angelica Mendoza or Donna Kinsella, AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3019 or (202) 482–0194, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 23, 2003, the Department extended the preliminary results of this new shipper review by 120 days until May 27, 2003. See *Honey from the People's Republic of China: Extension of*

Time Limits for Preliminary Results of New Shipper Antidumping Duty Review, 68 FR 4761 (January 30, 2003).

We published in the **Federal Register** the preliminary results of this new shipper review on June 3, 2003. See *Notice of Preliminary Results of Antidumping Duty New Shipper Review: Honey from the People's Republic of China,* 68 FR 33099 (June 3, 2003) (Preliminary Results). On July 16, 2003, the Department extended the final results of this new shipper review by 60 days until October 24, 2003. See *Honey from the People's Republic of China: Extension of Time Limit of Final Results of New Shipper Review,* 68 FR 42001 (July 16, 2003). See also Memorandum to the File through Donna L. Kinsella: Correction of *Notice of Extension of Time Limit of Final Results of New Shipper Review; Honey from the People's Republic of China* (A–570–863) dated July 22, 2003.

The period of review (POR) is December 1, 2001, through May 31, 2002. We invited parties to comment on our *Preliminary Results.* We received case briefs from Wuhan Bee Healthy Co., Ltd. (Wuhan) and petitioners (the American Honey Producers Association and the Sioux Honey Association (collectively, petitioners)), on July 21, 2003. We received rebuttal briefs from the same parties on July 28, 2003. On July 31, 2003, we held a public hearing for this new shipper review.

Scope of the Antidumping Duty Order

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

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

Analysis of Comments Received

All issues raised in the briefs are addressed in the Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the issues raised, all of which are in the Issues and Decision Memorandum, is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in the briefs and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit, room B–099 of the main Department building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at *http://ia.ita.doc.gov.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on the use of additional publicly available information and the comments received from the interested parties, we have made changes to the margin calculation for Wuhan. For a discussion of these changes, see Issues and Decision Memorandum. For business proprietary details of our analysis of the changes described below to our preliminary margin calculations, see Memo to the File regarding Analysis of the Data Submitted by Wuhan Bee Healthy Co., Ltd. in the Final Results of the New Shipper Review on the Antidumping Duty Order on Honey from the People's Republic of China (October 24, 2003) (Final Analysis Memo) and Memo to the File regarding Final Results of New Shipper Review of the Antidumping Duty Order on Honey from the People's Republic of China; Factors of Production Valuation (October 24, 2003) (Final FOP Memo).

For the final results, we adjusted the surrogate value used to calculate the cost of the raw honey input to reflect more accurately monthly raw honey price increases in India during the POR. See Issues and Decision Memorandum at Comment 2 and Final FOP Memo at 2 and Attachments 2 and 3.

We continue to calculate surrogate ratios for factory overhead (FO), selling, general and administrative expenses (SG&A), and profit using the 2001–2002 annual report from the Mahabaleshwar Honey Producers Cooperative (MHPC). However, we did adjust our calculations of the FO and SG&A surrogate ratios. See Issues and Decision Memorandum at Comment 3 and Final FOP Memo at 3 and Attachment 9.

In accordance with the Department's current practice, for these final results, we have also adjusted our calculation of Wuhan's COM to account for its by-product revenue. To accomplish this, we applied the above-mentioned surrogate ratios as adjusted to Wuhan's COM exclusive of the by-product offset, because the denominator in the ratio and the amount to which the ratio is applied must be on the same basis. See *Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,* 68 FR 10440 (March 5, 2003). See Final Analysis Memo at 2 and Final FOP Memo at Attachment 11.

Final Results of Review

We determine that the following antidumping margin percentage exists for Wuhan during the period December 1, 2001, through May 31, 2002:

Manufacturer and exporter	Margin (percent)
Wuhan Bee Healthy Co., Ltd.	32.84

Assessment of Antidumping Duties

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated an exporter/importer specific assessment rate for merchandise subject to this review. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of review. We will direct CBP to assess the resulting assessment rates against the CBP entered values for the subject merchandise on each of the importer's/customer's entries during the review period.

Cash Deposits Requirements

Bonding will no longer be permitted to fulfill security requirements for shipments from Wuhan of honey from the PRC entered, or withdrawn from warehouse, for consumption in the United States on or after the publication of this notice in the **Federal Register**.

The above cash deposit rate shall be required for shipments of honey that is both produced and exported by Wuhan, entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results for this new shipper review, as provided by section 751(a)(1) of the Act. These deposit requirements shall remain in effect until publication of the final results of the next administrative review. There are no changes to the rates applicable to any other company under this antidumping duty order.

Notification to Interested Parties

The Department will disclose calculations performed in connection with these final results of review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). This notice serves as a final reminder to importers of their

responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 351.305(a)(3) of the Department's regulations. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This new shipper review and notice are in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: October 24, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix I

Comments Discussed in Issues and Decision Memorandum

1. Bona Fides of Wuhan Bee Healthy Co., Ltd.'s U.S. Sale.
2. Surrogate Value for Raw Honey.
3. Factory Overhead, SG&A, and Profit Ratios.
4. Surrogate Value for Coal.
5. Surrogate Value for Electricity.
6. Exclusion of Certain Import Data in Calculating Certain Surrogate Values.

[FR Doc. 03–27493 Filed 10–30–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–839]

Certain Softwood Lumber Products From Canada: Preliminary Results of New Shipper Countervailing Duty Review

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

ACTION: Notice of preliminary results of countervailing duty new shipper review.

SUMMARY: The Department of Commerce (the Department) is conducting a new shipper review of Scierie La Pointe & Roy Ltee. (La Pointe & Roy) under the countervailing duty order on certain softwood lumber products from Canada for the period January 1, 2002, through December 31, 2002. If the final results remain the same as the preliminary results of this new shipper review, we will instruct the U.S. Customs and Border Protection (CBP) to assess countervailing duties as detailed in the ''Preliminary Results of New Shipper Review'' section of this notice. Interested parties are invited to comment on the preliminary results of this new shipper review. (*See* the ''Public Comment'' section of this notice).

EFFECTIVE DATE: October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Eric B. Greynolds or Meg Ward, AD/CVD Enforcement, Office VI, Group II, Import Administration, U.S. Department of Commerce, Room 4012, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On May 22, 2002, the Department published in the **Federal Register** the countervailing duty order on certain softwood lumber products from Canada. *See Notice of Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Certain Softwood Products From Canada,* 67 FR 36070 (May 22, 2002). On November 26, 2002, we received a request for a new shipper review from La Pointe & Roy, the respondent company in the proceeding. On December 31, 2002, we initiated a new shipper review covering the period January 1, 2002, through December 31, 2002. *See Certain Softwood Products From Canada: Notice of Initiation of Antidumping Duty New Shipper Review for the Period May 22, 2002, Through October 31, 2002; Notice of Initiation of Countervailing Duty New Shipper Review for the Period January 1, 2002, Through December 31, 2002; and Rescission of Countervailing Duty Expedited Review,* 68 FR 1030 (January 8, 2003).

On February 24, 2003, we issued a questionnaire to La Pointe & Roy. On May 28, 2003, we extended the period for the completion of the preliminary results pursuant to section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act). *See Certain Softwood Lumber Products From Canada: Notice of Extension of Time Limit for the Preliminary Results of Countervailing Duty New Shipper Review,* 68 FR 33921 (June 6, 2003). On April 4, 2003, La Pointe & Roy submitted its questionnaire response. On September 5, 2003, the Department issued a questionnaire to the Government of Canada (GOC) and the Government of Quebec (GOQ). On September 22, 2003, the GOC and GOQ submitted a combined questionnaire response.

In accordance with 19 CFR 351.214(a), this new shipper review covers only those producers or exporters for which a review was specifically requested. Accordingly, this new shipper review covers subject merchandise produced and exported by La Pointe & Roy.

Scope of Review

The products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:

(1) Coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters;

(2) Coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed;

(3) Other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood moldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and

(4) Coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this order is dispositive.

As specifically stated in the Issues and Decision Memorandum accompanying the *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber*

Products from Canada (67 FR 15539; April 2, 2002) (*see* comment 53, item D, page 116, and comment 57, item B–7, page 126), available at *http://www.ia.ita.doc.gov,* drilled and notched lumber and angle cut lumber are covered by the scope of this order.

The following softwood lumber products are excluded from the scope of this order provided they meet the specified requirements detailed below:

(1) *Stringers* (pallet components used for runners): if they have at least two notches on the side, positioned at equal distance from the center, to properly accommodate forklift blades, properly classified under HTSUS 4421.90.98.40.

(2) *Box-spring frame kits:* if they contain the following wooden pieces—two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails should be radius-cut at both ends. The kits should be individually packaged, they should contain the exact number of wooden components needed to make a particular box spring frame, with no further processing required. None of the components exceeds 1″ in actual thickness or 83″ in length.

(3) *Radius-cut box-spring-frame components,* not exceeding 1″ in actual thickness or 83″ in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantial cuts so as to completely round one corner.

(4) *Fence pickets* requiring no further processing and properly classified under HTSUS heading 4421.90.70, 1″ or less in actual thickness, up to 8″ wide, 6′ or less in length, and have finials or decorative cuttings that clearly identify them as fence pickets. In the case of dog-eared fence pickets, the corners of the boards should be cut off so as to remove pieces of wood in the shape of isosceles right angle triangles with sides measuring ¾ inch or more.

(5) *U.S. origin lumber* shipped to Canada for minor processing and imported into the United States, is excluded from the scope of this order if the following conditions are met: (1) The processing occurring in Canada is limited to kiln-drying, planing to create smooth-to-size board, and sanding, and (2) if the importer establishes to CBP satisfaction that the lumber is of U.S. origin.

(6) *Softwood lumber products contained in single family home packages or kits,*[1] regardless of tariff classification, are excluded from the scope of this order if the importer certifies to items 6 A, B, C, D, and requirement 6 E is met:

A. The imported home package or kit constitutes a full package of the number of wooden pieces specified in the plan, design or blueprint necessary to produce a home of at least 700 square feet produced to a specified plan, design or blueprint;

B. The package or kit must contain all necessary internal and external doors and windows, nails, screws, glue, sub floor, sheathing, beams, posts, connectors, and if included in the purchase contract, decking, trim, drywall and roof shingles specified in the plan, design or blueprint.

C. Prior to importation, the package or kit must be sold to a retailer of complete home packages or kits pursuant to a valid purchase contract referencing the particular home design plan or blueprint, and signed by a customer not affiliated with the importer;

D. Softwood lumber products entered as part of a single family home package or kit, whether in a single entry or multiple entries on multiple days, will be used solely for the construction of the single family home specified by the home design matching the entry.

E. For each entry, the following documentation must be retained by the importer and made available to the CBP upon request:

i. A copy of the appropriate home design, plan, or blueprint matching the entry;

ii. A purchase contract from a retailer of home kits or packages signed by a customer not affiliated with the importer;

iii. A listing of inventory of all parts of the package or kit being entered that conforms to the home design package being entered;

iv. In the case of multiple shipments on the same contract, all items listed in E(iii) which are included in the present shipment shall be identified as well.

Lumber products that the CBP may classify as stringers, radius cut box-spring-frame components, and fence pickets, not conforming to the above requirements, as well as truss components, pallet components, and door and window frame parts, are covered under the scope of this order and may be classified under HTSUS subheadings 4418.90.45.90, 4421.90.70.40, and 4421.90.97.40.

Finally, as clarified throughout the course of the investigation, the following products, previously identified as Group A, remain outside the scope of this order. They are:

1. Trusses and truss kits, properly classified under HTSUS 4418.90;
2. I-joist beams;
3. Assembled box spring frames;
4. Pallets and pallet kits, properly classified under HTSUS 4415.20;
5. Garage doors;
6. Edge-glued wood, properly classified under HTSUS item 4421.90.98.40;
7. Properly classified complete door frames;
8. Properly classified complete window frames;
9. Properly classified furniture.

In addition, this scope language has been further clarified to now specify that all softwood lumber products entered from Canada claiming non-subject status based on U.S. country of origin will be treated as non-subject U.S.-origin merchandise under the countervailing duty order, provided that these softwood lumber products meet the following condition: upon entry, the importer, exporter, Canadian processor and/or original U.S. producer establish to CBP's satisfaction that the softwood lumber entered and documented as U.S.-origin softwood lumber was first produced in the United States as a lumber product satisfying the physical parameters of the softwood lumber scope.[2] The presumption of non-subject status can, however, be rebutted by evidence demonstrating that the merchandise was substantially transformed in Canada.

Analysis of Programs

I. Program Preliminarily Determined To Be Countervailable

A. Private Forest Development Program (PFDP)

In the underlying investigation, the Department found the PFDP to be countervailable. *See* ''Program Administered by the Province of Quebec,'' in the March 21, 2002, Issues and Decision Memorandum that accompanied the *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 FR 15545 (April 2, 2002) (*Lumber Final*). Specifically, in the underlying investigation, the Department determined that the PFDP provides silviculture support to private

[1] To ensure administrability, we clarified the language of exclusion number 6 to require an importer certification and to permit single or multiple entries on multiple days as well as instructing importers to retain and make available for inspection specific documentation in support of each entry.

[2] *See* the scope clarification message (# 3034202), dated February 3, 2003, to the CBP, regarding treatment of U.S. origin lumber on file in the Central Records Unit, Room B–099 of the main Commerce Building.

woodlot owners through payments, either made directly to forest engineers or via reimbursement to the woodlot owner, for silviculture treatments executed on private land. Thus, we found that payments under the PFDP constitute a financial contribution under section 771(5)(D)(i) of the Act and that the benefit conferred under the PFDP is equal to the grant of funds provided during the review period. We further found in the underlying investigation that because the PFDP is limited to private woodlot owners, the assistance is specific under section 771(5A)(D) of the Act.

In its April 4, 2003, questionnaire response, La Pointe & Roy reported that it received assistance from an agency known as the Agence de Mise en Valeur de la Foret Privee de L'Estrie (AMFE) during calendar year 2002, the period of review (POR). Specifically, AMFE arranged for a company called the A.F.A. Des Appalaches Inc. (AFA) to perform silviculture work on a private woodlot held by La Pointe & Roy. La Pointe & Roy paid AFA for a portion of the work while AMFE directly compensated AFA for the remaining amount. La Pointe & Roy received similar assistance from the Agence de Mise en Valuer des Foret Privees de Chaudiere (AMFC) in 1999. In its questionnaire response, La Pointe & Roy stated that it did not know whether AMFE paid for the work performed by AFA with assistance from the GOQ-run PFDP. It stated the same with respect to the assistance received from AMFC.

According to the GOQ, AMFE and AMFC are two of 17 private regional agencies established in 1996 for the protection and development of private forest land in Quebec. Specifically, these agencies promote private forest development by providing information, education, and reimbursement to private woodlot owners for silviculture work. Each regional agency has a board of directors comprised of representatives from the municipality concerned, forest producer groups, holders of wood processing plant permits, and the GOQ's Ministry of Natural Resources (MRN). The agencies are funded by the MRN, via the PFDP, as well as by fees the MRN collects from holders of wood processing plant permits. Silviculture reimbursements made by the regional agencies cover a maximum of 80 percent of the cost of the silviculture work performed by or on behalf of the private woodlot owners. Private woodlot owners receiving the assistance are responsible for funding the difference.

La Pointe & Roy received assistance from AMFE and AMFC. We preliminarily determine that the PFDP assistance is countervailable. While the GOQ states that AMFE and AMFC are private organizations with no governmental ties, this does not appear to be the case. We note that all of the funding for these organizations is either provided by the MRN/GOQ or is provided by means of government-mandated private contributions and, as such, AMFE and AMFC appear to be government authorities. Consequently, we preliminarily find the existence of a subsidy in the form of a government financial contribution within the meaning of section 771(5)(B)(i) of the Act (direct transfer of funds). To the extent that AMFE and AMFC are non-governmental, however, we preliminarily find the existence of a subsidy in the form of a government ''payment to a funding mechanism to provide a financial contribution'' or government action that ''entrusts or directs'' a financial contribution within the meaning of section 771(5)(B)(iii) of the Act. Further, we preliminarily determine that the assistance received by La Pointe & Roy conferred a benefit in the form of a grant. Finally, we continue to find that this program is specific under section 771(5A)(D) of the Act, because assistance under this program is limited to private woodlot owners.

In accordance with 19 CFR 351.524(b)(2), we have allocated all of the grants provided under the PFDP to the year of receipt because the total amounts approved under the program are less than 0.5 percent of the company's total sales of softwood lumber products in the year of receipt, net of resales. Using this methodology, the net subsidy rate attributable to La Pointe & Roy under the PFDP is 0.08 percent *ad valorem.*

II. Programs Preliminarily Determined To Be Not Used

A. Provincial Stumpage Program

In the underlying investigation, the Department determined that the stumpage fees paid to harvest and cut Crown timber by softwood lumber producers, which are set by the provincial governments, conferred a countervailable benefit on the production and exportation of the subject merchandise. *See* ''Provincial Stumpage Programs Determined To Confer Subsidies,'' in the March 21, 2002, Issues and Decision Memorandum that accompanied the *Lumber Final.* In this new shipper review, La Pointe & Roy stated that it acquired all of its logs, its sole input, from private lands. Because La Pointe & Roy has stated that it did not utilize any inputs from the Crown during the POR, we preliminarily determine that it did not use the program.

B. Export Assistance Under the Societe de Developpement Industrial du Quebec (SDI)/Investissement Quebec(IQ)

La Pointe & Roy stated in its questionnaire response that it did not apply for, use or benefit from SDI/IQ during the POR, therefore, we preliminarily determine that it did not use the program. In the underlying investigation, the Department determined that the export assistance under SDI/IQ established, in part, to facilitate export activities, did not confer a countervailable benefit on the exportation of subject merchandise, given that the interest rates paid under this program were equal to or higher than the interest rates charged on comparable commercial loans at the time of the investigation. *See* ''Programs Determined Not to Confer a Benefit,'' in the March 21, 2002, Issues and Decision Memorandum that accompanied the *Lumber Final.* As no benefit was conferred during the POI, a final determination of this program's countervailability was not made. We are not further examining this program in the instant review because La Pointe & Roy did not use it.

C. Assistance Under Articles 7 and 28 of the SDI

La Pointe & Roy stated in its questionnaire response that it did not apply for, use or benefit from loans, loan guarantees or grants issued under Articles 7 and 28 of the SDI during the POR, therefore, we preliminarily determine that it did not use the program. In the underlying investigation, the Department determined that no benefit was provided by loans issued under Article 7 and 28 of the SDI because the interest rates charged under this program were equal to or higher than the interest rates charged on comparable commercial loans at the time of the investigation. *See* ''Programs Determined Not to Confer a Benefit,'' in the March 21, 2002, Issues and Decision Memorandum that accompanied the *Lumber Final.* As no benefit was conferred during the POI, a final determination of this program's countervailability was not made. We are not further examining this program in the instant review because La Pointe & Roy did not use it.

D. Assistance from the Societe de Recuperation d'Exploitation et de Developpement Forestiers du Quebec (Rexfor)

La Pointe & Roy stated in its questionnaire response that it did not apply for, use or benefit from loans or loan guarantees from Rexfor during the POR, therefore, we preliminarily determine that it did not use the program. In the underlying investigation, the Department determined that no benefit was provided by loans issued under Rexfor because the interest rates charged under this program were equal to or higher than the interest rates charged on comparable commercial loans at the time of the investigation. *See* ''Programs Determined Not to Confer a Benefit,'' in the March 21, 2002, Issues and Decision Memorandum that accompanied the *Lumber Final*. As no benefit was conferred during the POI, a final determination of this program's countervailability was not made. We are not further examining this program in the instant review because La Pointe & Roy did not use it.

Preliminary Results of New Shipper Review

In accordance with section 751(a)(2)(B)(i) of the Act, we have determined an individual rate for the manufacturer of the subject merchandise participating in this new shipper review. We preliminarily determine the total estimated net countervailable subsidy rate to be:

Producer/Exporter	Net subsidy rate
Scierie La Pointe & Roy Ltee.	0.08 percent *ad valorem*

As provided for in the Act and 19 CFR 351.106(c)(1) of the Department's regulations, any rate less than 0.5 percent *ad valorem* in a new shipper review is *de minimis*. Accordingly, if the final results of this new shipper review remain the same as the preliminary results, no countervailing duties will be assessed. The Department will instruct CBP to liquidate without regard to countervailing duties, shipments of the subject merchandise (*e.g.*, certain softwood lumber from Canada) produced and exported by La Pointe & Roy entered, or withdrawn from warehouse, for consumption on or after May 22, 2002 and on or before December 31, 2002. Also, the cash deposit rates will be set at zero for this company. The Department will issue appropriate appraisement instructions directly to the CBP within 15 days of publication of the final results of this review.

Public Comment

Pursuant to 19 CFR 351.224(b), the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the date of publication of this notice. Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Case briefs must be submitted within 30 days after the date of publication of this notice, and rebuttal briefs, limited to arguments raised in case briefs, must be submitted no later than five days after the time limit for filing case briefs. Parties who submit argument in this proceeding are requested to submit with the argument: (1) a statement of the issue, and (2) a brief summary of the argument. Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f).

Also, pursuant to 19 CFR 351.310, within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Secretary specifies otherwise, the hearing, if requested, will be held two days after the date of submission of rebuttal briefs, that is, thirty-seven days after the date of publication of these preliminary results.

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under 19 CFR 351.309(c)(ii), are due. The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are issued and published in accordance with section 751(a)(1) and 777(i)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 U.S.C. 1677f(1)).

Dated: October 24, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03–27495 Filed 10–30–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Federal Consistency Appeal by Millennium Pipeline Company From an Objection by the New York Department of State

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (Commerce).

ACTION: Notice of extension of time—administrative appeal decision.

SUMMARY: This notice announces that the due date for a decision of an administrative appeal filed with the Department of Commerce by the Millennium Pipeline Company (Consistency Appeal of Millennium Pipeline Company, L.P.) has been extended.

DATES: A decision for the Millennium Pipeline Company's administrative appeal is to be issued no later than December 15, 2003.

ADDRESSES: Materials from the appeal record are available at the Internet site *http://www.ogc.doc.gov/czma.htm* and at the Office of the General Counsel for Ocean Services, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, 1305 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Branden Blum, Senior Counselor, Office of the General Counsel for Ocean Services, via e-mail at *gcos.inquiries@noaa.gov,* or at 301–713–2967, extension 186.

SUPPLEMENTARY INFORMATION: This notice announces an extension of the 90-day deadline for issuing a final decision of an administrative appeal filed by the Millennium Pipeline Company, L.P. (Millennium) pursuant to the Coastal Zone Management Act of 1972 (CZMA), as amended, 16 U.S.C. 1451 *et seq.* The appeal was taken from an objection by the New York Department of State to Millennium's proposed natural gas pipeline project that would span approximately 420 miles from the U.S. Canada border to a terminus outside of New York City.

A **Federal Register** notice published on August 4, 2003, triggered the start of the 90-day decision period for this appeal. As indicated by that notice, the deadline may be extended before the end of the 90 day period, one time, by up to 45 days. See 16 U.S.C. 1465. Taking account of the extension, the deadline for a decision in the Millennium appeal is now December 15,

2003. See 16 U.S.C. 1465(b). The enlargement will provide time to more fully consider and address the complex issues presented by the Millennium appeal.

Additional information about the Millennium appeal, including a copy of the **Federal Register** notice announcing the closure of the Millennium appeal decision record, is available at the Department of Commerce CZMA appeals Web site, *http://www.ogc.doc.gov/czma.htm*.

(Federal Domestic Assistance Catalog No. 11.419 Coastal Zone Management Program Assistance)

Dated: October 23, 2003.

James R. Walpole,

General Counsel.

[FR Doc. 03–27221 Filed 10–30–03; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF DEFENSE

Department of the Navy

Public Meeting on the Draft Environmental Impact Statement for a Tertiary Treatment Plant and Associated Facilities at Marine Corps Base Camp Pendleton, CA

AGENCY: Department of the Navy, DOD.

ACTION: Announcement of public meeting.

SUMMARY: Pursuant to the National Environmental Policy Act as implemented by the Council on Environmental Quality Regulations (40 CFR parts 1500–1508), the Department of the Navy has prepared a Draft Environmental Impact Statement (DEIS) for construction and operation of a tertiary treatment plant (TTP) and associated facilities at Marine Corps Base (MCB) Camp Pendleton, CA. A public meeting will be held in order to collect public comments. This meeting will be conducted in an open house format and participants may attend a portion or the entire meeting.

DATES: The public meeting will be held on Thursday, November 13, 2003, from 6 p.m. to 9 p.m. at the Oceanside Civic Center Library and Community Rooms, 330 North Coast Highway, Oceanside, CA. All written comments regarding the DEIS must be postmarked by November 24, 2003.

ADDRESSES: Direct comments to Commander, Southwest Division, Naval Facilities Engineering Command, Code 5CPR.15 (Attn: Ms. Lisa Seneca), 937 North Harbor Drive, San Diego, CA 92132.

FOR FURTHER INFORMATION CONTACT: Ms. Lisa Seneca, telephone (619) 532–4744, fax (619) 532–4160.

SUPPLEMENTARY INFORMATION: The proposed action involves the consolidation of four sewage treatment plants (STPs) at MCB Camp Pendleton into a single TTP. This would include the construction and operation of a TTP; a conveyance system to transport wastewater from tributary areas of current STPs 1, 2, 3, and 13 to the TTP (which would be located at the site of existing STP 13); a wastewater reclamation system to convey tertiary-treated water to reuse points; the demolition of existing STPs 1, 2, 3, 8, and 13; and relocation of the existing Recycling Center. Five alternatives, including the no-action alternative, are evaluated in this DEIS.

This DEIS evaluates the potential environmental impacts to the following resource areas: land use, air quality, geological resources, biological resources, cultural resources, water resources, environmental justice, utilities and infrastructure, and safety and environmental health. Potentially significant but mitigable impacts associated with the proposed action and alternatives have been identified for biological, cultural, and water resources. Implementation of the no-action alternative would result in significant impacts to water resources.

The DEIS has been distributed to various Federal, State and local agencies, elected officials, and interested groups and individuals. The DEIS is also available for public review at the following libraries:

—Carlsbad City Library—1775 Dove Lane, Carlsbad, CA.

—Del Mar Branch Library—1309 Camino Del Mar, Del Mar, CA.

—City Heights/Weingart Library—3795 Fairmount Ave, San Diego, CA.

—Fallbrook Branch Library—124 South Mission Road, Fallbrook, CA.

—Oceanside Public Library—330 North Coast Highway, Oceanside, CA.

—San Clemente Library—242 Avenida Del Mar, San Clemente, CA.

—San Diego Central Library—820 East St, San Diego, CA.

Dated: October 27, 2003.

S.K. Melancon,

Paralegal Specialist, Office of the Judge Advocate General, Alternate Federal Register Liaison Officer.

[FR Doc. 03–27411 Filed 10–30–03; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Chief of Naval Operations (CNO) Executive Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice of closed meeting.

SUMMARY: The CNO Executive Panel will provide consensus advice to the Chief of Naval Operations on the Navy's role in future joint operating concepts and receive CNO direction regarding future studies to be conducted by the Panel.

DATES: The meetings will be held on Thursday, November 13, 2003, and Friday, November 14, 2003, from 9 a.m. to 4:30 p.m.

ADDRESSES: The meetings will be held at the Center for Naval Analyses Boardroom, 4825 Mark Center Drive, Alexandria, VA 22311–1846.

FOR FURTHER INFORMATION CONTACT: Commander David Hughes, CNO Executive Panel, 4825 Mark Center Drive, Alexandria, Virginia 22311, (703) 681–4908 or CDR Jonathan Huggins, CNO Executive Panel, (703) 681–6207.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2), these matters constitute classified information that is specifically authorized by Executive Order to be kept secret in the interest of national defense and are, in fact, properly classified pursuant to such Executive Order.

Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of the meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of title 5, United States Code.

Dated: October 23, 2003.

S.K. Melancon,

Paralegal Specialist, Office of the Judge Advocate General, Alternate Federal Register Liaison Officer.

[FR Doc. 03–27423 Filed 10–30–03; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2107]

Pacific Gas and Electric Company; Notice of Authorization for Continued Project Operation

October 24, 2003.

On July 2, 2002, Pacific Gas and Electric Company, licensee for the Poe Project No. 2107, filed a notice of intent to file application for a new license pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. Project No. 2107 is located on the North Fork Feather River in Butte County, California.

The license for Project No. 2107 was issued for a period ending September 30, 2003. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in Section 15 or any other applicable section of the FPA.

The project is subject to Section 15 of the FPA, therefore notice is hereby given that an annual license for Project No. 2107 is issued to Pacific Gas and Electric Company for a period effective October 1, 2003 through September 30, 2004, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before October 1, 2004, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under Section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00149 Filed 10–30–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG04–5–000, et al.]

Springerville Unit 3 Holding LLC, et al.; Electric Rate and Corporate Filings

October 24, 2003.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Springerville Unit 3 Holding LLC

[Docket No. EG04–5–000]

Take notice that on October 20, 2003, Springerville Unit 3 Holding LLC (Springerville) filed with the Federal Energy Regulatory Commission an Application for Determination of Exempt Wholesale Generator Status pursuant to Part 365 of the Commission's regulations.

Springerville states that it is a Delaware limited liability company, which has been formed to own Springerville Unit 3, a single unit, coal-fired, 400 MW (net) generating station near Springerville, Apache County, Arizona.

Comment Date: November 10, 2003.

2. Springerville Unit 3 OP LLC

[Docket No. EG04–6–000]

Take notice that on October 20, 2003, Springerville Unit 3 OP LLC (Springerville) filed with the Federal Energy Regulatory Commission an Application for Determination of Exempt Wholesale Generator Status pursuant to part 365 of the Commission's regulations.

Springerville states it is a Delaware limited liability company which has been formed to own the membership interests in Springerville Unit 3 Holding, LLC, which in turn will own Springerville Unit 3, a single unit, coal-fired, 400 MW (net) generating station near Springerville, Apache County, Arizona.

Comment Date: November 10, 2003.

3. Florida Power Corporation

[Docket Nos. ER97–2846–003]

Take notice that, on October 21, 2003, Progress Energy, Inc., on behalf of Florida Power Corporation, also known as Progress Energy Florida, Inc. (FPC), submitted a three-year market analysis update for FPC's market-based rate authority.

FPC states that copies of the filing were served on the official service lists in the above-captioned proceedings.

Comment Date: November 12, 2003.

4. American Transmission Company LLC

[Docket No. ER03–1211–001]

Take notice that on October 21, 2003, American Transmission Company LLC (ATCLLC) tendered for filing a revised Generation-Transmission Interconnection Agreement between ATCLLC and Fox Energy Company LLC (Second Revised Service Agreement No. 233) in compliance with the Commission's Letter Order dated Spetember 23, 2003 in Docket No. ER03–1211–000. ATCLLC requests retention of the original effective date of January 15, 2002.

Comment Date: November 12, 2003.

5. Bethlehem Steel Corporation

[Docket No. ER03–1322–001]

Take notice that on October 22, 2003, Bethlehem Steel Corporation (Bethlehem) submitted additional materials to supplement the Notice of Cancellation of Bethlehem's FERC Electric Tariff No. 1 and Rate Schedule FERC No. 2 filed on September 8, 2003 in Docket No. ER03–1322–000.

Comment Date: November 12, 2003.

6. New York Independent System Operator, Inc.

[Docket No. ER04–54–000]

Take notice that on October 16, 2003, the New York Independent System Operator, Inc. (NYISO), filed proposed revisions to the NYISO's Open Access Transmission Tariff (OATT) and Market Administration and Control Area Services Tariff (Services Tariff). The proposed filing would: (1) Establish congestion shortfall charges and congestion surplus payments; (2) change the manner in which congestion rent shortfalls and excess congestion rents are allocated to Transmission Owners; (3) establish auction shortfall charges and auction surplus payments; and (4) change the manner in which net Transmission Congestion Contract (TCC) revenues are allocated among Transmission Owners. The NYISO has requested that the Commission make a portion of the filing effective on December 15, 2003, and another portion of the filing effective on January 1, 2004.

NYISO states that a copy of this filing was served upon all parties that have executed Service Agreements under the NYISO's OATT or Services Tariff, the New York State Public Service Commission, and to the electric utility regulatory agencies in New Jersey and Pennsylvania.

Comment Date: November 6, 2003.

7. Maine Yankee Atomic Power Company

[Docket No. ER04–55–000]

Take notice that on October 20, 2003, Maine Yankee Atomic Power Company (Maine Yankee) tendered for filing, pursuant to Section 205 of the Federal Power Act and Section 35.13 of the Commission's regulations, proposed revisions to its FERC Rate Schedule No. 1. Maine Yankee states that the proposed changes would increase rates to recover decommissioning costs $3.77 million per year, to approximately $29.3 million, and would increase annual collections for post retirement benefits other than pensions (PBOPs) by $1.45 million per year.

Maine Yankee states that a principal purpose of its filing is to submit a revised decommissioning cost estimate and collection schedule to assure that adequate funds are available to safely and promptly decommission the plant and operate and manage the long-term storage of spent fuel and high level waste on site, and a revised actuarial analysis and collection schedule to assure that adequate funds are available to meet Maine Yankee's PBOP obligations. Maine Yankee's filing also requests approval of a change in its billing formula and deferral of recovery of amounts sufficient to replenish its Spent Fuel Trust fund until November 2008.

Maine Yankee states that copies of its filing were served upon its jurisdictional customers and to state regulatory commissions in Connecticut, New Hampshire, Massachusetts, Maine and Rhode Island and the Office of the Public Advocate, State of Maine.

Comment Date: November 10, 2003.

8. Consumers Energy Company

[Docket No. ER04–56–000]

Take notice that on October 20, 2003, Consumers Energy Company (Consumers) tendered for filing a Notice of Cancellation of its First Revised Electric Tariff No. 6.

Consumers requests that the cancellation become effective as of October 7, 2003. Consumers states that a copy of this filing was served upon the Michigan Public Service Commission.

Comment Date: November 10, 2003.

9. Ameren Energy Marketing Company

[Docket No. ER04–57–000]

Take notice that on October 20, 2003, Ameren Energy Marketing Company (AEM) petitioned the Commission to amend the Western Systems Power Pool (WSPP) Agreement to include AEM as a participant. AEM respectfully requests that the Commission allow the amendment to the WSPP Agreement to become effective on October 21, 2003.

AEM states that this filing has been served upon the WSPP Executive Committee Chair, WSPP Operating Committee Chair, WSPP General Counsel, and WSPP Secretary/Treasurer.

Comment Date: November 10, 2003.

10. Commonwealth Edison Company

[Docket No. ER04–58–000]

Take notice that on October 21, 2003 Commonwealth Edison Company (ComEd) submitted for filing an Interconnection Agreement by and between ComEd and FPL Energy Illinois Wind, LLC (FPL Energy) designated as Service Agreement No. 729 under ComEd's open access transmission service tariff, ComEd FERC Electric Tariff, Second Revised Volume No. 5, to be effective on December 20, 2003.

Comment Date: November 12, 2003.

11. Xcel Energy Services Inc. Public Service Company of Colorado

[Docket No. ER04–59–000]

Take notice that on October 21, 2003, Xcel Energy Services Inc. (XES), on behalf of Public Service Company of Colorado (PSCo) submitted for filing with the Federal Energy Regulatory Commission (Commission) a Generation Interconnection Agreement (Agreement) between PSCo and Colorado Green Holdings, LLC. PSCO requests an effective date of April 1, 2003.

Comment Date: November 12, 2003.

12. California Independent System Operator Corporation

[Docket No. ER04–61–000]

Take notice that on October 21, 2003, the California Independent System Operator Corporation (ISO), tendered for filing revisions to the Transmission Control Agreement (TCA) for acceptance by the Commission. The ISO states that the purpose of the revisions is to revise Exhibit B–1 to Pacific Gas and Electric Company's TCA Appendix B to substitute a new set of Path 15 Operating Instructions provided by Pacific Gas and Electric Company in place of the existing set of Path 15 Operating Instructions.

The ISO states that this filing has been served upon the Public Utilities Commission of the State of California, the California Energy Commission, the California Electricity Oversight Board, the Participating Transmission Owners, Trans-Elect, and all parties with effective Scheduling Coordinator Agreements under the ISO Tariff. The ISO is requesting an effective date of December 20, 2003, 60 days from the date of this filing.

Comment Date: November 12, 2003.

13. Arizona Public Service Company

[Docket No. ER04–62–000]

Take notice that on October 21, 2003, Arizona Public Service Company (APS) tendered for filing a Notice of Cancellation of the Interruptible Transmission Service Agreement between APS and El Paso Electric Company, Rate Schedule FERC No. 203, to be effective December 31, 2003.

APS states that copies of the filing have been served on Arizona Corporation Commission, Public Utility Commission of Texas and El Paso Electric Company.

Comment Date: November 12, 2003.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file 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 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 motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at*http://www.ferc.gov,* using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. 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. E3–00143 Filed 10–30–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application for Non-Project Use of Project Lands and Waters and Soliciting Comments, Motions To Intervene, and Protests

October 24, 2003.

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 and Waters.

b. *Project No:* 2503–076.

c. *Date Filed:* October 3, 2003.

d. *Applicant:* Duke Power, a Division of Duke Energy Corporation.

e. *Name of Project:* Keowee-Toxaway Hydroelectric Project.

f. *Location:* On Lake Keowee at Sunrise Pointe Development in Oconee County, South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a) 825(r) and 799 and 801.

h. *Applicant Contact:* Mr. Joe Hall, Lake Management Representative, Duke Energy Corporation, P.O. Box 1006, Charlotte, NC, 28201–1006, (704) 382–8576.

i. *FERC Contacts:* Any questions on this notice should be addressed to Ms. Shana High at (202) 502–8674, or e-mail address: *shana.high@ferc.gov*.

j. *Deadline for filing comments and or motions:* November 28, 2003.

All documents (original and eight copies) should be filed with: Ms. Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. Please include the project number (P–2628–052) 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 e-filings.

k. *Description of Request:* Duke Power is requesting Commission approval to lease 0.263 acre of land within the project boundary to Sunrise Pointe Association, Inc. for a commercial/residential marina. The marina will consist of a cluster dock with nine boat docking locations. The dock, constructed of Tec Wood decking, a metal frame, and encapsulated Styrofoam for floatation, will be constructed off site and floated into place.

l. *Location of the Applications:* The filings are available for review at the Commission in the Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, 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, please call the Helpline at (866) 208–3676 or contact *FERCONLINESUPPORT@ferc.gov*. For TTY, contact (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, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

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 applications. A copy of the applications 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.

q. 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 at *http://www.ferc.gov* under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00145 Filed 10–30–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Transfer of Licenses and Soliciting Comments, Motions To Intervene, and Protests

October 24, 2003.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Transfer of Licenses.

b. *Project Nos.:* 2785–046, 10808–026, 10809–021, and 10810–024.

c. *Date Filed:* September 23, 2003, supplement filed October 21, 2003.

d. *Applicants:* Wolverine Power Corporation, Synex Energy Resources, Ltd., and Synex Michigan, LLC.

e. *Name and Location of Projects:* The Sanford, Edenville, Secord, and Smallwood Hydroelectric Projects, Nos. 2785, 10808, 10809, and 10810, respectively, are located on the Tittabawassee River in Midland and Gladwin Counties, Michigan. The Edenville Project is also on the Tobacco River.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant Contact:* Mr. Greg Sunell, Synex Energy Resources, Ltd., 1444 Alberni Street, 4th Floor, Vancouver, BC V6G 2Z4, (604) 688–8271.

h. *FERC Contact:* James Hunter, (202) 502–6086.

i. *Deadline for filing comments, protests, and motions to intervene:* November 28, 2003.

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. 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. Please include the project number(s) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing a document with the Commission to serve a copy of that document on

each person in the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the documents on that resource agency.

j. *Description of Application:* The Applicants request approval of the transfer of the licenses to Synex Michigan, LLC. The Applicants state that, pursuant to foreclosure of security interests, there has been an ''involuntary'' transfer of the licenses under the proviso of Section 8 of the Federal Power Act from Wolverine Power Corporation, the current licensee for the projects, to Synex Energy Resources, Ltd., and that Synex Energy Resources, Ltd., intends to sell the licenses to Synex Michigan, LLC. The Applicants also state that, pursuant to mortgage foreclosures and sales, title to the real property under the licenses has been conveyed from Wolverine Power Corporation to Synex Michigan, LLC, as the assignee of Synex Energy Resources, Ltd.

k. This filing is available for review and reproduction at the Commission in the Public Reference Room at 888 First Street, NE., Room 2A, Washington, DC 20426. The 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 (P–2785) 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 review and reproduction at the address in item g. above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

n. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

o. 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. E3–00146 Filed 10–30–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Settlement Agreement and Soliciting Comments

October 24, 2003.

Take notice that the following settlement agreement has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Settlement Agreement.

b. *Project No.:* 637–022.

c. *Date Filed:* October 17, 2003.

d. *Applicant:* Public Utility District No. 1 of Chelan County.

e. *Name of Project:* Lake Chelan Hydroelectric Project.

f. *Location:* Located on the Chelan River, near the City of Chelan, in Chelan County, Washington.

g. *Filed Pursuant to:* Rule 602 of the Commission's Rules of Practice and Procedure, 18 CFR 385.602.

h. *Applicant Contact:* Mr. Gregg Carrington, Public Utility District No. 1 of Chelan County, 327 North Wenatchee Avenue, Wenatchee, WA, 98801. 1–888–663–8121.

i. *FERC Contact:* David Turner at (202) 502–6091, or by e-mail at *david.turner@ferc.gov*.

j. *Deadline for Filing Comments:* The deadline for filing comments on the Settlement Agreement is 20 days from the date of this notice. The deadline for filing reply comments is 30 days from the 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.

Under the Commission's Rules of Practice, intervenors in the relicensing proceeding filing documents with the Commission must 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 may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions of the Commission's Web site (*http:www.ferc.gov*) under the ''e-filing'' link.

k. Chelan PUD filed the Comprehensive Settlement Agreement on behalf of itself and 9 other stakeholders. The Settlement Agreement is intended to resolve, among the signatories, all issues related to Chelan PUD's pending Application for New License for the Lake Chelan Hydroelectric Project, including fish, water quality certification, wildlife and recreation. Chelan PUD requests that the Commission approve the Settlement Agreement and incorporate the proposed license articles in Appendix A of the Settlement Agreement into a new license for the project.

l. A copy of the Settlement Agreement 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.

Register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00147 Filed 10–30–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 7387–019]

Erie Boulevard Hydropower, L.P.; Notice of Application Tendered for Filing With the Commission, Soliciting Additional Study Requests, and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

October 24, 2003.

Take notice that the following hydroelectric license application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 7387–019.

c. *Date filed:* October 20, 2003.

d. *Applicant:* Erie Boulevard Hydropower, L.P.

e. *Name of Project:* Piercefield Hydroelectric Project.

f. *Location:* On the Raquette River, in St. Lawrence and Franklin Counties, New York.

The project does not occupy federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contacts:* Mr. Jerry L. Sabattis, P.E., Licensing Coordinator, Erie Boulevard Hydropower, L.P., 225 Greenfield Parkway, Liverpool, New York, 13088, telephone (315) 413–2787 and Mr. Samuel S. Hirschey, P.E., Manager, Licensing, Compliance, and Project Properties, 225 Greenfield Parkway, Liverpool, New York, 13088, telephone (315) 413–2790.

i. *FERC Contact:* Janet Hutzel, *janet.hutzel@ferc.gov* (202) 502–8675.

j. *Cooperating Agencies:* We are asking Federal, state, and local agencies and Indian tribes with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions for filing comments described in item k below.

k. Pursuant to Section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian tribe, or person believes that an additional scientific study should be conducted in order to form an factual basis for complete analysis of the application on its merit, the resource agency, Indian tribe, or person must file a request for a study with the Commission not later than 60 days after the application filing date and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* December 19, 2003.

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.

Additional study requests may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filing. 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.

m. The application is not ready for environmental analysis at this time.

n. Project Description: The Piercefield Hydroelectric Project consists of the following existing facilities: (a) A dam comprising of a 495-foot-long concrete retaining wall/dike on the right shoreline, a 620-foot-long concrete and masonry stone retaining wall located along the left shoreline, a 118-foot-long stop log spillway, and a 294-foot-long, 22-foot-high ogee spillway section; (b) a 110-foot-long concrete masonry forebay, having a varying width of 40 feet to 55 feet with an average depth of 17 feet; (c) a reservoir having a surface area of 370 acres at normal pool elevation of 1542.0 feet m.s.1.; (d) a powerhouse containing 3 generating units having a total rated capacity of 2,700 kW; (e) 600–V and 2.4-kV generator leads; (f) 600–V/46-kV, 2.5–MVA and the 2.4/46-kV, 2.5–MVA three-phase transformer banks; (g) 3.84-mile, 46-kV transmission line; and (h) appurtenant facilities.

o. A copy of the application is on file with the Commission and is available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link—select ''Docket #'' and follow the instructions. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676 or for TTY, contact (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

p. You may also register online at *http://www.ferc.gov/esubscribenow.htm* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support. To view upcoming FERC events, go to *www.ferc.gov* and click on ''View Entire Calendar''.

With this notice, we are initiating consultation with the *New York State Historic Preservation Officer (SHPO),* as required by 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36, CFR, at 800.4.

r. Procedural schedule and final amendments: The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Acceptance or Deficiency Letter—February 2004

Issue Scoping Document for comments—May 2004

Notice of Application is Ready for Environmental Analysis—September 2004

Notice of the availability of the EA—February 2005

Ready for Commission's decision on the application—June 2005

Unless substantial comments are received in response to the EA, staff intends to prepare a single EA in this case. If substantial comments are received in response to the EA, a final EA will be prepared with the following modifications to the schedule.

Notice of the availability of the final EA—June 2005

Ready for Commission's decision on the application—August 2005

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00148 Filed 10–30–03; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[RCRA–1997–0019; FRL–7581–7]

Agency Information Collection Activities: Proposed Collection; Comment Request; Exports From and Imports to the United States Under International and Bilateral Waste Agreements, EPA ICR Number 1647.04, OMB Control Number 2050–0143

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to an existing approved collection. This ICR is scheduled to expire on April 30, 2004. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before December 30, 2003.

ADDRESSES: Submit your comments, referencing docket ID number RCRA–1997–0019, to EPA online using EDOCKET (our preferred method), by e-mail to *RCRA-docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, OSWER Docket, mail code 5305T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Jim Kent, Office of Solid Waste, 5304W, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–0461; fax number: 703–308–0514; e-mail address: *Kent.Jim@EPAMAIL.EPA.GOV*.

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number RCRA–1997–0019, which is available for public viewing at the OSWER Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0270. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA within 60 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket*.

Affected entities: Entities potentially affected by this action are those which export hazardous waste from or import hazardous waste to the U.S.

Title: Exports from and Imports to the United States Under International and Bilateral Waste Agreements, EPA ICR No. 1647.04, expiring on 04/30/04.

Abstract: Authority to promulgate this rule is found in sections 2002(a) and 3017(a)(2) and (f) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, and as amended by the Hazardous and Solid Waste Amendments, 42 U.S.C. 6901 *et seq*. The Organization for Economic (OECD) Decision C(92)39 is considered legally binding on the United States under Articles 5(a) and 6(2) of the OECD Convention, 12 U.S.T. 1728. In addition, the OECD Decision and EPA's rule implementing the OECD Decision, 40 CFR part 262, subpart H (61 FR 16290–16316, April 12, 1966) impose requirements on U.S. exporters and importers of hazardous waste for recovery to and from OECD member countries. EPA also imposes requirements on U.S. exports and imports of hazardous waste to and from other countries at 40 CFR part 262, subpart E for exports and at subpart F for imports (51 FR 28664, August 8, 1986). The Office of Enforcement and Compliance Assurance, U.S. EPA uses the information provided by each U.S. exporter and U.S. importer to determine compliance with the applicable RCRA regulatory provisions. In addition, the information will be used to determine the number, origin, destination, and type of exports from and imports to the U.S. for tracking purposes and for reporting to the OECD. This information also will be used to assess the efficiency of the program.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Burden Statement: The annual U.S. exporter burden for this collection is estimated to average 10.23 hours per exporter. The annual U.S. importer burden for this collection is estimated to average 1.3 hours per importer. This amounts to a total annual cost of $441,360 for exporters and $38, 582 for importers. These estimates represent the burden associated with the RCRA export and import requirements. Calculation of these estimates is based on the following numbers:

Exporters: 816.

Importers: 746.

Annual Export Shipments: 25,000.

Annual Import Shipments: 2,984.

The number of export notifications is equal to the number of exporters (816) and the number (and frequency per year) of tracking documents corresponds to the number of annual export and import shipments (25,000 and 2,984, respectively). These estimates take into account all aspects of the information collection, including the time necessary for new entrants to obtain and read the regulations and assess their applicability; time to complete a notification of intent to export; time to complete a tracking document and to transmit copies of the tracking document. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or

for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: October 23, 2003.

Robert Springer,

Director, Office of Solid Waste.

[FR Doc. 03–27477 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2003–0078, FRL–7581–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Landfill Methane Outreach Program, EPA ICR Number 1849.02, OMB Control Number 2060–0446

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on October 31, 2003. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before December 1, 2003.

ADDRESSES: Submit your comments, referencing docket ID number OAR–2003–0078, to (1) EPA online using EDOCKET (our preferred method), by e-mail to a-and-r-docket@epamail.epa.gov, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Air and Radiation Docket and Information Center, Mail Code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Brian Guzzone, Climate Protection Partnerships Division, Office of Atmospheric Programs, (Mail Code 6202J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9248; fax number: (202) 565–2079; e-mail address: *guzzone.brian@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 18, 2003 (68 FR 36546), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). Three comments were received and addressed by EPA in the ICR.

EPA has established a public docket for this ICR under OAR–2003–0078, which is available for public viewing at the Air and Radiation Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

Title: Landfill Methane Outreach Program.

Abstract: The Landfill Methane Outreach Program (LMOP) is an EPA-sponsored voluntary program that encourages landfill owners, communities, and project developers to reduce emissions of methane, a potent greenhouse gas, by implementing landfill gas technologies that collect and utilize the methane as a source of energy. The Landfill Methane Outreach Program further encourages utilities and other energy customers to support and promote the use of landfill methane at their facilities. The Landfill Methane Outreach Program signs voluntary Memoranda of Understanding (MOU) with these organizations to enlist their support in promoting cost-effective landfill gas utilization. The information collection includes completion and submission of the MOU, and annual online completion and submission of information forms that include basic information on the organizations that sign the MOU and landfill methane projects in which they are involved. The information collection is to be utilized to maintain up-to-date data and information about Landfill Methane Outreach Program partners and landfill methane projects in which they are involved. In addition, the information collection will assist LMOP to evaluate the reduction of methane emissions from landfills.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 3.5 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes

of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: This information collection will encompass a wide variety of respondents. Community partners include local agencies and municipalities that own landfills. State agencies involved in energy, air pollution, and solid waste management are represented through State partners. Industry partners include manufacturers and suppliers of equipment and knowledge needed to capture and utilize landfill gas. This includes engine and turbine manufacturers, engineering firms, construction companies, and environmental consultants. Industry partners also include companies involved in the logistics of developing LFGE projects such as law firms and financing companies. Energy partners include utility companies who purchase the energy generated from the landfills, power marketers, and the end users of energy from the landfill. The end user is potentially the most diverse category. Any facility located near a landfill that utilizes fuel either in manufacturing products or heating the facility is a potential energy end user.

Estimated Number of Respondents: 315.

Frequency of Response: Initial, Annual, and On Occasion.

Estimated Total Annual Hour Burden: 1,533.

Estimated Total Annual Cost: $89,630, which includes $744 for O&M costs.

Changes in the Estimates: There is an increase of 49 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is due to an increase in the number of partners.

Dated: October 27, 2003.

Doreen Sterling,

Acting Director, Collection Strategies Division.

[FR Doc. 03–27478 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2003–0145, FRL–7581–6]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Production Line Testing, In-use Testing, and Selective Enforcement Auditing Reporting and Recordkeeping Requirements for Manufacturers of Nonroad Spark Ignition Engines At or Below 19 Kilowatts, EPA ICR Number 1845.03, OMB Control Number 2060–0427

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on 10/31/2003. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before December 1, 2003.

ADDRESSES: Submit your comments, referencing docket ID number OAR–2003–0145, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mail Code 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ms. Nydia Y. Reyes-Morales, Certification and Compliance Division, Office of Transportation and Air Quality, Office of Air and Radiation, Mail Code 6403J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–9264; fax number: 202–565–2057; e-mail address: reyes-*morales.nydia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On August 4, 2003 (68 FR 45815), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OAR–2003–0145, which is available for public viewing at the Air and Radiation Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

Title: Production Line Testing, In-use Testing, and Selective Enforcement Auditing Reporting and Recordkeeping Requirements for Manufacturers of Nonroad Spark Ignition Engines At or Below 19 Kilowatts.

Abstract: Title II of the Clean Air Act requires engine manufacturers to obtain a certificate of conformity with applicable emission standards for engine prototypes before they may legally introduce their products into commerce. The Act also mandates EPA to verify that manufacturers have successfully translated their certified engine prototypes into mass produced engines and that these engines comply with emission standards throughout their useful lives. EPA emission regulations pertaining to spark-ignition engines rated at or below 19 kilowatts are codified at 40 CFR part 90.

Under the Production Line Testing (PLT) Program, manufacturers test a sample of engines as they leave the assembly line. This self-audit program allows manufacturers to monitor compliance with statistical certainty and minimize the cost of correcting errors through early detection. Under the Voluntary In-use Testing Program, manufacturers test engines after a number of years of use to verify that the engines comply with emission standards throughout their useful lives. Participation in the In-use Testing Program is voluntary for Phase 2 SI engine families.

Sections 206(b) and 213(d) of the Act also mandate that EPA conduct testing of a sample of certified engines to determine if these engines do in fact conform with the applicable emission regulations. Under the Selective Enforcement Audit (SEA) Program, EPA selects a number of engines to be taken directly from the assembly line and tested according to EPA specifications. These audits are performed to ensure that test data submitted by manufacturers is reliable and testing is performed according to EPA regulations. All SI engine manufacturers are subject to be audited. Participation in the SEA program is mandatory.

The information requested by this information collection is used to enforce different provisions of the Act and maintain the integrity of the overall emissions reduction program. Data generated through the PLT, In-use and SEA programs may be used to evaluate future applications for certification, to identify potential issues, and as basis to suspend or revoke the certificate of conformity of those engines that fail. There are recordkeeping requirements in all programs.

The information is collected by the Engine Programs Group, Certification and Compliance Division, Office of Transportation and Air Quality, Office of Air and Radiation. Confidentiality of proprietary information submitted by manufacturers is granted in accordance with the Freedom of Information Act, EPA regulations at 40 CFR part 2, and class determinations issued by EPA's Office of General Counsel.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 529 hours per respondent for the Production Line Testing Program, 354 hours per respondent for the In-use Testing Program and 127 hours per respondent for the Selective Enforcement Auditing Program. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Manufacturers of spark ignition engines rated at or below 19 kilowatts.

Estimated Number of Respondents: 59.

Frequency of Response: Annually, quarterly and on occasion.

Estimated Total Annual Hour Burden: 27,197.

Estimated Total Annual Cost: $1,591,487, which includes $197,533 annualized O&M costs and $1,393,945 labor costs.

Changes in the Estimates: There is a decrease of 53,186 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is due to the elimination of a learning curve previously accounted for (respondents are already sufficiently familiar with this information collection requirements) and a significant increase in electronic reporting. The decrease in burden is, therefore, due to an adjustment to the estimates.

Dated: October 27, 2003.

Doreen Sterling,

Acting Director, Collection Strategies Division.

[FR Doc. 03–27479 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7581–4]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notices.

SUMMARY: This document announces the Office of Management and Budget's (OMB) responses to Agency clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Susan Auby (202) 566–1672, or e-mail at *auby.susan@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR No. 1428.06; Trade Secret Claims for Emergency Planning and Community Right-to-Know (EPCRA Section 322); was approved 10/10/2003; in 40 CFR part 350; OMB Number 2050–0078; expires 10/31/2006.

EPA ICR No. 1969.02; NESHAP for Miscellaneous Organic Chemical Manufacturing; was approved 10/02/2003; in 40 CFR part 63, subpart FFFF; OMB Number 2060–0533; expires 10/31/2006.

EPA ICR No. 1894.04; NESHAP for Secondary Aluminum Production; was approved 09/25/2003; in 40 CFR part 63, subpart RRR; OMB Number 2060–0433; expires 09/30/2006.

EPA ICR No. 2055.01; Data Submission for Voluntary Children's Chemical Evaluation Program (VCCEP); was approved 09/25/2003; OMB Number 2070–0165; expires 09/30/2006.

EPA ICR No. 2109.01; Seven County Study of Air Quality and Birth Defects: Computer-Assisted Telephone Questionnaire for Subset of Study

Population; was approved 09/30/2003; OMB Number 2080–0069; expires 09/30/2006.

EPA ICR No. 1712.04; NESHAP for Shipbuilding and Ship Repair Facilities (Surface Coating); was approved 09/22/2003; in 40 CFR part 63, subpart II; OMB Number 2060–0330; expires 09/30/2006.

EPA ICR No. 1896.04; Disinfectants/Disinfection by-Products, Chemical and Radionuclides Rules: Lead and Copper Rule Amendment; was approved 10/17/2003; OMB Number 2040–0204; expires 12/31/2004.

Short Term Extensions

EPA ICR No. 0276.11; Application for Experimental Use Permit (EUP) to Ship and Use a Pesticide for Experimental Purposes Only; OMB Number 2070–0040; on 09/29/2003 OMB extended the expiration date through 12/31/2003.

EPA ICR No. 1249.06; Recordkeeping for Certified Applicators Using 1080 Collars for Livestock Protection; OMB Number 2070–0074; on 09/29/2003 OMB extended the expiration date through 12/31/2003.

EPA ICR No. 1912.01; Information Collection Request: National Primary Drinking Water Regulation for Lead and Copper (Final Rule); in 40 CFR 141.80–141.91; OMB Number 2040–0210; on 09/30/2003 OMB extended the expiration date through 12/31/2003.

EPA ICR No. 1916.01; Emission Defect Information and Voluntary Emission Recall Reports for On-Highway, Light-Duty Vehicles; OMB Number 2060–0425; on 09/26/2003 OMB changed the expiration date to 09/30/2003.

EPA ICR No. 1761.03; Regulations for a Voluntary Emissions Standards Program Applicable to Manufacturers of Light-Duty Vehicles and Trucks Beginning in Model Year 1997; in 40 CFR 86.1700; OMB 2060–0345; on 09/26/2003 OMB changed the expiration date to 09/30/2003.

EPA ICR No. 1912.01; Information Collection Request: National Primary Drinking Water Regulation for Lead and Copper (Final Rule); OMB Number 2040–0210; on 10/17/2003 OMB change the expiration date to 10/31/2003.

Notice of Transfer

EPA ICR No. 2057.01; Eliciting Risk Tradeoffs for Valuing Fatal Cancer Risks; OMB changed the OMB control number from 2060–0502 to 2090–0022 on 04/02/2003

Dated: October 22, 2003.

Doreen Sterling,

Acting Director, Collection Strategies Division.

[FR Doc. 03–27480 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OEI–2003–0025; FRL–7581–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Toxic Chemical Release Reporting, Recordkeeping, Supplier Notification and Petitions Under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA): Renewal; EPA ICR Number 1363.13, OMB Control Number 2070–0093

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. The Agency is requesting that OMB renew for 3 years the existing approval for this ICR, which is scheduled to expire on October 31, 2003. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before December 1, 2003.

ADDRESSES: Submit your comments, referencing docket ID number OEI–2003–0025, to (1) EPA online using EDOCKET (our preferred method), by email to *oei.docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Office of Environmental Information Docket, 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Judith Kendall, Office of Environmental Information, Mailcode 2844T, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–0750; fax number: (202) 566–0741; email address: *kendall.judith@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. A **Federal Register** notice announcing the Agency's intent to seek the renewal of this ICR and the 60-day public comment opportunity, requesting comments on the request and the contents of the ICR, was issued on July 1, 2003 (68 FR 39074). EPA received a number of comments on this ICR during the comment period, which have been addressed. The comments and EPA's responses are included as part of the ICR renewal request package, and will be made available in the docket for OEI–2003–0025 and on the EPA TRI Web site at *http://www.epa.gov/tri.*

EPA has established a public docket for this ICR under Docket ID No. OEI–2003–0025, which is available for public viewing at the Office of Environmental Information Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Office of Environmental Information Docket is (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 *FR* 38102 (May

31, 2002), or go to *http://www.epa.gov/edocket.*

Title: Toxic Chemical Release Reporting, Recordkeeping, Supplier Notification and Petitions under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA): Renewal

Abstract: EPCRA section 313 requires owners and operators of certain facilities that manufacture, process, or otherwise use any of over 650 listed toxic chemicals and chemical categories in excess of applicable threshold quantities to report annually to the Environmental Protection Agency and to the states in which such facilities are located on their environmental releases and other waste management quantities of such chemicals. In addition, section 6607 of the Pollution Prevention Act (PPA) requires that facilities provide information on the quantities of the toxic chemicals in waste streams and the efforts made to reduce or eliminate those quantities.

EPA collects, processes, and makes available to the public all of the information collected. The information gathered under these authorities is stored in a database maintained at EPA and is available through the Internet. This information, commonly known as the Toxics Release Inventory (TRI), is used extensively by both EPA and the public sector. Program offices within EPA use TRI data, along with other sources of data, to establish priorities, evaluate potential exposure scenarios, and undertake enforcement activities. Environmental and public interest groups use the data in studies and reports, making the public more aware of releases of chemicals in their communities.

Responses to the collection of information are mandatory (see 40 CFR part 372). Respondents may claim all or part of a notice confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures in TSCA section 14 and 40 CFR part 2.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form.

Burden Statement: The annual public burden for this collection of information is estimated to average 19.5 hours per response. Under the PRA, ''burden'' means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. For this collection, it includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The following is a summary of the burden estimates taken from the ICR:

Respondents/affected entities: Owners or operators of certain facilities that manufacture, process, or otherwise use certain specified toxic chemicals and chemical categories and are required to report annually on the environmental releases and transfers of waste management activities for such chemicals.

Estimated total number of potential responses: 84,000.

Frequency of response: Annual.

Estimated total annual burden hours: 2,432,898.

Estimated total annual burden costs: $111.3 million in labor costs.

Changes in Burden Estimates

The reduction in the estimated total burden of 3,133,666 hours is the result of three adjustments.

The first adjustment is to the number of responses. The estimate of 88,117 responses in the existing OMB approval incorporated a predicted reporting increase from the economic analysis of the final rule to lower reporting thresholds for lead and lead compounds. This prediction overestimated actual reporting levels; EPA received about 70 percent of the additional lead and lead compound reports that were forecast. The number of responses in this ICR supporting statement have been adjusted to accurately reflect actual reporting levels (rounded to the next highest thousand responses). This adjustment accounts for a decrease of about 218,000 hours.

The second adjustment is to the unit burden hour estimates for subsequent year reporting. EPA has adjusted the estimate of unit burden hours for Form R completion in subsequent years from 47.1 hours to 14.5 hours based on responses from TRI reporting facilities. This adjustment accounts for a decrease of about 2.68 million hours.

The third adjustment relates to the adoption of TRI–ME, an automated reporting software package. EPA has reduced the burden estimates related to Form R Completion and Recordkeeping/Submission by 15 percent for the reports filed using TRI–ME. An estimated 90 percent of reports are expected to be filed using TRI–ME over the three years of the ICR. This adjustment accounts for a decrease of about 232,000 hours.

The sum of these adjustments is a decrease of 4,117 responses and 3,133,666 burden hours from the current approved total.

Dated: October 27, 2003.

Doreen Sterling,

Acting Director, Collection Strategies Division.

[FR Doc. 03–27481 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OEI–2003–0026; FRL–7581–2]

Agency Information Collection Activities: Submission to OMB for Review and Approval; Comment Request; Toxic Chemical Release Reporting, Alternate Threshold for Low Annual Reportable Amounts, Recordkeeping, Supplier Notification and Petitions Under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA): Renewal; EPA ICR Number 1704.07, OMB Control Number 2070–0143

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that the following continuing Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. The Agency is requesting that OMB renew for 3 years the existing approval for this ICR, which is scheduled to expire on October 31, 2003. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. This ICR describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before December 1, 2003.

ADDRESSES: Submit your comments, referencing docket ID number OEI–2003–0026, to (1) EPA online using EDOCKET (our preferred method), by e-mail to *oei.docket@epa.gov*, or by mail

to: EPA Docket Center, Environmental Protection Agency, Office of Environmental Information Docket, 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Judith Kendall, Office of Environmental Information, Mailcode 2844T, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–0750; fax number: (202) 566–0741; e-mail address: *kendall.judith@epa.gov.*

SUPPLEMENTARY INFORMATION: A **Federal Register** notice announcing the Agency's intent to seek the renewal of this ICR and the 60-day public comment opportunity, requesting comments on the request and the contents of the ICR, was issued on July 1, 2003 (68 FR 39071). EPA received and responded to public comments that were submitted in response to this ICR renewal request. The comments and EPA's responses are included in an attachment to the ICR Supporting Statement that is being submitted to OMB with this ICR renewal request, and will be made available in the docket for OEI–2003–0026 and on the EPA TRI Web site at *http://www.epa.gov/tri.*

EPA has established a public docket for this ICR under Docket ID No. OEI–2003–0026, which is available for public viewing at the Office of Environmental Information Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Office of Environmental Information Docket is (202) 566–1752. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

Title: Toxic Chemical Release Reporting, Alternate Threshold for Low Annual Reportable Amounts, Recordkeeping, Supplier Notification and Petitions under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA): Renewal.

Abstract: EPCRA section 313 requires certain facilities manufacturing, processing, or otherwise using certain toxic chemicals in excess of specified threshold quantities to report their environmental releases and other waste management quantities of such chemicals annually. Each such facility must file a separate report for each such chemical.

In accordance with the authority in EPCRA, EPA has established an alternate threshold for those facilities with low amounts of a listed toxic chemical in wastes. A facility that otherwise exceeds the current reporting thresholds, but estimates that the total amount of the chemical in waste does not exceed 500 pounds per year, and that the chemical was manufactured, processed, or otherwise used in an amount not exceeding 1 million pounds during the reporting year, can take advantage of reporting under the alternate threshold option for that chemical for that reporting year.

Each qualifying facility that chooses to apply the revised threshold must file the Form A Certification Statement (EPA Form 9350–2) in lieu of a complete TRI reporting Form R (EPA Form 9350–1). In submitting the Form A certification statement, the facility certifies that the sum of the amount of the EPCRA section 313 chemical in wastes did not exceed 500 pounds for the reporting year, and that the chemical was manufactured, processed, or otherwise used in an amount not exceeding 1 million pounds during the reporting year. Use of the Form A certification represents a substantial savings to respondents, both in burden hours and in labor costs.

The Form A certification statement provides communities with information that the chemical is being manufactured, processed or otherwise used at facilities. Additionally, the Form A certification provides compliance monitoring and enforcement programs and other interested parties with a means to track chemical management activities and verify overall compliance with the rule. Responses to this collection of information are mandatory (see 40 CFR part 372) and facilities subject to reporting must submit either a Form A Certification Statement or a Form R.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9.

Burden Statement: The annual public burden for this collection of information is estimated to average 13.7 hours for a facility that certifies one chemical per Form A Certification Statement.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The following is a summary of the estimates taken from the ICR supporting statement:

Respondents/affected entities: Owners or operators of certain facilities that manufacture, process, or otherwise use certain specified toxic chemicals and chemical categories and are required to report annually on the environmental releases and transfers of waste management activities for such chemicals.

Estimated No. of Responses: 5,000.

Frequency of Responses: Annual.

Estimated Total Annual Burden Hours: 173,850 burden hours.

Estimated Total Annual Burden Costs: $ 8.02 million in labor costs.

Changes in Burden Estimates

The burden estimated in this supporting statement differs from OMB's inventory as a result of adjustments to estimates of number of responses (from 5,121 responses to 5,000 responses), changes to subsequent year unit reporting burden estimates (from 30.2 to 9.3 burden hours per chemical certified on a Form A Certification Statement), and an adjustment for use of TRI–ME for those forms completed using TRI–ME. These changes are described in greater detail in the supporting statement for this ICR, available in the public version of the official record.

Dated: October 27, 2003.

Doreen Sterling,

Acting Director, Collection Strategies Division.

[FR Doc. 03–27482 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6644–9]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed October 20, 2003 Through October 24, 2003

Pursuant to 40 CFR 1506.9.

EIS No. 030485, Final EIS, AFS, CA, Combined Array for Research in Millimeter-wave Astronomy (CARMA) Project, Construction, Reconstruction and Operation of 23 Antennas at the Juniper Flat Site, Special-Use-Permit Issuance, Inyo Mountain, Inyo National Forest, Inyo County, CA, Wait Period Ends: December 1, 2003, Contact: Jeffery E. Bailey (760) 873–2400.

EIS No. 030486, Draft EIS, AFS, CA, Larson Reforestation and Fuel Reduction Project, Implementation, Stanislaus National Forest, Groveland Ranger District, Mariposa and Tuolumne Counties, CA, Comment Period Ends: December 15, 2003, Contact: Steve Marsh (209) 962–7825. This document is available on the Internet at: *http://www.r5.fs.fed.us/stanislaus.*

EIS No. 030487, Draft EIS, AFS, WY, Lost Cabin Mine Project, Improvement of Historic Mining Road (Way 4170H) to Allow Motorized Access to the Lost Mine for Mineral Exploration), Plan-of-Operation, Medicine-Bow Routt National Forests and Thunder Basin National Grassland, Carbon County, WY, Comment Period Ends: December 15, 2003, Contact: Melissa Martin (307) 745–2371. This document is available on the Internet at: *http://www.fs.fed.us\mrnf.*

EIS No. 030488, Draft EIS, AFS, WY, Wyoming Range Allotment Complex, To Determine Whether or not to Allow Domestic Sheep Grazing, Bridger-Teton National Forest, Big Piney, Greys River and Jackson Ranger Districts, Sublette, Lincoln and Teton Counties, WY, Comment Period Ends: December 29, 2003, Contact: Greg Clark (307) 276–3375.

EIS No. 030489, Draft EIS, AFS, OR, Baked Apple Fire Salvage Project, Salvaging Fire Killed Trees in the Matrix Portion of the 2002 Apple Fire, Umpqua National Forest, Umpqua Ranger District, Douglas County, OR, Comment Period Ends: December 15, 2003, Contact: Debbie Anderson (541) 496–3532. This document is available on the Internet at: *http://www.fs.fed.us/r6/umpqua.*

EIS No. 030490, Final EIS, BLM, CA, Santa Rosa and San Jacinto Mountains National Monument Management Plan, Implementation, Public Lands Management, Riverside County, CA, Wait Period Ends: December 1, 2003, Contact: Melissa Briston (760) 251–4817. This document is available on the Internet at: *http://www.ca.blm.gov/palmsprings.*

EIS No. 030491, Final EIS, AFS, AL, Forest Health and Restoration Project, Proposal to Determine the Desired Future Conditions of all Existing Loblolly Pine Stands, National Forests in Alabama, Bankhead National Forest, Winston, Lawrence and Franklin Counties, AL, Wait Period Ends: December 1, 2003, Contact: John W. Creed (205) 489–5111.

EIS No. 030492, Final EIS, AFS, WI, Sunken Moose Project, Proposal to Restore and/or Maintain the Red and White Pine Communities, Washurn Ranger District, Chequamegon-Nicolet Forest, Bayfield County, WI, Wait Period Ends: December 1, 2003, Contact: Ray Kiewit (715) 373–2667.

EIS No. 030493, Final EIS, FTA, TX, Northwest Corridor Light Rail Transit (LRT) Line to Farmers Branch and Carrollton, Construction and Operation, NPDES and U.S. Army COE Section 404 Permits Issuance, Dallas Area Rapid Transit, Dallas and Denton Counties, TX, Wait Period Ends: December 1, 2003, Contact: John Sweek (817) 975–0550.

EIS No. 030494, Final EIS, FTA, TX, Southeast Corridor Light Rail Transit Project, Construction and Operation, Funding, NPDES Permit and U.S. Army COE Section 404 Permit Issuance and, Mobility 2025 Plan Update, Dallas Area Rapid Transit (DART), City of Dallas, Dallas County, TX, Wait Period Ends: December 1, 2003, Contact: John Sweek (817) 975–0550.

EIS No. 030495, Final EIS, NOA, Dolphin and Wahoo Fishery Management Plan, Establishing Fishery Management Units, Stock Status Determination and Harvesting Restrictions, Initial Regulatory Flexibility Analysis, South Atlantic, Caribbean, and Gulf of Mexico, Wait Period Ends: December 1, 2003, Contact: Roy E. Crabtree (727) 570–5301.

EIS No. 030496, Final EIS, AFS, ID, Twin Creek Timber Sale Project, Proposal to Cut and Remove Lodgepole Pine Sawtimber, Road Construction/Reconstruction, Montpelier Ranger District, Caribou National Forest, U.S. Corps of Engineers Permit, Bear Lake County, ID, Wait Period Ends: December 1, 2003, Contact: Jerry B. Reese (208) 624–3151.

Amended Notices

EIS No. 030453, Draft EIS, BLM, CA, Desert Southwest Transmission Line Project, New Substation/Switching Station, Construction, Operation and Maintenance, Right-of-Way Grant and US Army COE Section 10 and 404 Permits Issuance, North Palm Springs and Blythe, CA, Comment Period Ends: January 8, 2004, Contact: John Kalish (760) 251–4849. Revision of FR Notice Published on 10/10/2003: Correction to the Internet Address should be: *http://www.ca.blm.gov/palmsprings.* Also, CEQ Comment Period Ending 11/17/2003 has been Extended to 01/08/2004.

Dated: October 28, 2003.

Joseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–27474 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6645–1]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 4, 2003 (68 FR 16511).

Draft EISs

ERP No. D–AFS–E65067–AL

Rating EC1, Forest Health and Red-Cockade Woodpecker (RCW) Initiative, Implementation, Talladega National Forest, Talladega and Shoal Creek Ranger Districts, Calhoun, Cherokee, Clay, Clebourne and Talladega Counties, AL.

Summary: While EPA supports the efforts to restore the longleaf pine ecosystem and enhance red-cockade woodpecker habitat, EPA has environmental concerns related to potential water quality impacts and herbicide use.

ERP No. D–AFS–J70020–CO

Rating EC1, Upper Blue Stewardship Project, Vegetation Management, Travel Management, and Dispersed Camping Sites Designation, Implementation, U.S. Army COE 404 Permit, White River National Forest, Dillon Ranger District, Summit County, CO.

Summary: EPA expressed environmental concerns with the creation of permanent, recreation timber clearings in lynx corridor and foraging habitat.

ERP No. D–AFS–K65258–CA

Rating EC2, Emigrant Wilderness Dams Project, Reconstruct, Repair, Maintain and Operate 12 Dams; Snow, Bigelow, Huckleberry, Emigrant Meadow, Middle Emigrant, Emigrant, Leighton, Long, Lower Buck, Y-Meadow and Bear, Stanislous National Forest, Summer Ranger District, Tuolumne County, CA.

Summary: EPA expressed environmental concerns regarding the potential impacts to wilderness, air and water quality, and wildlife as a result of the maintenance of twelve dams. EPA requested additional information on water quality impacts, compliance with wilderness policy, and rationale to support the proposed alternative be included in the final EIS.

ERP No. D–AFS–L65426–OR

Rating EC2, Flagtail Fire Recovery Project, To Address the Differences between Existing and Desired Conditions, Blue Mountain Ranger District, Malheur National Forest, Grant County, OR.

Summary: EPA expressed environmental concerns with potential impacts from harvesting activities and grazing, and the removal and destruction of nest structures for landbirds in dry forest habitats.

ERP No. D–AFS–L65430–OR

Rating EC2, Monument Fire Recovery Project and Proposed Non Significant Forest Plan Amendments, Implementing Four Alternatives for Recovery, Malheur National Forest, Prairie City Ranger District, Grant and Baker Counties, OR.

Summary: EPA expressed environmental concerns with potential adverse impacts from harvesting which can result in disturbance and habitat loss primary cavity excavator bird species.

ERP No. D–BLM–J02042–UT

Rating EC2, Uinta Basin Natural Gas Project, Proposed to Produce and Transport Natural Gas in the Atchee Wash Oil and Gas Production Region, Resource Development Group, Right-of-Way Grant, U.S. Army COE Section 404 Permit and Endangered Species Act Permit, Uintah County, Utah.

Summary: EPA expressed environmental concerns with the regional air quality analysis and impacts to wetlands.

ERP No. D–BLM–J65387–CO

Rating EC1, Silverton Outdoor Learning and Recreation Center, Authorization for Long-Term Use of 1,300 acres for Backcountry-type Skiing, Summer Recreation and Educational Activities, Amendment of the San Juan/San Miguel Resource Management Plan, San Juan County, CO.

Summary: EPA expressed environmental concerns regarding the potential adverse impacts to alpine vegetation, lynx habitat, and from foreseeable future development.

ERP No. D–BLM–L65431–OR

Rating EC2, Timbered Rock Fire Salvage and Elk Creek Watershed Restoration Project, Implementation, Northwest Forest Plan, Butte Falls Resource Area, Medford District, Douglas, Jackson, and Josephine Counties, OR.

Summary: EPA expressed environmental concerns regarding indirect and cumulative effects, project restoration activities and proposed salvage prescriptions that are inconsistent with the Northwest Forest Plan.

ERP No. D–HUD–L85027–WA

Rating LO, Tacoma Housing Authority (THA) Hope VI Salishan Redevelopment Project, Revitalize the Community Neighborhood, Funding, NHPA Section 106, NPDES Permit, City of Tacoma, WA.

Summary: EPA Region 10 used a screening tool to conduct a limited review of this action. Based upon this screen, EPA does not foresee having any environmental objections to the proposed project.

ERP No. D–NPS–F61021–WI

Rating LO, Apostle Islands National Lakeshore Wilderness Study, Wilderness Designation or Nondesignation, Ashland and Bayfield Counties, WI.

Summary: EPA expressed lack of objections with the proposed wilderness designation.

ERP No. DR–COE–K39066–CA

Rating EC2, Port J Long Beach Pier J South Terminal Expansion Project, Additional Cargo Requirements Associated with Growing Export and Import Volumes, Port Master Plan (PMP) Amendment, COE Section 404, 401, and 10 Permits, City of Long Beach, CA.

Summary: EPA raised environmental concerns on potential impacts to air quality and aquatic resources, and the adequacy of mitigation for these impacts. The EIS appears to underestimate the project's air pollutant emissions; additional air quality mitigation may be needed. EPA has concerns that the EIS did not address the source(s) from which material for the project's landfill component would be obtained; impacts associated with obtaining this fill material; and consistency with Federal Regulations at 40 CFR 230, including identification of the Least Environmentally Damaging Practicable Alternative.

Final EISs

ERP No. F–AFS–J65379–CO

Green Ridge Mountain Pine Beetle Analysis Project, Proposal to Reduce the Spread of Mountain Pine Beetle and Associated Tree Mortality, Medicine Bow-Routt National Forest & Thunder

Basin National Grassland, Parks Ranger District, Jackson County, CO.

Summary: EPA expressed environmental concerns with adverse impacts to aquatic resources from soil disturbance.

ERP No. F–AFS–L65360–AK

Madan Timber Sale, Implementation, Tongass National Forest, Wrangell Ranger District, COE Section 404 Permit and NPDES Permit, AK.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–BLM–J65240–WY

Pittsburg and Midway Coal Mining Proposal (WYW148816), Exchange of Private Owned Land P&M for Federally-Owned Coal, Lincoln, Carbon and Sheridan Counties, WY.

Summary: EPA expressed environmental concerns with potential cumulative air quality impacts from this coal mine, when added to other energy development in northeastern Wyoming. Exceedances of Clean Air Act criteria on the Northern Cheyenne Reservation in Montana, and extinguishing the coal seam fire should be addressed before completing the proposed land exchange.

ERP No. F–CGD–G03021–LA

Port Pelican Deepwater Port Construction and Operation, License Approval, Vermillion Lease Block 140 on the Continental Shelf in the Gulf of Mexico southwest of Freshwater City, LA.

Summary: EPA has no objections to the proposed action.

ERP No. F–COE–K39077–CA

East Cliff Drive Bluff Protection and Parkway Project, Alternatives Evaluation for Coastal Bluff Erosion Protection, City of Santa Cruz, Santa Cruz County, CA.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–NPS–D61053–VA

Green Spring Colonial National Historical Park Management Plan, Implementation, James City County, VA.

Summary: EPA's concerns were adequately addressed in the final EIS.

Dated: October 28, 2003.

Joseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–27476 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7575–2]

State Innovation Grant Program, Notice of Availability of Solicitation for Proposals for 2003/2004 Awards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency, Office of Policy, Economics and Innovation (OPEI) is giving notice of the availability of its solicitation for proposals for the 2003/2004 grant program to support innovation by State environmental regulatory agencies—the ''State Innovation Grant Program.'' The solicitation is available at the Agency's State Innovation Grant Web site: *http://www.epa.gov/innovation/stategrants,* or may be requested from the Agency by e-mail, telephone, or by mail. Only the principal environmental regulatory agency within each State (generally, where delegated authorities for Federal environmental regulations exist) is eligible to receive these grants.

DATES: State environmental regulatory agencies will have 68 days (until January 7, 2004) from the date of publication of the solicitation on the Web site (October 30, 2003) to respond with a pre-proposal, budget, and project summary. The environmental regulatory agencies from the fifty (50) States; Washington, DC, and four (4) territories were notified of the solicitation's availability by fax and email transmittals on October 30, 2003.

ADDRESSES: Copies of the Solicitation can be downloaded from the Agency's Web site at: *http://www.epa.gov/innovation/stategrants/2003solicitation* or may be requested by telephone (202–566–2182), or by e-mail (*Innovation_State_Grants@epa.gov*). Proposals submitted in response to this solicitation, or questions concerning the solicitation should be sent to:

State Innovation Grant Program, Office of Policy, Economics and Innovation, U.S. Environmental Protection Agency (1807T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Proposal responses or questions may also be sent by fax to (202–566–2220), addressed to the ''State Innovation Grant Program,'' or by e-mail to: *Innovation_State_Grants@epa.gov.* We encourage e-mail responses. If you have questions about responding to this notice, please contact EPA at this e-mail address or fax number, or you may call Gerald Filbin at 202–566–2182. EPA will acknowledge all responses it receives to this notice.

SUPPLEMENTARY INFORMATION:

Background: In Fall of 2002, EPA conducted a competition for a new grant program designed to support innovation in environmental programs at the State level. Following the pilot round of State Innovation Grants in 2002, EPA consulted with the States through the Environmental Council of the States and through a comment period announced in the **Federal Register** (68 FR 34944, June 11, 2003) (see *http://www.epa.gov/innovation/stategrants* on the grant solicitation process). Based upon that input EPA made several improvements in the process for this year—including a pre-announcement process that would allow time for States to consult with EPA Regions on potential projects prior to the solicitation, and a change from a 30-day to a 60-day response period once the solicitation is announced. One of the recommendations from the consultation was to incorporate State input into the selection of topic areas for subsequent solicitations, to ensure that State priorities were considered in projects that EPA selected.

There was support from a large number of the responding States for maintaining *innovation in permitting* as a subject of the next solicitation, in order to create a stable resource base for an area that is core to the innovation efforts in most States. Within this topic there was considerable support for EPA assistance to the States for implementation of Environmental Management Systems (EMS) relating to permitting (see: *http://www.epa.gov/ems/* and Environmental Results Programs (ERPs) (see: *http://www.epa.gov/ooaujeag/permits/masserp.htm*). There were other topics suggested by the States—including a few topics that were suggested by more than one State, but because of the strong support for the *innovation in permitting* topic, and the relatively small amount of funding anticipated this year for the program, EPA was concerned that too many topics might diffuse the resources available and prohibit adequate funding for projects of significant scale. Several of the other topics suggested may in fact, be eligible for support through other EPA assistance programs. The State Innovation Grant Program will try to provide some flexibility around the ''innovation in permitting'' theme for a variety of projects, although permitting programs or alternatives to permitting programs will be at the core of projects we select.

Dated: October 9, 2003.

Christopher Knopes,

Associate Director, Office of Environmental Policy Innovation.

[FR Doc. 03–27486 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7580–8]

Public Notice of Draft NPDES General Permits for Wastewater Lagoon Systems Located In Indian Country in MT, ND, SD, UT, and WY

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent to reissue NPDES general permits.

SUMMARY: EPA Region 8 is hereby giving notice of its proposed determination to issue five National Pollutant Discharge Elimination System (NPDES) general permits for wastewater lagoon systems that are located in Indian country in the States of MT, ND, SD, UT, and WY and that are treating primarily domestic wastewater. The general permits are grouped geographically by State, with the permit coverage being for specified Indian reservations in the State; any land held in trust by the United States for an Indian tribe; and any other areas which are Indian country within the meaning of 18 U.S.C. 1151. These general permits will replace the twenty-one general permits that were issued for a 5-year term in 1998 for Indian reservations in MT, ND, SD, and UT.

The use of wastewater lagoon systems is the most common method of treating municipal wastewater in Indian country in MT, ND, SD, UT and WY. Wastewater lagoon systems are also used to treat domestic wastewater from isolated housing developments, schools, camps, missions, and similar sources of domestic wastewater that are not connected to a municipal sanitary sewer system and do not use septic tank systems. Region 8 is proposing to use general permits instead of individual permits for permitting the discharges from such facilities in order to reduce the Region's administrative burden of issuing separate individual permits. The administrative burden for the regulated sources is expected to be about the same under the general permits as with individual permits, but it will be much quicker to obtain permit coverage with general permits than with individual permits. The discharge requirements would essentially be the same with an individual permit or under the general permit.

DATES: Public comments on this proposal must be received, in writing, on or before December 30, 2003.

ADDRESSES: Public comments should be sent to: U.S. EPA, Region 8; Water Permits Unit (8P–W–P); 999 18th Street, Suite 300; Denver, CO 80202–2466.

FOR FURTHER INFORMATION CONTACT: For a copy of the draft permit and Fact Sheet, please write William Kennedy at the above address or telephone (303) 312–6285. Copies of the draft permit and Fact Sheet may also be downloaded from the EPA Region 8 web page at *http://www.epa.gov/region08/html/npdes/lagoons.html.* Questions regarding the specific permit requirements may be directed to Mike Reed at (303) 312–6132, or E-mail address *Reed.Mike@epa.gov.*

SUPPLEMENTARY INFORMATION It is proposed that general permits be issued for discharges from wastewater lagoon systems located in the following areas:

Montana: MTG589###. This permit covers the Blackfeet Indian Reservation; the Crow Indian Reservation; the Flathead Indian Reservation; the Fort Belknap Indian Reservation; the Fort Peck Indian Reservation; the Northern Cheyenne Indian Reservation; the Rocky Boy's Indian Reservation; any land within the State of Montana held in trust by the United States for an Indian tribe; and any other areas within the State of Montana which are Indian country within the meaning of 18 U.S.C. 1151.

North Dakota: NDG589###. This permit covers the Fort Berthold Indian Reservation; the Fort Totten Indian Reservation—also known as Spirit Lake Indian Reservation; the Standing Rock Sioux Indian Reservation; the Turtle Mountain Indian Reservation; any land within the State of North Dakota held in trust by the United States for an Indian tribe; and any other areas within the State of North Dakota which are Indian country within the meaning of 18 U.S.C. 1151. This permit includes that portion of the Standing Rock Indian Reservation and associated Indian country located within the State of South Dakota. It does not include any land held in trust by the United States for the Sisseton-Wahpeton Sioux Tribe or any other Indian country associated with that Tribe, which is covered under general permit SDG589###.

South Dakota: SDG589###. This permit covers the Cheyenne River Sioux Indian Reservation; Crow Creek Sioux Indian Reservation; the Flandreau Indian Reservation; the Lower Brule Indian Reservation; the Pine Ridge Indian Reservation—includes the entire Reservation, which is located in both South Dakota and Nebraska; the Rosebud Sioux Indian Reservation; the Yankton Sioux Indian Reservation; any land within the State of South Dakota held in trust by the United States for an Indian tribe; and any other areas, within the State of South Dakota which are Indian country within the meaning of 18 U.S.C. 1151. This permit includes any land in the State of North Dakota that is held in trust by the United States for the Sisseton-Wahpeton Sioux Tribe or any other Indian country associated with that Tribe. It does not include the Standing Rock Indian Reservation or any associated Indian country, which is covered under general permit NDG589###.

Utah: UTG589###. This permit covers the Northwestern Band of Shoshoni Indian Reservation; the Paiute Indian Reservation; the Skull Valley Indian Reservation; the Uintah and Ouray Indian Reservation; any land within the State of Utah held in trust by the United States for an Indian tribe; and any other areas within the State of Utah which are Indian country within the meaning of 18 U.S.C. 1151. It does not include those portions of the Navajo Nation, the Goshutes Indian Reservation, and the Ute Mountain Indian Reservation located in the State of Utah, any land held in trust by the United States for an Indian tribe that is associated with those reservations, and any other areas which are Indian country within the meaning of 18 U.S.C. 1151 that are associated with those reservations.

Wyoming: WYG589###. This permit covers the Wind River Indian Reservation; any land within the State of Wyoming held in trust by the United States for an Indian tribe; and any other areas within the State of Wyoming which are Indian country within the meaning of 18 U.S.C. 1151.

General permits are not being issued for the portions of the Navajo Nation and the Goshutes Indian Reservation in Utah since the permitting activities for these reservations are done by Region 9 of EPA. Also, general permits are not being issued for the Southern Ute Indian Reservation located in the State of Colorado and the Ute Mountain Indian Reservation located in the States of Colorado, New Mexico, and Utah because of water quality concerns in the San Juan River Basin portion of the Colorado River Basin.

Coverage under the general permits will be limited to lagoon systems treating primarily domestic wastewater and will include the following three categories: (1) Lagoons where no permission is required before starting to discharge; (2) lagoons where permission is required before starting to discharge;

and (3) lagoons that are required to have no discharge. The effluent limitations for lagoons coming under categories 1 and 2 are based on the Federal Secondary Treatment Regulation (40 CFR part 133) and best professional judgement (BPJ). There are provisions in the general permits for adjusting the effluent limitations on total suspended solids (TSS) and pH in accordance with the provisions of the Secondary Treatment Regulation. If more stringent and/or additional effluent limitations are considered necessary to comply with applicable water quality standards, etc., those limitations may be imposed by written notification to the permittee. Lagoon systems under category 3 are required to have no discharge except in accordance with the bypass provisions of the permit. Self-monitoring requirements and routine inspection requirements are included in the permits. The permits do not authorize the discharge of wastewater from land application sites, but they do require that the land application of wastewater from the lagoon systems be done in accordance with a written operational plan for the land application of the wastewater. The objectives of the operational plan are to minimize the potential for the discharge of wastewater from the land application site and to avoid applying excessive amounts of nitrogen to the land application site.

With the exception of the Flathead Indian Reservation and the Fort Peck Indian Reservation, where the Tribes have Clean Water Act section 401(a)(1) certification authority, EPA intends to certify that the permits comply with the applicable provisions of the Clean Water Act as long as the permittees comply with all permit conditions. The permits will be issued for a period of five years, with the permit effective date and expiration date determined at the time of issuance.

Paperwork Reduction Act

The information collection requirements of these permits were previously approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act, 40 U.S.C. 3501, *et seq.* and assigned OMB control numbers 2040–0250 (General Permits) and 2040–0004 (Discharge Monitoring Reports).

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

OMB has waived review of NPDES general permits under the terms of Executive Order 12866.

Regulatory Flexibility Act

Issuance of an NPDES general permit is not subject to rulemaking requirements, including the requirement for a general notice of proposed rulemaking, under section 535 of the Administrative Procedures Act (APA) or any other law, and is, thus, not subject to the Regulatory Flexibility Act (RFA) requirement to prepare an Initial Reg Flex Analysis (IRFA).

The APA defines two broad, mutually exclusive categories of agency action—''rules'' and ''orders.'' Its definition of ''rule'' encompasses ''an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *'' APA section 551(4). Its definition of ''order'' is residual: ''a final disposition * * * of an agency in a matter other than rulemaking but including licensing.'' APA section 551(6) (emphasis added). The APA defines ''license'' to ''include * * * an agency permit * * *'' APA section 551(8). The APA thus categorizes a permit as an order, which by the APA's definition is not a rule. Section 553 of the APA establishes ''rulemaking'' requirements. The APA defines ''rulemaking'' as ''the agency process for formulating, amending, or repealing a rule.'' (APA section 551(5)). By its terms, then, section 553 applies only to ''rules'' and not also to ''orders,'' which include permits.

Unfunded Mandates Reform Act

Section 201 of the Unfunded Mandates Reform Act (UMRA), Public Law 104–4, generally requires Federal agencies to assess the effects of their ''regulatory actions'' on State, local, and tribal governments and the private sector. UMRA uses the term ''regulatory actions'' to refer to regulations. (See, *e.g.*, UMRA section 201, ''Each agency shall * * * assess the effects of Federal regulatory actions * * * (other than to the extent that such regulations incorporate requirements specifically set forth in law)'' (emphasis added)). UMRA section 102 defines ''regulation'' by reference to 2 U.S.C. 658 which in turn defines ''regulation'' and ''rule'' by reference to section 601(2) of the Regulatory Flexibility Act (RFA). That section of the RFA defines ''rule'' as ''any rule for which the agency publishes a notice of proposed rulemaking pursuant to section 553(b) of [the Administrative Procedure Act (APA)], or any other law. * * *''

As discussed in the RFA section of this notice, NPDES general permits are not ''rules'' under the APA and thus not subject to the APA requirement to publish a notice of proposed rulemaking. NPDES general permits are also not subject to such a requirement under the CWA. While EPA publishes a notice to solicit public comment on draft general permits, it does so pursuant to the CWA section 402(a) requirement to provide ''an opportunity for a hearing.'' Thus, NPDES general permits are not ''rules'' for RFA or UMRA purposes.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: October 24, 2003.

Stephen S. Tuber,

Assistant Regional Administrator, Office of Partnerships and Regulatory Assistance.

[FR Doc. 03–27485 Filed 10–30–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval

October 7, 2003.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with

a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before December 1, 2003. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov* or Kim A. Johnson, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3562 or via the Internet at *Kim_A._Johnson@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copy of the information collection(s) contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0059.

Title: Statement Regarding the Importation of Radio Frequency Devices Capable of Harmful Interference, FCC Form 740.

Form Number: FCC 740.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; Individuals or households; and State, Local, or Tribal Governments.

Number of Respondents: 5,077.

Estimated Time per Response: 1–5 minutes.

Frequency of Response: On occasion reporting requirement; Third party disclosure.

Total Annual Burden: 28,030 hours.

Total Annual Costs: None.

Needs and Uses: The FCC, working in conjunction with the U.S. Customs Service, is responsible for the regulation of both authorized radio services and devices that can cause interference. FCC Form 740 must be completed for each radio frequency device, which is imported into the United States, and is used to keep non-compliant devices from being distributed to the general public, thereby reducing the potential for harmful interference being caused to authorized communications. FCC Form 740 may now be filed on paper or by electronic means.

OMB Control Number: 3060–0341.

Title: Section 73.1680, Emergency antennas.

Form Number: N/A.

Type of Review: Extension of currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents: 142.

Estimated Time per Response: 0.5 hours.

Frequency of response: On occasion reporting requirements.

Total Annual Burden: 71 hours.

Total Annual Costs: $28,400.

Needs and Uses: 47 CFR 73.1680 requires that licensees of AM, FM, or TV stations submit an informal request to the FCC (within 24 hours of commencement of use) to continue operation with an emergency antenna. An emergency antenna is one that is erected for temporary use after the authorized main and auxiliary antennas are damaged and cannot be used. FCC staff use the data to ensure that interference is not caused to other existing stations.

OMB Control Number: 3060–0580.

Title: Operator Interests in Video Programming, Sections 76.504 and 76.1710.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1,500.

Estimated Time per Response: 15 hours.

Frequency of Response: Recordkeeping.

Total Annual Burden: 22,500 hours.

Total Annual Costs: None.

Needs and Uses: 47 CFR 76.1710 (formerly 76.504) requires cable operators to maintain records in their public file for a period of three years regarding the nature and extent of their attributable interests in all video programming services. 47 CFR 76.504, Note 2 states that the information collection requirements are found in Section 76.1710. These records must be maintained in operators' public files for a period of three years and must be made available to members of the public, local franchising authorities, and the Commission on reasonable notice and during regular business hours. The Commission and local franchising authorities will review the information to monitor compliance with channel occupancy limits in respective local franchise areas. (OMB Control No. 3060–0581 contains the remaining information collections for this rule.)

OMB Control Number: 3060–0773.

Title: Marketing of RF Devices Prior to Equipment Authorization, Section 2.803.

Form Number: N/A.

Type of Review: Extension of currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 6,000.

Estimated Time per Response: 0.5 hours.

Frequency of Response: One time reporting requirement; Third party disclosure.

Total Annual Burden: 3,000 hours.

Total Annual Costs: None.

Needs and Uses: FCC rules permit the display and advertising of radio frequency (RF) devices prior to equipment authorization or a determination of compliance, providing that the advertising or display contains a conspicuous notice as specified at 47 CFR 2.803(c). A notice must also accompany RF prototype equipment devices offered for sale, as stated in 47 CFR 2.803(c)(2), prior to equipment authorization or a showing of compliance, that the equipment must comply with FCC rules prior to delivery. This information informs third parties of the FCC's requirement for the responsible party to comply with its rules.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–27432 Filed 10–30–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 96–45; DA 03–3112]

Wireline Competition Bureau Seeks Comment on Western Wireless Corporation Petition To Reject Rural Telephone Company Self-Certification Filed by Valor Telecommunications of Texas, LP, for the State of Oklahoma

AGENCY: Federal Communications Commission

ACTION: Notice; solicitation for comments.

SUMMARY: In this document the Commission invites comment on

Western Wireless's petition to reject Valor's self-certification as a rural telephone company in the state of Oklahoma.

DATES: Submit comments on or before December 1, 2003 and reply comments on or before December 15, 2003.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554, Room TW–B204. *See* Supplemental Information for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Sheryl Todd (202) 418–7400 TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: On June 30, 2003, Valor Telecommunications of Texas, LP (Valor) filed a rural self-certification letter stating that it meets the criterion set forth in section 153(37)(D) of the Act for all its study areas in the states of Texas (which includes a small portion in Arkansas), Oklahoma, and New Mexico. Valor had previously self-certified its Texas and New Mexico study areas as rural telephone company study areas on June 27, 2000. Valor states that it now also meets the criterion for certification of its Oklahoma study area as a rural telephone company study area as a result of a merger among Valor Telecommunications of Texas, LP, Valor Telecommunications of Oklahoma, LLC, and Valor Telecommunications of New Mexico, LLC.

On September 16, 2003, Western Wireless Corporation (Western Wireless) filed a petition requesting that the Commission reject Valor's self-certification as a rural carrier in the state of Oklahoma. Western Wireless previously filed a similar petition to reject Valor's self-certification as a rural telephone company in Texas and New Mexico, and the Commission asked for and received public comment on that petition. Western Wireless now claims, similar to its arguments in its petition opposing Valor's self-certifications in Texas and New Mexico, that Valor does not qualify as a rural telephone company in Oklahoma under section 153(37)(D) because Valor was not a local exchange carrier on the date of enactment of the Telecommunications Act of 1996 (1996 Act) and Valor did not have ''less than 15 percent of its access lines in communities of more than 50,000'' on the date that the 1996 Act was adopted. Western Wireless further argues that any interpretation of section 153(37)(D) that would allow Valor to qualify as a rural telephone company as a consequence of its purchase of exchanges from GTE would subvert the Commission's policy to ''prevent carriers from subdividing study areas to gain an advantage under the [universal service] rules.'' Western Wireless also argues that it would be anti-competitive for Valor's claimed rural telephone company status to potentially prejudice the Eligible Telecommunications Carrier (ETC) status of competitive entrants. Finally, Western Wireless argues that Valor cannot use an internal corporate reorganization as a means to acquire rural telephone company status.

We invite comment on Western Wireless's petition to reject Valor's self-certification as a rural telephone company in the state of Oklahoma. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before December 1, 2003, and reply comments on or before December 15, 2003. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998.

Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission.

Parties also must send three paper copies of their filing to Sheryl Todd, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street SW., Room 5–B540, Washington, DC 20554. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054.

Pursuant to § 1.1206 of the Commission's rules, this proceeding will be conducted as a permit-but-disclose proceeding in which *ex parte* communications are permitted subject to disclosure.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–27428 Filed 10–30–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 03–3309]

Announcement of Next Meeting Date and Agenda of Consumer Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the next meeting date and agenda of the Consumer Advisory Committee whose purpose is to make recommendations to the Federal Communications Commission (''Commission'') regarding consumer issues within the jurisdiction of the Commission and to facilitate the participation of consumers (including people with disabilities and underserved populations, such as Native Americans and persons living in

rural areas) in proceedings before the Commission.

DATES: The next meeting of the Committee will take place on Thursday, November 20, 2003, from 9 a.m. to 4 p.m.

ADDRESSES: Federal Communication Commission, 445 12th Street SW., Room TW–C305, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Scott Marshall, (202) 418–2809 (voice), (202) 418–0179 (TTY) or e-mail: *cac@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice DA 03–3309 released October 21, 2003. The Commission announced the next meeting date and meeting agenda of its Consumer Advisory Committee.

Purpose and Functions

The purpose of the committee is to make recommendations to the Commission regarding consumer issues within the jurisdiction of the Commission and to facilitate the participation of consumers (including people with disabilities and underserved populations, such as Native Americans and persons living in rural areas) in proceedings before the Commission.

Meeting Agenda

The Committee will consider: (1) Recommendations of its TRS Working Group regarding outreach and funding for telecommunications relay services; (2) a recommendation of its Broadband Working Group regarding further study of broadband issues; (3) recommendations of its consumer Complaints, Education and Outreach Working Group regarding funding for, and effective methods of, outreach to consumers; and (4) a progress report of its Ancillary Services Working Group. Time will also be allotted for working group meetings between 10 a.m. and 12 p.m. The Committee will also receive briefings by FCC staff regarding Consumer & Governmental Affairs Bureau activities and other matters.

Availability of Copies and Electronic Accessibility

A copy of the October 21, 2003, Public Notice is available in alternate formats (Braille, cassette tape, large print or diskette) upon request. It is also posted on the Commission's Web site at *http://www.fcc.gov/cgb/cac.* Meeting minutes will be available for public inspection at the FCC headquarters building and will be posted on the Commission's Web site at *http://www.fcc.gov/cgb/cac.*

The Committee meeting will be open to the public and interested persons may attend the meeting and communicate their views. Members of the public will have an opportunity to address the Committee on issues of interest to them and the Committee. Written comments for the Committee may also be sent to the Committee's Designated Federal Officer, Scott Marshall.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Meeting agendas and handouts will be provided in accessible format. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. The meeting will be webcast with open captioning at *http://www.fcc.gov/cgb/cac.* Request other reasonable accommodations for people with disabilities as early as possible; please allow at least 5 days advance notice. Include a description of the accommodation you will need including as much detail as you can. Also include a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Federal Communications Commission.

K. Dane Snowden,

Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 03–27408 Filed 10–30–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

FDIC Advisory Committee on Banking Policy; Notice of Meeting

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of opening meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given of a meeting of the FDIC Advisory Committee on Banking Policy (''Advisory Committee''), which will be held in Washington, DC. The Advisory Committee will provide advice and recommendations on a broad range of issues relating to the FDIC's mission and activities.

Time and Place: Wednesday, November 19, 2003, from 9 a.m. to 12 p.m., and 1:30 p.m. to 2:30 p.m. The meeting will be held in the FDIC Board Room on the sixth floor of the FDIC Building located at 550 17th Street, NW., Washington, DC.

Agenda: The agenda items include discussion of financial literacy (MoneySmart and beyond), the future of banking (structure and policy considerations), and FDIC Corporate University (progress, strategy, and vision). Agenda items are subject to change. Any changes to the agenda will be announced at the beginning of the meeting.

Type of Meeting: The meeting will be open to the public, limited only by the space available on a first-come, first-served basis. For security reasons, members of the public will be subject to security screening procedures and must present a valid photo identification to enter the building. The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call (202) 416–2089 (Voice); (202) 416–2007 (TTY), at least two days before the meeting to make necessary arrangements. Written statements may be filed with the committee before or after the meeting.

FOR FURTHER INFORMATION CONTACT: Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Committee Management Officer of the FDIC, at (202) 898–3742.

Dated: October 28, 2003.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Committee Management Officer.

[FR Doc. 03–27433 Filed 10–30–03; 8:45 am]

BILLING CODE 6725–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10:00 a.m. on Tuesday, November 4, 2003, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous Board of Directors' meetings.

Summary reports, status reports, and reports of action is taken pursuant to

authority delegated by the Board of Directors.

Discussion Agenda

Memorandum and resolution re: Notice of Proposed Rulemaking: 12 CFR part 352—Amendment to FDIC's Rehabilitation Act Regulation.

Memorandum and resolution re: FDIC Insurance Funds: Outlook and Premium Rate Recommendations for the First Semiannual Assessment Period of 2004.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street NW., Washington, DC.

The FDIC will provide attendees with auxiliary aids (*e.g.*, sign language interpretation) required for this meeting. Those attendees needing such assistance should call (202) 416–2089 (Voice); (202) 416–2007 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 8098–3742.

Dated: October 28, 2003.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 03–27533 Filed 10–28–03; 4:04 pm]

BILLING CODE 6714–01–M

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 24, 2003.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. First National Bankshares of Florida, Inc., Naples, Florida; to become a bank holding company by acquiring 100 percent of the voting shares of First National Bank of Florida, Naples, Florida.

In connection with this proposal, *First National Bankshares of Florida, Inc.*, Naples, Florida, has applied to engage *de novo* through its subsidiary, First National Wealth Management Company, Naples, Florida, in trust activities, pursuant to section 225.28(b)(5) of Regulation Y, and to acquire 100 percent of the voting shares of Roger Bouchard Insurance, Inc., Clearwater, Florida, and thereby engage in the sale of credit–insurance, pursuant to section 225.28(b)(11)(i) of Regulation Y.

2. Synovus Financial Corp., Columbus, Georgia; to merge with Peoples Florida Banking Corporation, Palm Harbor, Florida, and thereby indirectly acquire Peoples Bank, Palm Harbor, Florida.

Board of Governors of the Federal Reserve System, October 27, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 03–27396 Filed 10–30–03; 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 November 24, 2003.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106-2204:

1. The Royal Bank of Scotland Group plc, the Royal Bank of Scotland plc, RBSG International Holdings Ltd., all of Edinburgh, Scotland, Citizens Financial Group, Inc., Providence, Rhode Island and Citizens Bank of Pennsylvania, Philadelphia, Pennsylvania; to acquire Thistle Group Holdings and its wholly–owned federal savings association, Roxborough–Manayunk Bank, both of Philadelphia, Pennsylvania, and thereby engage in operating a savings association, pursuant to section 225.28 (b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, October 27, 2003.

Robert deV. Frierson,

Depouty Secretary of the Board.

[FR Doc.03–27397 Filed 10–30–03; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention Health Resources and Services Administration

CDC/HRSA Advisory Committee on HIV and STD Prevention and Treatment

In accordance with section l0(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) and the Health Resources and Services Administration (HRSA) announce the following committee meeting.

Name: CDC/HRSA Advisory Committee on HIV and STD Prevention and Treatment.

Times and Dates: 8 a.m.–5 p.m., November 20, 2003. 8 a.m.–2:45 p.m., November 21, 2003

Place: Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, Maryland 20814, Telephone: (301) 652–2000

Status: Open to the public, limited only by the space available. The meeting room will accommodate approximately 100 people.

Purpose: This committee is charged with advising the Secretary, the Director, CDC and the Administrator, HRSA, regarding activities related to prevention and control of HIV/AIDS and other STDs, the support of health care services to persons living with HIV/AIDS, and education of health professionals and the public about HIV/AIDS and other STDs. The committee will support the Agencies' process of identifying and responding to the prevention and health service delivery needs of affected communities, and the needs of individuals living with or at risk for HIV and other STDs.

Matters to be Discussed: Agenda items include issues pertaining to (1) Ryan White CARE Act Reauthorization (RWCA) 2) syphilis elimination and (3) Advancing HIV Prevention: New Strategies for a Changing Epidemic. Agenda items are subject to change as priorities dictate.

For Further Information Contact: Paulette Ford-Knights, Public Health Analyst, National Center for HIV, STD, and TB Prevention, 1600 Clifton Road, NE, M/S E-07, Atlanta, Georgia 30333. Telephone 404/639–8008, fax 404/639–3125, e-mail *pbf7@cdc.gov*.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: October 9, 2003.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 03–27424 Filed 10–30–03; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0483]

Agency Information Collection Activities; Proposed Collection; Comment Request; Food Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection provisions in FDA's food labeling regulations.

DATES: Submit written or electronic comments on the collection of information by December 30, 2003.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–250), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice for an extension of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Food Labeling Regulations—(21 CFR Parts 101, 102, 104, and 105) (OMB Control Number 0910–0381)

FDA regulations require food producers to disclose to consumers and others specific information about themselves or their products on the label or labeling of their products. Related regulations require that food producers retain records establishing the basis for the information contained in the label or labeling of their products and provide those records to regulatory officials. Finally, certain regulations provide for the submission of food labeling petitions to FDA. FDA's food labeling regulations under parts 101, 102, 104, and 105 (21 CFR parts 101, 102, 104, and 105) were issued under the authority of sections 4, 5, and 6 of the Fair Packaging and Labeling Act (the FPLA) (15 U.S.C. 1453, 1454, and 1455) and under sections 201, 301, 402, 403, 409, 411, 701, and 721 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321, 331, 342, 343, 348, 350, 371, and 379e). Most of these regulations derive from section 403 of the act, which provides that a food product shall be deemed to be misbranded if, among other things, its label or labeling fails to bear certain required information concerning the food product, is false or misleading in any particular, or bears certain types of unauthorized claims. The disclosure requirements and other collections of information in the regulations in parts 101, 102, 104, and 105 are necessary to ensure that food products produced or sold in the United States are in compliance with the labeling provisions of the act and the FPLA.

Section 101.3 of FDA's food labeling regulations requires that the label of a food product in packaged form bear a statement of identity (*i.e.*, the name of the product), including, as appropriate, the form of the food or the name of the food imitated. Section 101.4 prescribes requirements for the declaration of ingredients on the label or labeling of food products in packaged form. Section 101.5 requires that the label of a food product in packaged form specify the name and place of business of the manufacturer, packer, or distributor and, if the food producer is not the

manufacturer of the food product, its connection with the food product. Section 101.9 requires that nutrition information be provided for all food products intended for human consumption and offered for sale, unless an exemption in § 101.9(j) applies to the product. Section 101.9(g)(9) also provides for the submission to FDA of requests for alternative approaches to nutrition labeling. Finally, § 101.9(j)(18) provides for the submission to FDA of notices from firms claiming the small business exemption from nutrition labeling.

Section 101.10 requires that restaurants provide nutrition information, upon request, for any food or meal for which a nutrient content claim or health claim is made. Section 101.12(b) provides the reference amount that is used for determining the serving sizes for specific products, including baking powder, baking soda, and pectin. Section 101.12(e) provides that a manufacturer that adjusts the reference amount customarily consumed (RACC) of an aerated food for the difference in density of the aerated food relative to the density of the appropriate nonaerated reference food must be prepared to show FDA detailed protocols and records of all data that were used to determine the density-adjusted RACC. Section 101.12(g) requires that the label or labeling of a food product disclose the serving size that is the basis for a claim made for the product if the serving size on which the claim is based differs from the RACC. Section 101.12(h) provides for the submission of petitions to FDA to request changes in the reference amounts defined by regulation.

Section 101.13 requires that nutrition information be provided in accordance with § 101.9 for any food product for which a nutrient content claim is made. Under some circumstances, § 101.13 also requires the disclosure of other types of information as a condition for the use of a nutrient content claim. For example, under § 101.13(j), if the claim compares the level of a nutrient in the food with the level of the same nutrient in another ''reference'' food, the claim must also disclose the identity of the reference food, the amount of the nutrient in each food, and the percentage or fractional amount by which the amount of the nutrient in the labeled food differs from the amount of the nutrient in the reference food. It also requires that when this comparison is based on an average of food products, this information must be provided to consumers or regulatory officials upon request. Section 101.13(q)(5) requires that restaurants document and provide to appropriate regulatory officials, upon request, the basis for any nutrient content claims they have made for the foods they sell.

Section 101.14 provides for the disclosure of nutrition information in accordance with § 101.9 and, under some circumstances, certain other information as a condition for making a health claim for a food product. Section 101.15 provides that, if the label of a food product contains any representation in a foreign language, all words, statements, and other information required by or under authority of the act to appear on the label shall appear thereon in both the foreign language and in English. Section 101.22 contains labeling requirements for the disclosure of spices, flavorings, colorings, and chemical preservatives in food products. Section 101.22(i)(4) sets forth reporting and recordkeeping requirements pertaining to certifications for flavors designated as containing no artificial flavor. Section 101.30 specifies the conditions under which a beverage that purports to contain any fruit or vegetable juice must declare the percentage of juice present in the beverage and the manner in which the declaration is to be made.

Section 101.36 requires that nutrition information be provided for dietary supplements offered for sale, unless an exemption in § 101.36(h) applies. Section 101.36(f)(2) cross-references the provisions in § 101.9(g)(9) for the submission to FDA of requests for alternative approaches to nutrition labeling. Also, § 101.36(h)(2) cross-references the provisions in § 101.9(j)(18) for the submission of small business exemption notices.

Section 101.42 requests that food retailers voluntarily provide nutrition information for raw fruits, vegetables, and fish at the point of purchase, and § 101.45 contains guidelines for providing such information. Also, § 101.45(c) provides for the submission of nutrient data bases and proposed nutrition labeling values for raw fruit, vegetables, and fish to FDA for review and approval.

Sections 101.54, 101.56, 101.60, 101.61, and 101.62 specify information that must be disclosed as a condition for making particular nutrient content claims. Section 101.67 provides for the use of nutrient content claims for butter, and cross-references requirements in other regulations for ingredient declaration (§ 101.4) and disclosure of information concerning performance characteristics (§ 101.13(d)). Section 101.69 provides for the submission of a petition requesting that FDA authorize a particular nutrient content claim by regulation. Section 101.70 provides for the submission of a petition requesting that FDA authorize a particular health claim by regulation. Section 101.77(c)(2)(ii)(D) requires the disclosure of the amount of soluble fiber per serving in the nutrition labeling of a food bearing a health claim about the relationship between soluble fiber and a reduced risk of coronary heart disease. Section 101.79(c)(2)(iv) requires the disclosure of the amount of folate per serving in the nutrition labeling of a food bearing a health claim about the relationship between folate and a reduced risk of neural tube defects.

Section 101.100(d) provides that any agreement that forms the basis for an exemption from the labeling requirements of section 403(c), (e), (g), (h), (i), (k), and (q) of the act be in writing and that a copy of the agreement be made available to FDA upon request. Section 101.100 also contains reporting and disclosure requirements as conditions for claiming certain labeling exemptions.

Section 101.105 specifies requirements for the declaration of the net quantity of contents on the label of a food in packaged form and prescribes conditions under which a food whose label does not accurately reflect the actual quantity of contents may be sold, with appropriate disclosures, to an institution operated by Federal, State, or local government. Section 101.108 provides for the submission to FDA of a written proposal requesting a temporary exemption from certain requirements of § 101.9 and § 105.66 for the purpose of conducting food labeling experiments with FDA's authorization.

Regulations in part 102 define the information that must be included as part of the statement of identity for particular foods and prescribe related labeling requirements for some of these foods. For example, § 102.22 requires that the name of a protein hydrolysate shall include the identity of the food source from which the protein was derived.

Part 104, which pertains to nutritional quality guidelines for foods, cross-references several labeling provisions in part 101 but contains no separate information collection requirements.

Part 105 contains special labeling requirements for hypoallergenic foods, infant foods, and certain foods represented as useful in reducing or maintaining body weight.

The disclosure and other information collection requirements in the previously mentioned regulations are placed primarily upon manufacturers, packers, and distributors of food products. Because of the existence of

exemptions and exceptions, not all of the requirements apply to all food producers or to all of their products. Some of the regulations affect food retailers, such as supermarkets and restaurants.

The purpose of the food labeling requirements is to allow consumers to be knowledgeable about the foods they purchase. Nutrition labeling provides information for use by consumers in selecting a nutritious diet. Other information enables a consumer to comparison shop. Ingredient information also enables consumers to avoid substances to which they may be sensitive. Petitions or other requests submitted to FDA provide the basis for the agency to permit new labeling statements or to grant exemptions from certain labeling requirements. Recordkeeping requirements enable FDA to monitor the basis upon which certain label statements are made for food products and whether those statements are in compliance with the requirements of the act or the FPLA.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Sections	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours	Total Capital, Operating, & Maintenance Costs
101.3, 101.22, 102 and 104	17,000	1.03	17,500	0.5	8,750	0
101.4, 101.22, 101.100, 102, 104, and 105	17,000	1.03	17,500	1	17,500	0
101.5	17,000	1.03	17,500	0.25	4,375	0
101.9, 101.13(n), 101.14(d)(3), 101.62, and 104	17,000	1.03	17,500	4	70,000	$1,000,000
101.9(g)(9) and 101.36(f)(2)	12	1	12	4	48	0
101.9(j)(18) and 101.36(h)(2)	10,000	1	10,000	8	80,000	0
101.10	265,000	1.5	397,500	0.25	99,375	0
101.12(b)	29	2.3	66	1	66	$39,600
101.12(e)	25	1	25	1	25	0
101.12(g)	5,000	1	5,000	1	5,000	0
101.12(h)	5	1	5	80	400	$400,000
101.13(d)(i) and 101.67	200	1	200	1	200	0
101.13(j)(2), 101.13(k), 101.54, 101.56, 101.60, 101.61, and 101.62	2,500	1	2,500	1	2,500	0
101.13(q)(5)	265,000	1.5	397,500	0.75	298,125	0
101.14(d)(2)	265,000	1.5	397,500	0.75	298,125	0
101.15	160	10	1,600	8	12,800	0
101.22(i)(4)	25	1	25	1	25	0
101.30 and 102.33	1,500	3.3	5,000	1	5,000	0
101.36	300	40	12,000	4	48,000	$15,000,000
101.42 and 101.45	72,270	1	72,270	0.5	36,135	0
101.45(c)	5	4	20	4	80	0

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

21 CFR Sections	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours	Total Capital, Operating, & Maintenance Costs
101.69	3	1	3	25	75	0
101.70	3	1	3	80	240	$400,000
101.79(c)(2)(ii)(D)	1,000	1	1,000	0.25	250	0
101.79(c)(2)(iv)	100	1	100	0.25	25	0
101.100(d)	1,000	1	1,000	1	1,000	0
101.105 and 101.100(h)	17,000	1.03	17,500	0.5	8,750	0
101.108	0	0	0	40	0	0
Total					996,000	$16,800,000

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Sections	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
101.12(e)	25	1	25	1	25
101.13(q)(5)	265,000	1.5	397,500	0.75	298,125
101.14(d)(2)	265,000	1.5	397,500	0.75	298,125
101.22(i)(4)	25	1	25	1	25
101.100(d)(2)	1,000	1	1,000	1	1,000
101.105(t)	100	1	100	1	100
Total					597,400

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

In the **Federal Register** of January 6, 1993 (58 FR 2927), FDA published a document based on these estimates entitled ''Regulatory Impact Analysis of the Final Rules to Amend the Food Labeling Regulations,'' which is the agency's most recent comprehensive review of food labeling costs. The estimates are also based on agency communications with industry and FDA's knowledge of and experience with food labeling and the submission of petitions and requests to the agency. Where an agency regulation implements an information collection requirement in the act or the FPLA, only any additional burden attributable to the regulation has been included in FDA's burden estimate.

No burden has been estimated for those requirements where the information to be disclosed is information that has been supplied by FDA. Also, no burden has been estimated for information that is disclosed to third parties as a usual and customary part of a food producer's normal business activities. Under 5 CFR 1320.3(c)(2), the public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public is not a collection of information. Under 5 CFR 1320.3(b)(2), the time, effort, and financial resources necessary to comply with a collection of information are excluded from the burden estimate if the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary because they would occur in the normal course of activities.

Dated: October 24, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–27388 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0302]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Certain Biologics Labeling

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Fax written comments on the collection of information by December 1, 2003.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Certain Biologics Labeling

Under the authority of section 351 of the Public Health Services Act (42 U.S.C. 262), the biologics regulations in part 601 (21 CFR part 601) require a manufacturer of a biological product to submit an application with accompanying information, including labeling information, to FDA for approval to market a product in interstate commerce (§ 601.2). In addition, § 601.12 requires that any changes to labeling be submitted to FDA for review and approval. For biological products, excluding blood and blood components for transfusion, the container and package labeling requirements subject to the PRA are provided in §§ 610.60 through 610.62 (21 CFR 610.60 through 610.62). The collections of information under §§ 601.2, 601.12, and 610.60 through 610.62 are approved under OMB control number 0910–0338 (expires August 31, 2005). In addition to the labeling requirements prescribed in §§ 610.60 through 610.62 or other labeling regulations (*e.g.*, 21 CFR 809.10), there are additional container and/or package labeling requirements for certain licensed biological products subject to the PRA:

- Sections 640.70 and 640.74 (21 CFR 640.70 and 640.74) (source plasma),
- Section 640.84 (albumin),
- Section 640.94 (plasma protein fraction),
- Section 660.2 (21 CFR 660.2) (antibody to Hepatitis B surface antigen),
- Section 660.28 (blood grouping reagent),
- Section 660.35 (reagent red blood cells),
- Section 660.45 (Hepatitis B surface antigen), and
- Section 660.55 (anti-human globulin).

An example of an additional labeling requirement for each of the specific regulations follows:

- Section 640.70(a), the total volume or weight of plasma;
- Section 640.74(b)(3) and (b)(4), the name of the manufacturer of the final blood derivative product for whom it was prepared;
- Sections 640.84(a) and (c), and 640.94(a), the osmotic equivalent;
- Section 660.2(c), name of the recommended test method(s);
- Section 660.28(a) and (b), the name of the antibody or antibodies present;
- Section 660.35(a), (c) through (g), and (i) through (m), information regarding washing of cells, percentage of red blood cells in suspension;
- Section 660.45, name of the recommended test method(s); and
- Section 660.55(a) and (b), the name of the antibody or antibodies present.

Form FDA 2567 ''Transmittal of Labels and Circulars'' is used by manufacturers of licensed biological products to submit with labeling (*e.g.*, circulars, package labels, container labels, etc.) and labeling changes for FDA review and approval. Labeling information is submitted to FDA for review in an application, supplement, or, when appropriate, an annual report. Form FDA 2567 is approved under OMB control number 0910–0338.

Based on information obtained from the Center for Biologics Evaluation and Research's database system, there are an estimated 350 manufacturers of licensed biological products. However, not all manufacturers will have any submissions in a given year and some may have multiple submissions. The total annual responses are based on the estimated number of submissions for a particular product (*e.g.*, license applications and labeling supplements) received annually by FDA. No applications have been received for most of the listed products in the last couple of years, but FDA is using the estimate of one application in the event that one is submitted in the future. Based on previous estimates, the rate of submissions is not expected to change significantly in the next few years.

The hours per response are based on FDA's past experience with the various submissions to FDA and includes the time estimated to prepare the various submissions for FDA review and collate the documentation. The burden associated with the additional labeling requirements for submission in a license application is minimal because the majority of the burden is associated with the requirements under §§ 610.60 through 610.62 or other labeling requirements. FDA estimates that it takes between 10 and 40 hours (average 25 hours) to complete a labeling supplement or annual report for submission to FDA.

In the **Federal Register** of July 22, 2003 (68 FR 43359), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Part	Type of Submission	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
640.70(a), and 640.74(b)(3) and (b)(4)	application	5	1	5	2	10
	supplement	20	1.5	30	25	750
640.84(a) and (c)	application	1	1	1	1	1
	supplement	3	1.25	4	25	100
640.94(a)	application	1	1	1	1	1
	supplement	1	1	1	25	25

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

21 CFR Part	Type of Submission	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
660.2(c)	application	1	1	1	3	3
	supplement	1	1	1	25	25
660.28(a) and (b)	application	1	1	1	6	6
	supplement	1	2	2	25	50
660.35(a), (c) through (g), and (i) through (m)	application	1	1	1	6	6
	supplement	1	1	1	25	25
660.45	application	1	1	1	3	3
	supplement	1	1	1	25	25
660.55(a) and (b)	application	1	1	1	6	6
	supplement	1	1	1	25	25
Total						1,061

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: October 24, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–27389 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2000D–1598]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Suggested Documentation for Substantiating Whether Foods Have or Have Not Been Developed Using Bioengineering

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Fax written comments on the collection of information by December 1, 2003.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

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.

Suggested Documentation for Substantiating Whether Foods Have or Have Not Been Developed Using Bioengineering

On May 29, 1992 (57 FR 22984), FDA (we) published a statement of policy entitled ''Statement of Policy: Foods Derived From New Plant Varieties''(the 1992 policy). The 1992 policy stated that the method of development of a new plant variety, including plants developed using bioengineering, is not information that is material under section 201(n) of the act (21 U.S.C. 321(n)) and, therefore, would not be required in the labeling of food. This conclusion is consistent with our historic interpretation of section 201(n) of the act, in that the method of plant breeding is not required to be disclosed in labeling. In the **Federal Register** of April 28, 1993 (58 FR 25837) (the 1993 information request), we requested additional information on labeling issues that had risen from our 1992 policy. Subsequently, in 1999, we held three public meetings to get public input on our existing policy with regard to its premarket review of foods produced through biotechnology and the labeling of such products. In response to comments that we received on our 1992 policy, the 1993 information request, and the public meetings, we decided to develop guidance for voluntary labeling indicating whether foods have or have not been developed using bioengineering. This guidance will assist manufacturers in labeling foods that have or have not been developed using bioengineering so that the labeling statement is truthful, not misleading, and scientifically valid. The information that the manufacturers will collect is documentation of handling practices so that they can truthfully label their products to indicate, if they so choose, whether the food has or has not been developed using bioengineering.

In general, FDA anticipates that manufacturers claiming that a product is not developed using bioengineered material would substantiate the claim. If validated testing is not available to ensure the absence of bioengineered material for a specific food, we suggest that manufacturers document handling practices to substantiate a claim that a food was not developed using bioengineering, rather than using a ''free''claim. Thus, to substantiate handling practices, the manufacturers

would have to document the source of such foods. Examples of documentation that we anticipate will demonstrate handling practices and procedures about how the food was processed are recordkeeping, certifications or affidavits from farmers, processors, and others in the food production and distribution chain. We are neither suggesting that firms maintain a certain set list of documents nor are we suggesting that anything less or different would likely be considered unacceptable. Rather, we are leaving it to each firm's discretion to maintain appropriate documentation to demonstrate that the food was produced using traditional methods.

Description of Respondents: Manufacturers of foods that were and were not produced using bioengineering.

In the 1993 information request, we requested information on labeling of foods that have or have not been developed using bioengineering. Additionally, in 1999, we held three public meetings to get public input on our existing policy on the labeling of foods produced through biotechnology and the premarket review of such products. In response to comments that we received, we decided to develop guidance for the voluntary labeling of foods indicating if they have or have not been developed using bioengineering. In the **Federal Register** of January 18, 2001 (66 FR 4839) FDA published a 60-day notice requesting public comment on the information collection provisions. The following is a discussion of the comments received and FDA's response to those comments.

Most of the comments agreed that labeling food products as bioengineered or nonbioengineered would result in costs due to segregation, testing, or third-party validation, in addition to label changes. However, some comments said the producers that choose to label their products as nonbioengineered and the consumers that choose to purchase these products should incur these costs. Other comments said that these costs should be borne by the growers, manufacturers, processors, and marketers of bioengineered foods. Who should bear the paperwork burden is not within the scope of the guidance.

One comment stated that FDA underestimated the number of small firms that will choose to label their product as not bioengineered, but will not attempt to make an organic claim. The comment did not offer any evidence to substantiate this claim or give an estimate of how many small firms will choose to make a nonbioengineered claim. FDA's estimate of the number of products that would label their products with a bioengineered claim is based on the number of products making an organic claim and the number of products that are not currently making an organic claim on their label, but are making a statement about bioengineering on their Web site, through a press release, or other venue. The PRA analysis estimates the burden for the expected number of firms making bioengineered claims, however, if more firms choose to make bioengineered claims then the paperwork burden would be higher.

Numerous comments pointed out that mandatory labeling would have high costs for additional activities such as segregation, testing, labeling, quality control, and certification. One comment estimated that these costs could be as high as 6–17 percent of the farmgate price. The paperwork reduction analysis only estimates the paperwork burden associated with voluntary labeling, and so does not dispute these estimates, but does not include them in the analysis.

FDA estimates the burden for this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Operating & Maintenance Costs	Total Hours
893	21	18,753	1	1,781,400	18,753

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

No. of Respondents	Annual Frequency per Recordkeeper	Total Annual Records	Hours per Record	Operating & Maintenance Costs	Total Hours
68	26	1,768	1	53,040	1,768

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA estimates that almost all of the organic producers and manufacturers who have issued statements that they will not use bioengineered ingredients will choose to label, and therefore, will incur the reporting burden. We determined the estimates for the annual reporting burden by using the approximately 18,753 products (16,985 organic products and 1,768 nonorganic products) from producers who may not use bioengineered ingredients in their products. These manufacturers include producers who market to a niche of consumers who choose not to use products with bioengeered ingredients and manufacturers who have stated that they do not use bioengineered ingredients in their products. We estimated that the numbers of firms that will choose to label is 893 (825 firms for organic products and 68 for nonorganic products). We estimated that the manufacturers of these products would choose to state on their label and in their labeling that those products were not developed using bioengineering. Such labeling would increase their paperwork burden. The estimates on the annual reporting burden (table 1 of this document) are based on agency knowledge of, and experience with, food labeling. The 18,753 product estimate may be too low if FDA has been unable to identify all producers that could use nonbioengineering labels or if FDA's labeling guidance encourages producers who have not issued bioengineering statements to now use such statements on the label. On the other hand, this may be an overestimate if some producers, who have been making statements indicating that they will try to use foods that were not developed using bioengineering, choose not to label their products.

We believe that the burden associated with the voluntary labeling of foods that have not been developed using bioengineering would be a one-time burden for the small number of firms that would decide, voluntarily, to add

this additional information to the labels for their products, separate from any other label changes for their products. We estimate that at least 90 percent of firms would coordinate the addition of the statement on the label that their products were not developed using bioengineering with other changes in their labels, in which case the voluntary cost of transmitting the information to consumers in labeling would be included almost entirely in the cost of other voluntary or required labeling changes. The incremental cost for these 803 firms (893 x 90 percent) would be approximately $50 per label for 16,878 labels, or $843,900 total. For the remaining 90 firms that would not coordinate changes with other labeling changes, we estimate that the cost would be approximately $500 per label for 1,875 labels, or $937,500 total. The estimated total operating and maintenance costs in table 1 of this document are, therefore, $1,781,400.

When determining the annual recordkeeping burden (table 2 of this document), we estimated that the number of firms that would maintain records to substantiate labeling that their products were not developed using bioengineering is the same as the number of respondents with the reporting burden minus the number of firms marketing organic products (i.e., 68). We did not include products that are labeled ''organic'' in the estimated annual recordkeeeping burden because according to a proposal in the **Federal Register** of March 13, 2000 (65 FR 13512), issued by the Agriculture Marketing Service of the U.S. Department of Agriculture, a food labeled as ''organic'' would not be permitted to contain bioengineered materials. Therefore, the 16,985 organic products available today would be able to bear a voluntary labeling statement that the food was not developed using bioengineering. Thus, there is no additional paperwork burden to substantiate a claim that a product is not developed using bioengineering for these products. Because most of the nonorganic products whose producers have stated they will not use bioengineered ingredients are made by large firms for whom the verification process is not likely to impose a significant burden relative to the size of their operation, we assume that the paperwork processing time associated with testing or source verification for these products is approximately 1 hour for a total of 1,768 hours per year. Therefore, FDA estimated that the total recordkeeping burden would be 1,768 hours per year. Based on our experience, we have estimated that the overhead and maintenance cost are $30 per hour. The estimated total operating and maintenance cost in table 2 of this document are, therefore, $53,040 total.

Dated: October 24, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–27391 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Psychopharmacologic Drugs Advisory Committee and the Pediatric Subcommittee of the Anti-Infective Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committees: Psychopharmacologic Drugs Advisory Committee and the Pediatric Subcommittee of the Anti-Infective Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on February 2, 2004, from 8 a.m. to 5 p.m.

Location: Holiday Inn, Versailles Ballrooms, 8120 Wisconsin Ave., Bethesda, MD.

Contact Person: Anuja Patel, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776 or e-mail: *patelA@cder.fda.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12544 or 12532. Please call the Information Line for up-to-date information on this meeting.

Agenda: The Psychopharmacologic Drugs Advisory Committee and the Pediatric Subcommittee of the Anti-Infective Drugs Advisory Committee will discuss reports of the occurrence of suicidality (both suicidal ideation and suicide attempts) in clinical trials for various antidepressant drugs in pediatric patients with major depressive disorder (MDD). The committee will consider optimal approaches to the analysis of data from these trials, and the results of analyses conducted to date, with regard to the question of what regulatory action may be needed pertinent to the clinical use of these products in pediatric patients. The committee will also consider further research needs to address questions on this topic.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by January 26, 2004. Oral presentations from the public will be scheduled between approximately 8:15 a.m. to 9:15 a.m., and 1 p.m. to 1:30 p.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before January 26, 2004, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Anuja Patel at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 23, 2003.

Peter J. Pitts,

Associate Commissioner for External Relations.

[FR Doc. 03–27394 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Veterinary Medicine Advisory Committee; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

The Food and Drug Administration (FDA) is announcing an amendment to the notice of meeting of the Veterinary Medicine Advisory Committee. This meeting was announced in the **Federal Register** of September 18, 2003 (68 FR 54734). The amendment is being made to reflect changes in the *Date and Time*, and the *Agenda*, portions of the document. Specifically, due to withdrawal of permission by a sponsor to discuss a specific fourth generation cephalosporin on November 3, 2003, the topic has been indefinitely postponed. Discussions on November 5, 2003, regarding genetic engineering research with food animals have also been postponed.

FOR FURTHER INFORMATION CONTACT: Aleta Sindelar, Center for Veterinary Medicine (CVM) (HFV–3), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 301–827–4515, e-mail: *asindela@cvm.fda.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12546. Please call the Information Line for up-to-date information on this meeting.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 18, 2003, FDA announced that a meeting of the Veterinary Medicine Advisory Committee will be held on November 3, 4, and 5, 2003. On page 54734, in the second column, the *Date and Time* portion of the meeting is amended to read as follows:

Date and Time: The meeting will be held on November 4, 2003, from 9 a.m. to 5 p.m.

On page 54734, in the second column, the *Agenda* portion of the meeting is amended to read as follows:

Agenda: On November 4, 2003, the committee will hear a preview of a draft risk assessment on animal cloning using somatic cell nuclear transfer. The risk assessment addresses both animal health and consumption of food derived from animal clones and their progeny. Background information that includes a draft executive summary of the risk assessment will be made available to committee members and the public in advance of the meeting and posted on CVM's home page at *http://www.fda.gov/cvm*. A limited number of paper copies of the background information will be available at the registration table. The complete draft risk assessment document will be made available for public comment at a later date.

Dated: October 28, 2003.

Peter J. Pitts,

Associate Commissioner for External Relations.

[FR Doc. 03–27558 Filed 10–29–03; 1:11 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0221]

Guidance for Industry and FDA Staff; Class II Special Controls Guidance Document: Endotoxin Assay; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Class II Special Controls Guidance Document: Endotoxin Assay.'' This guidance document describes a means by which an endotoxin assay may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to classify the endotoxin assay into class II (special controls). This guidance document is effective immediately as the special control for the endotoxin assay, but it remains subject to comment in accordance with the agency's good guidance practices (GGPs).

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies on a 3.5'' diskette of the guidance document entitled ''Class II Special Control Guidance Document: Endotoxin Assay'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Freddie M. Poole, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 301–594–2096.

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying the endotoxin assay into class II (special controls) under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(2)). This guidance document will serve as the special control for the endotoxin assay. Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request that FDA classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA will publish a notice in the **Federal Register** announcing such classification.

Because of the timeframes established by section 513(f)(2) of the act, FDA has determined, under 21 CFR 10.115(g)(2), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Therefore, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any comments that are received in response to this notice to determine whether to amend the guidance document.

II. Significance of Guidance

This guidance is being issued consistent with FDA's GGPs regulation (21 CFR 10.115). The guidance represents the agency's current thinking on endotoxin assays. 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.

III. Electronic Access

To receive ''Class II Special Controls Guidance Document: Endotoxin Assay''

by fax machine, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt, press 1 to order a document. Enter the document number (1222) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH home page may be accessed at *http://www.fda.gov/cdrh.* A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html.* Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets.*

IV. Paperwork Reduction Act of 1995

This 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 USC 3501–3520) (the PRA). The collections of information addressed in the guidance document have been approved by OMB in accordance with the PRA under the regulations governing premarket notification submissions (21 CFR part 807, subpart E, OMB Control No. 0910–0120). The labeling provisions addressed in the guidance have been approved by OMB under the PRA under OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments to *http://www.fda.gov/dockets/ecomments* or two paper copies of any written comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 17, 2003.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 03–27393 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003D–0476]

Guidance for Industry on Product Recalls, Including Removals and Corrections; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance document for industry entitled ''Product Recalls, Including Removals and Corrections.'' This document provides members of industry regulated by FDA with guidance for handling all aspects of product recalls, including removals and corrections. The guidance applies to the recalls of all FDA-regulated products.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of ''Product Recalls, Including Removals and Corrections'' to the Food and Drug Administration, Office of Enforcement, Division of Compliance Management and Operations (HFC–210), 1350 Piccard Dr., Rockville, MD 20850. Requests should be identified with the docket number found in brackets in the heading of this document. For documents without a docket number, include the title of the guidance document. Send one self-addressed adhesive label to assist that office in processing your requests. You may fax your request to 301–827–0342. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments.* Comments may be submitted at any time. *See* the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Willie R. Bryant, Jr., Senior Recall Officer, Division of Compliance Management and Operations (HFC–210), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 301–827–0391.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance document that provides the agency's recommendations to members of FDA-regulated industry for the handling of product recalls. This document sets forth the agency's existing practices in recommending procedures for addressing all aspects of product recalls, including removals and corrections. The cooperation of manufacturers and distributors in expediting recall activities is vital. The recalling firm's notification of the local FDA District Recall Coordinator and submission of recall information outlined in the guidance allows FDA the opportunity to review, comment, offer assistance, and monitor the recall process.

II. Significance of Guidance

This is a level 2 guidance issued consistent with FDA's good guidance practices regulation (§ 10.115 (21 CFR 10.115)). The agency is implementing this guidance document immediately in accordance with § 10.115(g)(4)(i)(B) and inviting public comment in accordance with § 10.115(g)(4)(i)(C). This guidance represents the agency's current thinking on product recalls, including removals and corrections. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternate approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Electronic Access

Persons interested in obtaining an electronic copy of the guidance may do so using the Internet. ORA maintains an entry on the Internet for easy access to information, including recent publications, consumer information references, compliance and inspection references, and recall information (model recall letters and press releases) that may be downloaded to a personal computer with Internet access. The ORA home page may be accessed at *http://www.fda.gov/ora/.* A search capability for all ORA guidance documents is available at *http://www.fda.gov/cdrh/guidance.html.* Guidance documents are also available at *http://www.fda.gov/ohrms/dockets.*

IV. Paperwork Reduction Act

The information collection requirements in this guidance have been approved under 21 CFR part 7, Office of Management and Budget (OMB) control number 0910–0249, which expires on October 31, 2004.

V. Comments

Two copies of mailed comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. For documents without a docket number, include the title of the guidance document. The 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.

VI. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/ora* or *http://www.fda.gov/ohrms/dockets/default*.

Dated: October 22, 2003.

John R. Marzilli,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 03–27387 Filed 10–30–03; 8:45 am]

BILLING CODE 4160–01–S

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 Innovative Technologies for the Molecular Analysis of Cancer.

Date: November 12–13, 2003.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Hilton, 620 Perry Parkway, Gaithersburg, MD 20877.

Contact Person: Sherwood Githens, PhD, Scientific Review Administrator, Special Review and Logistics Branch, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Room 8068, Bethesda, MD 20892, (301) 435–1822.

(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: October 24, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–27399 Filed 10–30–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye 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 Eye Institute Special Emphasis Panel; P30, R24, and K08 Review Meeting.

Date: December 3, 2003.

Time: 8:30 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Samuel Rawlings, PhD, Chief, Scientific Review Branch, Division of Extramural Research, National Eye Institute, Bethesda, MD 20892, 301–451–2020.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: October 24, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–27404 Filed 10–30–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; 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 section 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communications Disorders Special Emphasis Panel—Childhood Speech-Sound Acquisition.

Date: December 5, 2003.

Time: 1 p.m. to 3:30 p.m.

Agenda: To review an evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852. (Telephone Conference Call).

Contact Person: Ali A. Azadegan, DVM, PhD, Scientific Review Administrator, Scientific Review Branch Division of Extramural Activities, NIDCD, NIH, EPS–400C, 6120 Exeutive blvd, MSC 7180, Bethesda, MD 20892–7180, (301) 496–8683, *azadegan@nih.gov.*

Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: October 24, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–27400 Filed 10–30–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; 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 meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552(b)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Clinical Trials Unit.

Date: November 25, 2003.

Time: 9 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Maxine A. Lesniak, MPH, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 756, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7792, *lesniakm@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Pathophysiology of Renal Allograft Dysfunction.

Date: December 8, 2003.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Maxine A. Lesniak, MPH, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 756, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7792, *lesniakm@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Immune Pathogenesis in Murine and Human T1D (Type 1 Diabetes).

Date: December 12, 2003.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Maxine A. Lesniak, MPH, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 756, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7792, *lesniakm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: October 24, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–27403 Filed 10–30–03; 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, Prokaryotic and Eukaryotic Molecular Biology and genetics.

Date: October 30–31, 2003.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Four Points by Sheraton Bethesda, 8400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mary P. McCormick, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2208, MSC 7890, Bethesda, MD 20892, (301) 435–1047, *mccormim@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, F10(20): Fellowships: Pathophysiology.

Date: November 5–6, 2003.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Governor's House Hotel, 1615 Rhode Island Avenue, NW, Washington, DC 20036.

Contact Person: Peter J. Perrin, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2183, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, SBIR/STTR.

Date: November 5, 2003.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW, Washington, DC 20015.

Contact Person: Joseph Kimm, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5178, MSC 7844, Bethesda, MD 20892, (301) 435–1249, *kimmj@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel (AIDS SBIR/STTR).

Date: November 5, 2003.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1000 29th Street, NW., Washington, DC 20007.

Contact Person: Kenneth A. Roebuck, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 VACC 01: AIDS Vaccines.

Date: November 5–6, 2003.

Time: 8:30 a.m. to 10 a.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mary Clare Walker, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, LAM: Neuroimaging.

Date: November 5, 2003.
Time: 9:30 a.m. to 11:30 a.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference).
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.
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Tumor Immunotherapy.
Date: November 5, 2003.
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).
Contact Person: John L. Meyer, MPH, PhD, Scientific Review Administrator, ONC IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6198, MSC 7804, Bethesda, MD 20892, (301) 435–1213, *meyerjl@csr.nih.gov.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Clinical CV.
Date: November 5–6, 2003.
Time: 1:30 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select, 8120 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Russell T. Dowell, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Dr., Rm. 2180, MSC 7818, Bethesda, MD 20892, (301) 435–1850, *dowellr@csr.nih.gov.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 NMB (05) Neuropharmacology of Ethanol.
Date: November 5, 2003.
Time: 2 p.m. to 5 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: Gamil C. Debbas, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7844, Bethesda, MD 20892, (301) 435–1018. *debbasg@csr.nih.gov.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Pain: Cellular and Molecular Mechanisms.
Date: November 5, 2003.
Time: 2:30 p.m. to 5:30 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: 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.
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts.
Date: November 5, 2003.
Time: 12 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: Karin F. Helmers, PhD, Scientific Review Administrator, Center for Scientific Review/SNEM IRG, 6701 Rockledge Drive, Room 3166, MSC 7770, Bethesda, MD 20892, (301) 435–1017, *helmersk@csr.nih.gov.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Bacterial Biodefense.
Date: November 6–7, 2003.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The River Inn, 924 25th Street NW., Washington, DC 20037.
Contact Person: Rolf Menzel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3196, MSC 7808, Bethesda, MD 20892, (301) 435–0952, *menzelro@csr.nih.gov.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Anterior Eye Diseases.
Date: November 6–7, 2003.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.
Contact Person: David M. Armstrong, PhD, Chief, BDCN IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892, (301) 435–1253, *armstrda@csr.nih.gov.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Infectious Diseases and Microbiology.
Date: November 6–7, 2003.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Watergate Hotel, 2650 Virginia Avenue, NW., Washington, DC 20037.
Contact Person: Marian Wachtel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892, (301) 435–1148, *wachtelm@csr.nih.gov.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Radiation Physics.
Date: November 6, 2003.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Place, NW., Washington, DC 20015.
Contact Person: Paul K. Strudler, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6186, MSC 7816, Bethesda, MD 20892, (301) 435–1716, *strudlep@csr.nih.gov.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Clinical Neuroimmunology and Brain Tumors Study Section (CNBT).
Date: November 6–7, 2003.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency New Orleans, at Louisiana Superdome, 500 Poydras Plaza, New Orleans, LA 70113.
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.*
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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Maternal—Infant Patterns of Attention.
Date: November 6, 2003.
Time: 11 a.m. to 12 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: Victoria S. Levin, MSW, Scientific Review Administrator, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7848, Bethesda, MD 20892, (301) 435–0912, *levin@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowship: Endocrinology, Metabolism, Nutrition and Reproductive Sciences.

Date: November 6–7, 2003.

Time: 7 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Four Points by Sheraton Bethesda, 8400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Krish Krishnan, 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.*

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. 93.306, 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, 98.893, National Institutes of Health, HHS)

Dated: October 24, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–27401 Filed 10–30–03; 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: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Skeletal Muscle Biology and Exercise Physiology Study Section.

Date: October 27–28, 2003.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Jurys Hotel, 1500 New Hampshire Avenue, NW., Washington, DC 20036.

Contact Person: Paul D. Wagner, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4108, MSC 7814, Betheseda, MD 20892, (301) 435–6809, *wagnerp@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel and Protein Structure Function Special Emphasis Panel.

Date: November 3, 2003.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Janet Nelson, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4168, MSC 7806; Bethesda, MD 20892, (301) 435–1723, *nelsonja@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; zRG1 VACC 04: Bacterial, Fungal, Parasitic, and Viral Vaccines.

Date: November 3, 2003.

Time: 8:30 a.m. to 6 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: Mary Clare Walker, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; ZRG1 VACC 10: Small Business: Non-biodefense Vaccines.

Date: November 4, 2003.

Time: 8:30 a.m. to 6 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: Mary Clare Walker, Ph.D., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6700 Rockledge Drive, Room 5104, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Speech Treatment and Behavior Modification.

Date: November 4, 2003.

Time: 11 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Thomas A. Tatham, Ph.D., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, (301) 594–6836, *tatham@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Hyperaccelerated Award/Mechanisms in Immunomodulation Trials.

Date: November 4, 2003.

Time: 1 p.m. to 2 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: Samuel C. Edwards, Ph.D., Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4200, MSC 7812, Bethesda, MD 20892, (301) 435–1152, *edwardss@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Brain Disorders and Clinical Neuroscience/SBIR.

Date: November 4, 2003.

Time: 1:30 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: Rene Etcheberrigaray, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5196, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *etcheber@csr.nih.gov.*

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; CLHP 6 Member Applications.

Date: November 4, 2003.

Time: 2:30 p.m. to 5:30 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: Yvette M. Davis, VMD, Scientific Review Administrator, Center for

Scientific Review National Institutes of Health, 6701 Rockledge Drive, Room 3152, MSC 7770, Bethesda, MD 20892 (301) 435–0906

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Chemoprevention Molecular Mechanisms.

Date: November 4, 2003.

Time: 3 p.m. to 4:30 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: Angela Y. Ng, Ph.D., MBA, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804 (For courier delivery, use MD 20817), Bethesda, MD 20892, 301–435–1715, *nga@csr.nih.gov.*

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. 93.306, 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: October 24, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–27402 Filed 10–30–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4815–N–83]

Notice of Submission of Proposed Information Collection to OMB: ''Logic Model''

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Applications of HUD Federal Financial Assistance are required to indicate intended results and impacts. Grant recipients report against their baseline performance standards. This process standardizes grants progress reporting requirements and promotes greater emphasis on performance and results in grant programs.

DATES: *Comments Due Date:* December 1, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2535–0114) and should be sent to: Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–6974; E-mail *Lauren_Wittenberg@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This Notice also lists the following information:

Title of Proposal: ''Logic Model''.

OMB Approval Number: 2535–0114.

Form Numbers: HUD–96010.

Description of the Need for the Information and Its Proposed Use: Applicants of HUD Federal Financial Assistance are required to indicate intended results and impacts. Grant recipients report against their baseline performance standards. This proves standardizes grants progress reporting requirements and promotes greater emphasis on performance and results in grant programs.

Respondents: Individuals or households, Business or other for-profit, Not-for-profit institutions, State, Local or Tribal Government.

Frequency of Submission: Quarterly, Annually.

Reporting Burden: Number of Respondents 11,000; Average response per Respondent 2.8; Total annual responses 30,800; Average burden per response 1 hrs.

Total Estimated Burden Hours: 30,800.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 24, 2003.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 03–27406 Filed 10–30–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4809–N44]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, Department of Housing and Urban Development, Room 7262, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has

reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: October 23, 2003.

John D. Garrity,

Director, Office of Special Needs Assistance Programs.

[FR Doc. 03–27184 Filed 10–30–03; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and/or marine mammals.

DATES: Written data, comments or requests must be received by December 1, 2003.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

PRT–072584

Applicant: Columbia University, CERC, New York, NY

The applicant requests a permit to export/re-export biological samples from mongoose lemur (*Eulemur mongoz*), Ring-tailed lemur (*Lemur catta*), and grey gentle lemur (*Hapalemur griseus*), going to Cambridge University in the United Kingdom for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

PRT–078305

Applicant: Clarence E. Ellis, Powell, WY

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT–078306

Applicant: T. F. Lambert, Memphis, TN

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT–074414

Applicant: Little Rock Zoological Gardens, Little Rock, AR

The applicant requests a permit to import two captive born female Western lowland gorillas (*Gorilla gorilla gorilla*) from the Toronto Zoo, Ontario, Canada for the purpose of enhancement of the survival of the species through captive propagation.

Dated: October 17, 2003.

Michael S. Moore,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 03–27457 Filed 10–30–03; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

DEPARTMENT OF AGRICULTURE

Forest Service

[CA–668–03–1610–DQ]

Notice of Availability of Santa Rosa and San Jacinto Mountains National Monument Proposed Management Plan and Final Environmental Impact Statement

AGENCY: Bureau of Land Management.

ACTION: Notice of availability of the Santa Rosa and San Jacinto proposed Management Plan and Final Environmental Impact Statement.

SUMMARY: In compliance with Bureau of Land Management (BLM) planning regulations, title 43 Code of Federal Regulations (CFR) part 1610.2(f)(4) and title 40 CFR part 1500, the BLM and Forest Service hereby gives notice that the proposed Management Plan/Final Environmental Impact Statement (FEIS) has been prepared for the Santa Rosa and San Jacinto Mountains National Monument. This Management Plan is a cooperative effort between the Department of the Interior, BLM, and the Department of Agriculture, Forest Service. The 272,000 acre National Monument encompasses 86,400 acres of Bureau of Land Management lands and 64,400 acres of Forest Service lands in the Coachella Valley and surrounding mountains. Additional land managing entities within the National Monument include the Agua Caliente Band of Cahuilla Indians, the California Department of Parks and Recreation, the California Department of Fish and Game, Riverside County, local jurisdictions, and private landowners. The management plan provides direction for coordination between the BLM, Forest Service, and various partners and outlines proposed strategies for protecting the values that the National Monument was established to protect.

DATES: BLM Planning Regulations (43 CFR 1610.5–2) state that any person who participated in the planning process, and has an interest that may be adversely affected, may protest. The protest must be filed within 30 days of the date that the Environmental Protection Agency publishes this notice in the **Federal Register**. Instructions for filing of protests are described in the preface of the Santa Rosa and San Jacinto Mountains National Monument Management Plan/FEIS and are included in the Supplementary Information section of this notice.

FOR FURTHER INFORMATION CONTACT: Greg Hill, Planning and Environmental Coordinator, Santa Rosa and San Jacinto Mountains National Monument Management Plan, Palm Springs-South Coast Field Office, P.O. Box 581260, 690 W. Garnet Avenue, North Palm Springs, CA 92258. Phone Number: 760–251–4800.

SUPPLEMENTARY INFORMATION: The Santa Rosa and San Jacinto Mountains National Monument was established by Public Law 106–351 and will be cooperatively managed by the Bureau of

Land Management (BLM) and the U.S. Forest Service (USFS). The Santa Rosa and San Jacinto Mountains National Monument Act of 2000 affects only Federal lands and Federal interests located within the established boundaries. The BLM and the Forest Service will jointly manage Federal lands in the National Monument in coordination with the Agua Caliente Band of Cahuilla Indians, other Federal agencies, State agencies, and local governments.

Copies of the Santa Rosa and San Jacinto Mountains National Monument Management Plan/FEIS have been sent to affected Federal, State, and Local Government agencies, interested parties and those who requested a copy of the Draft Management Plan/Draft EIS. Copies of the proposed Plan/Final EIS are available for public inspection at the BLM Palm Springs-South Coast Field Office, P.O Box 581260, 690 W. Garnet Avenue, North Palm Springs, CA 92258. Interested persons may also review the Proposed Management Plan/FEIS on the Internet at *http://www.ca.blm.gov/palmsprings.* Electronic (on CD–ROM) and paper copies may also be obtained by contacting Greg Hill at the aforementioned addresses and phone number.

Comments on the Draft Management Plan/EIS received from the public and internal BLM and Forest Service review comments were incorporated into the proposed plan. Public comments resulted in the addition of clarifying text, but did not significantly change proposed land use decisions. The range of alternatives in this plan does not reevaluate planning decisions included in the BLM California Desert Conservation Area Plan (1980 as amended) or included in the Forest Service San Bernardino National Forest Land and Resource Management Plan (1989 as amended). Records of Decision will be prepared by the BLM and FS for the Santa Rosa and San Jacinto Mountains National Monument Management Plan in accordance with planning regulations at Title 43 CFR 1610 and NEPA. No decisions in the National Monument Management Plan are proposed amendments to the San Bernardino National Forest Land and Resource Management Plan (1989). Those decisions within the National Monument Management Plan that are proposed amendments to the California Desert Conservation Area Plan are subject to protest according to BLM regulations.

Instructions for filing a protest with the Director of the BLM regarding the Proposed Plan/Final EIS may be found at 43 CFR 1610.5. A protest may only raise those issues which were submitted for the record during the planning process. New issues raised in the protest period should be directed to Greg Hill, Palm Springs-South Coast Field Office, (address provided previously in this notice) for consideration in plan implementation, as potential plan amendments, or as otherwise appropriate. Protests must be in writing, and to be considered ''timely,'' the protest must be postmarked no later than the last day of the 30-day protest period. Also, although not a requirement, it is recommended that the protest be sent by certified mail, return receipt requested. E-mail and faxed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the protest period. Under these conditions, BLM will consider the e-mail or faxed protest as an advance copy and it will receive full consideration. If you wish to provide BLM with such advance notification, please direct faxed protests to the attention of the BLM protest coordinator at 202–452–5112, and e-mails to *Brenda_Hudgens_Williams@blm.gov.* Please direct the follow-up letter to the appropriate address provided below.

The protest must contain:

a. The name, mailing address, telephone number, and interest of the person filing the protest.

b. A statement of the part or parts of the management plan and the issue or issues being protested. To the extent possible, this should be done by reference to specific pages, paragraphs, sections, tables, maps, etc., included in the proposed management plan;

c. A copy of all documents addressing the issue(s) that the protesting party submitted during the planning process or a statement of the date they were discussed for the record.

d. A concise statement explaining why the protestor believes the State Director's decision is wrong. This is a critical part of the protest. Take care to document all relevant facts. As much as possible, reference or cite the planning documents, environmental analysis documents, and/or available planning records (*i.e.*, meeting minutes or summaries, correspondence, etc.).

A protest which merely expresses disagreement with proposed decision without supporting data will not provide additional basis for the Director's review of the decision. Please note that comments, including names and street addresses of respondents, are available for public review and/or release under the Freedom of Information Act (FOIA). Individual respondents may request confidentiality. Respondents who wish to withhold name and/or street address from public review or from disclosure under FOIA, must state this prominently at the beginning of the written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, will be made available for public inspection in their entirety.

All protests must be in writing and mailed to the following address:

Regular Mail: Director (210), Attention: Brenda Williams, P.O. Box 66538, Washington, DC 20035.

Overnight Mail: Director (210), Attention: Brenda Williams, 1620 L Street, NW., Suite 1075, Washington, DC 20036.

The BLM Director will promptly render a decision on the protest. The decision will be in writing and will be sent to the protesting party by certified mail, return receipt requested. The decision of the BLM Director shall be the final decision of the Department of the Interior.

Dated: August 22, 2003.

Tracy Liegler,

Acting Santa Rosa and San Jacinto Mountains, National Monument Manager.

Dated: August 20, 2003.

Laurie Rosenthal,

District Ranger, San Jacinto Ranger District, San Bernardino National Forest.

[FR Doc. 03–26816 Filed 10–30–03; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[DES 03–56]

Lake Berryessa Visitor Services Plan, Napa County, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of Availability (NOA) of the Draft Environmental Impact Statement (DEIS) and notice of public hearings.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, the Bureau of Reclamation has made available for public review and comment the DEIS for the Lake Berryessa Visitor Services Plan (VSP). The DEIS outlines the proposed project alternatives that seek to address issues related to the VSP, including the type

and level of facilities and services that are appropriate for future uses on Federal land. The current concession contracts at Lake Berryessa expire in 2008/2009. The VSP will be used as a basis for future concession contracts.

DATES: An open house will be held on November 22, 2003, from 1 to 4 p.m.

Two public hearings will be held on January 21, 2004, from 1 to 4 p.m. and 7 to 10 p.m. Requests for special assistance at the public hearings should be made as far in advance of the hearings as possible, but not later than January 7, 2004.

Comments on the DEIS will be accepted on or before February 4, 2004. (See **SUPPLEMENTARY INFORMATION** section for additional information on the open house, public hearings, submitting comments, and special assistance.)

ADDRESSES: The open house and public hearings will be held at the Solano County Fairgrounds, Exposition Hall, 900 Fairgrounds Drive, Vallejo, CA 94589.

Send comments on the DEIS to Ms. Janet Sierzputowski, Bureau of Reclamation, 2800 Cottage Way (Attn: MP–140), Sacramento, CA 95825. A copy of the Executive Summary, DEIS, and/or the technical appendices may be obtained by calling Ms. Sierzputowski at 916–978–5112.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Rodgers at 707–966–2111 x106, fax 707–966–0409, or e-mail: srodgers@mp.usbr.gov

SUPPLEMENTARY INFORMATION:

Background

Lake Berryessa was created as part of the Solano Project with the completion of Monticello Dam in 1957. In 1958, Reclamation and the County of Napa entered into an agreement for the County to assume management responsibilities for the lake. A Public Use Plan (PUP) was developed by the National Park Service in 1959 to guide Reclamation and the County in the development of recreational facilities at the lake. In 1975, Reclamation resumed direct management of Lake Berryessa as a result of Title VI of the Reclamation Development Act of October 27, 1974 (Pub. L. 93–493), which authorizes Reclamation to provide for the protection, use, and enjoyment of the aesthetic and recreational values at Lake Berryessa. In 1987, a new planning process began to develop an updated management document for the lake. A Reservoir Area Management Plan (RAMP) was developed to provide guidance for Reclamation in management issues which were not mentioned in the PUP and to assist Reclamation in administering the lake and concession areas. Reclamation completed a Final EIS for the RAMP in 1993.

Presently there are seven concessionaires authorized by Reclamation to provide commercial support services to Lake Berryessa visitors. These seven concession contracts have been in effect since the late 1950s. All the contracts will expire by 2009. Reclamation also administers two day-use areas and a public boat launching facility as well as numerous roadside turnouts and trails. The east side of the lake has been designated a State Wildlife Area and is managed cooperatively by Reclamation and the California Department of Fish and Game.

Visitor Services Plan (VSP)

The VSP will identify and develop the types and levels of recreation support services and facilities to be provided both commercially and by the government at Lake Berryessa. Some of the issues to be addressed in the VSP include day use needs, long-term and short-term recreational vehicle and trailer sites, retention or elimination of exclusive long-term trailer sites as presently operated, campground development, marina development, consolidation or expansion of existing commercial operations, new services development and construction, retention or removal of existing facilities, food and beverage service needs, overnight lodging facilities, and support for marine based activities such as fishing (individual and tournament), swimming, water skiing, etc.

Special Assistance

If special assistance is required, please call Janet Sierzputowski at 916–978–5112. If a request cannot be honored, the requester will be notified. A telephone device for the hearing impaired (TDD) is available at 916–978–5608.

Open House

The open house will be held to provide the public with an opportunity to study the environmental issues addressed in the DEIS. It will consist of informational displays staffed by project team members who will be answering questions.

Public Hearings

The public hearings will be held to provide the public with an opportunity to comment on the DEIS. Oral comments will be taken by a certified court reporter. Comments will also be taken via comment sheets.

Comments

Comments will be accepted in the following formats:

Written—Written comments should be addressed to Ms. Janet Sierzputowski at the address above.

Comment Cards—Comment cards will be available to all that attend the public hearings. They can be returned at the public hearing, faxed to Janet Sierzputowski at 916–978–5114, or mailed to Ms. Sierzputowski at the address above.

Electronic—Comments may be submitted electronically by e-mailing the project team at: jsierzputowski@mp.ubsr.gov.

Additional Information

Additional information is available at the Web site: *http:/www.usbr.gov/mp/berryessa.*

Comments, including the names and home addresses of respondents, will be available for public review. Individual respondents may request that their home address be withheld from public disclosure, which will be honored to the extent allowable by law. If they wish their name and/or address withheld, they must state that prominently at the beginning of their comment. Submissions from organizations or businesses, and individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public disclosure in their entirety.

Dated: September 25, 2003.

Susan Ramos,

Assistant Regional Director, Mid-Pacific Region.

[FR Doc. 03–27497 Filed 10–30–03; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,528]

A & E Products, a Tyco International Ltd. Company, Ringtown, PA;

Notice of Termination of Investigation Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 12, 2003 in response to a worker petition filed on behalf of workers at A & E Products, A Tyco International Ltd. Company, Ringtown, Pennsylvania.

The petitioners have requested that the petition be withdrawn.

Consequently, the investigation has been terminated.

Signed at Washington, DC, this 22nd day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27453 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,464]

Ace Packaging Systems, a Wholly-Owned Subsidiary of International Paper, Newport, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 5, 2003 in response to a petition filed on behalf of workers at Ace Packaging Systems, Newport, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 5th day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27455 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,543]

Arch Chemicals, Inc., Lake Charles, LA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 12, 2003, in response to a petition filed on behalf of workers at Arch Chemicals, Inc., Lake Charles, Louisiana.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 11th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27443 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,546]

Baxter Healthcare, Inc., Bioscience Division, Rochester, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 12, 2003 in response to a petition filed by a company official on behalf of workers of Baxter Healthcare, Inc., Bioscience Division, Rochester, Michigan.

The petitioning group of workers is covered by an earlier petition filed on July 28, 2003 (TA–W–52,409) that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 5th day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27452 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,601]

Congress Industries, Hawthorne, NJ; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on August 18, 2003, in response to a petition filed by the Union of Needletrades, Industrial and Textile Employees, Local 1733, on behalf of workers at Congress Industries, Inc., Hawthorne, New Jersey (TA–W–52,601).

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 11th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27441 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,682]

Continental Teves, Asheville, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 26, 2003 in response to a worker petition filed a company official on behalf of workers at Continental Teves, Asheville, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 22nd day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27449 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,871]

General Mills, Eden Prairie, MN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 17, 2003 in response to a petition filed by a company official on behalf of workers at General Mills, Eden Prairie, Minnesota.

The subject group of workers is covered by an earlier petition filed on September 12, 2003 that is the subject of an ongoing investigation for which a determination has not yet been issued (TA–W–52,851). Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 22nd day of September 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27447 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,378]

Hitachi Automotive Products, Inc., Harrodsburg, KY; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on July 23, 2003, in response to a petition filed on behalf of workers at Hitachi Automotive Products, Inc., Harrodsburg, Kentucky.

The petitioners have requested that the petition be withdrawn. Consequently, further investigation would serve no purpose and the investigation is terminated.

Signed at Washington, DC, this 12th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27445 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,493]

North Pacific Processors, Inc., Cordova, AK; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 11, 2003 in response to a petition filed by a company official on behalf of workers at North Pacific Processors, Inc., Cordova, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 23rd day of September 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27454 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,719]

Padgett Furniture Manufacturing Company, Inc.; Calhoun, TN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 2, 2003, in response to a petition filed by a company official on behalf of workers at Padgett Furniture Manufacturing Company, Inc., Calhoun, Tennessee.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 11th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27440 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,750]

Penn-Union Corp., Nesco Division, Edinboro, PA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 3, 2003, in response to a petition filed on behalf of workers at Penn-Union Corporation, Nesco Division, Edinboro, Pennsylvania.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 29th day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27438 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,596]

Photronics, Inc., Milpitas, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 18, 2003, in response to a worker petition filed a company official on behalf of workers at Photronics, Inc., Milpitas, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 11th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27442 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,744]

Rockwell Automation, Dublin, GA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on September 3, 2003, in response to a worker petition which was filed by a company official on behalf of workers at Rockwell Automation, Dublin, Georgia (TA–W–52,744).

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 11th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27439 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,698]

Rohm and Haas Company, Philadelphia, Pennsylvania; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 28, 2003, in response to a worker petition filed on behalf of workers at Rohm and Haas Company, Philadelphia, Pennsylvania.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 23rd day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27448 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,886]

Savane International Corporation, El Paso Cutting Facility, El Paso, TX; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 22, 2003, in response to a petition filed on behalf of workers at Savane International Corporation, El Paso Cutting Facility, El Paso, Texas.

The petition regarding the investigation has been deemed invalid. In order to establish a valid petition, there must be at least three workers to sign the petition. The petition in this case did not meet this threshold number. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 24th day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27446 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,420]

Seahawk Seafoods, Inc., Valdez, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on July 30, 2003, in response to a petition filed by a company official on behalf of workers at Seahawk Seafoods, Inc., Valdez, Alaska.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 11th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27444 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,801]

Springs Industries, Inc., Grace Fabrication Plant, Lancaster, SC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 11, 2003, in response to a worker petition filed by a company official on behalf of workers at Spring Industries, Inc., Grace Fabrication Plant, Lancaster, South Carolina.

The petitioning group of workers is covered by an earlier petition filed on September 10, 2003 (TA–W–52,788B), that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 22nd day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27437 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,926]

Standard Mercerizing & Specialty Yarn, LLC, Formerly Known as Standard Coosa Industries, Inc., Chattanooga, TN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 23, 2003, in response to a worker petition filed by a UNITE!, Tennessee-Kentucky District, Local 1418, on behalf of workers at Standard Mercerizing and Specialty Yarns, LLC, Chattanooga, Tennessee. The facility closed in June of 2003.

The Department issued a negative determination applicable to the petitioning group of workers on August 26, 2003 (TA–W–51,939). No new information or change in circumstances is evident which would result in a reversal of the Department's previous determination. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 29th day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27436 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,662]

Vantico, Inc., a Subsidiary of Huntsman Advanced Materials, LLC, Minneapolis, MN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 22, 2003 in response to a petition filed by a state agency representative on behalf of workers of Vantico, Inc., a subsidiary of Huntsman Advanced Materials, LLC, Minneapolis, Minnesota.

The petition regarding the investigation has been deemed invalid. A representative of Vantico, Inc., has reported that there is no such facility. Consequently, further investigation would serve no purpose and the investigation is terminated.

Signed at Washington, DC, this 23rd day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27450 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,583, TA–W–52,583A, TA–W–52,583B]

VF Jeanswear, LP, AdA, OK, VF Jeanswear, LP, Windsor, NC, VF Jeanswear, LP, Wilson, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, an investigation was initiated on August 18, 2003 in response to a petition filed on behalf of workers at VF Jeanswear, LP, Ada, Oklahoma (TA–W–52,583), Windsor, North Carolina (TA–52,583A) and Wilson, North Carolina (52,583B).

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 22nd day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–27451 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefits information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Connecticut
- CT30001 (Jun. 13, 2003)
- CT30002 (Jun. 13, 2003)
- CT30003 (Jun. 13, 2003)
- CT30004 (Jun. 13, 2003)
- CT30006 (Jun. 13, 2003)

Volume II

District of Columbia
- DC030001 (Jun. 13, 2003)
- DC030003 (Jun. 13, 2003)

Delaware
- DE030001 (Jun. 13, 2003)
- DE030002 (Jun. 13, 2003)
- DE030004 (Jun. 13, 2003)
- DE030005 (Jun. 13, 2003)
- DE030009 (Jun. 13, 2003)

West Virginia
- WV030002 (Jun. 13, 2003)
- WV030003 (Jun. 13, 2003)
- WV030006 (Jun. 13, 2003)
- WV030009 (Jun. 13, 2003)
- WV030010 (Jun. 13, 2003)

Volume III

Kentucky
- KY030001 (Jun. 13, 2003)
- KY030002 (Jun. 13, 2003)
- KY030003 (Jun. 13, 2003)
- KY030004 (Jun. 13, 2003)
- KY030005 (Jun. 13, 2003)
- KY030006 (Jun. 13, 2003)
- KY030007 (Jun. 13, 2003)
- KY030025 (Jun. 13, 2003)
- KY030027 (Jun. 13, 2003)
- KY030028 (Jun. 13, 2003)
- KY030029 (Jun. 13, 2003)
- KY030035 (Jun. 13, 2003)
- KY030044 (Jun. 13, 2003)
- KY030049 (Jun. 13, 2003)

Mississippi
- MS030003 (Jun. 13, 2003)
- MS030031 (Jun. 13, 2003)
- MS030055 (Jun. 13, 2003)
- MS030056 (Jun. 13, 2003)

Volume IV

None

Volume V

Arkansas
- AR030001 (Jun. 13, 2003)
- AR030003 (Jun. 13, 2003)
- AR030008 (Jun. 13, 2003)
- AR030023 (Jun. 13, 2003)
- AR030027 (Jun. 13, 2003)

New Mexico

NM030001 (Jun. 13, 2003)
NM030011 (Jun. 13, 2003)

Volume VI

North Dakota
ND030001 (Jun. 13, 2003)
ND030002 (Jun. 13, 2003)
ND030003 (Jun. 13, 2003)
ND030004 (Jun. 13, 2003)
ND030005 (Jun. 13, 2003)
ND030006 (Jun. 13, 2003)
ND030007 (Jun. 13, 2003)
ND030008 (Jun. 13, 2003)
ND030009 (Jun. 13, 2003)
ND030010 (Jun. 13, 2003)
ND030017 (Jun. 13, 2003)
ND030019 (Jun. 13, 2003)

Volume VII

Nevada
NV030001 (Jun. 13, 2003)
NV030002 (Jun. 13, 2003)
NV030003 (Jun. 13, 2003)
NV030004 (Jun. 13, 2003)
NV030005 (Jun. 13, 2003)
NV030007 (Jun. 13, 2003)
NV030008 (Jun. 13, 2003)
NV030009 (Jun. 13, 2003)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon And Related Acts,''. This publication is available at each of the 50 Regional Governmental Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon.* They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov)* of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s), of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 23 day of October, 2003.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 03–27191 Filed 10–30–03; 8:45 am]

BILLING CODE 4510–27–M

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation of 1978, Pub. L. 9541.

SUMMARY: The National Science Foundation (NSF) is required to publish to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On September 4, 2003, the National Science Foundation published a notice in the **Federal Register** of permit applications received. A permit was issued on October 21, 2003 to Gary D. Miller (2004–013).

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 03–27458 Filed 10–30–03; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Conservation Act of 1978; Notice of Permit Modification

AGENCY: National Science Foundation.

SUMMARY: The Foundation modified a permit to conduct activities regulated under the Antarctic Conservation Act of 1978 (Pub. L. 95–541; Code of Federal Regulations Title 45, Part 670).

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy, Permit Officer, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

SUPPLEMENTARY INFORMATION: On September 28, 2000, the National Science Foundation issued a permit (ACA #2001–011) to Dr. Wayne Z. Trivelpiece after posting a notice in the August 29, 2000 **Federal Register**. Public comments were not received. A request to modify the permit was posted in the **Federal Register** on September 3, 2003. No public comments were received. The modification was issued by the Foundation on October 14, 2003.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 03–27459 Filed 10–30–03; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Call for Anticipatory Research Projects

NRC research is performed in order to meet a known or anticipated regulatory need. There are two main categories of research that require separate consideration: Confirmatory research and anticipatory research. Confirmatory research aids the agency in responding to license issues that are now before the agency or that are anticipated to come before the agency in the near term. This type of research is performed either when the Office of Nuclear Regulatory Research recognizes issues of concern or at the request of a program office that is directly responsible for regulatory oversight, *e.g.*, Offices of Nuclear Reactor Regulation (NRR), Nuclear Materials Safety and Safeguards (NMSS), or Nuclear Security and Incident Response (NSIR).

The NRC also conducts research programs that are more forward looking, which we refer to as ''anticipatory'' research, an effort to try to foresee where the NRC may need information to respond to future regulatory issues. This research is related to better understanding evolving technologies or issues that may become important regulatory concerns in the future. Some of this work may also be confirmatory in nature by providing independent assessment of information developed by the nuclear industry. These types of programs may have been requested by the other program offices, or they may be developed as a result of independent examination of industry trends and emerging issues. If the agency waits until these potential issues become actual regulatory concerns, it may be too late to develop the technical information to respond in a timely fashion. Examples of anticipatory research that have been highly valuable to the agency include probabilistic risk analysis methods and applications, severe accident source term research, and the evaluation of the effects of aging on plant components.

Therefore, the NRC's Office of Nuclear Regulatory Research (RES) is seeking recommendations for anticipatory research both within NRC and from external stakeholders. This research will

help the NRC resolve current challenges and prepare for anticipated future regulatory issues. The responding submittal should describe the proposed research and the potential use of the research results in current or future regulatory activities. We also solicit your comments on the factors that should be considered when anticipatory research topics are prioritized. Responses to this request will be evaluated for possible inclusion in the FY 2006 and FY 2007 budgets.

To permit these new topics to be considered in developing future plans, your recommendations should be submitted no later than November 28, 2003, to: Michael Lesar, Chief, Rules and Directives Branch, Mail Stop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Comments may also be submitted by e-mail to *NRCREP@NRC.GOV.*

(5 U.S.C. 552(a))

Dated at Rockville, MD, this 27th Day of October 2003.

For the Nuclear Regulatory Commission.

Alan E. Levin,

Senior Technical Advisor to the Director, Office of Nuclear Regulatory Research.

[FR Doc. 03–27456 Filed 10–30–03; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Cost of Hospital and Medical Care Treatment Furnished by the United States; Certain Rates Regarding Recovery From Tortiously Liable Third Persons

By virtue of the authority vested in the President by Section 2(a) of Pub. L. 87–693 (76 Stat. 593; 42 U.S.C. 2652), and delegated to the Director of the Office of Management and Budget by Executive Order No. 11541 of July 1, 1970 (35 **Federal Register** 10737), the two sets of rates outlined below are hereby established. These rates are for use in connection with the recovery, from tortiously liable third persons, of the cost of hospital and medical care and treatment furnished by the United States (Part 43, Chapter I, Title 28, Code of Federal Regulations) through three separate Federal agencies. The rates have been established in accordance with the requirements of OMB Circular A–25, requiring reimbursement of the full cost of all services provided and will remain in effect until further notice. The rates for the Department of Veterans Affairs and the Indian Health Service in the Department of Health and Human Services that were published in the **Federal Register** on October 31, 2000 and December 26, 2001, respectively, remain in effect until further notice. In addition, the inpatient rates for the Department of Defense published in on December 9, 2002 remain in effect until further notice. The rates are as follows:

1. Department of Defense

The Fiscal Year (FY) and Calendar Year (CY) 2003 Department of Defense (DoD) reimbursement rates for inpatient, outpatient, and other services are provided in accordance with Title 10, United States Code, section 1095. Due to size, the sections containing the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) Maximum Allowable Charges (CMAC, section II), Dental (section III. F), Pharmacy (section III. D), and Durable Medical Equipment/Durable Medical Supplies (DME/DMS) (section III. K) are not included in this package. Those rates are available from the TRICARE Management Activity (TMA) Uniform Business Office (UBO) Web site: *http://www.tricare.osd.mil/ebc/rm_home/ubo_documents_rates_tables.cfm.*

The outpatient rates in this package will have an effective date of May 1, 2003. The inpatient medical rates in this package, republished in this package, are from the December 9, 2002 package and are referenced above on the UBO Web site; these became effective October 1, 2002.

A government billing calculation factor (percentage discount) for billing outpatient International Military Education and Training (IMET) (58.57% of full rate), and Interagency and Other Federal Agency Sponsored Patients (IAR) rate (93.14% of full rate), will be applied to the line item charges calculated for outpatient medical and ancillary services using CMAC or anesthesia charges.

Inpatient, Outpatient, and Other Rates and Charges

I. Inpatient Rates

A. All Inpatient Services

(Based on Diagnosis Related Groups (DRG) [1] [2])

1. Average FY 2003 Direct Care Inpatient Reimbursement Rates

Adjusted standard amount (ASA)	International military education & training (IMET)	Interagency and other federal agency sponsored patients	Other (full/third party)
Large Urban	$3,521.00	$6,434.00	$6,748.00
Other Urban/Rural	4,316.00	7,191.00	7,575.00
Overseas	4,443.00	9,879.00	10,344.00

2. Overview

The FY 2003 inpatient rates are based on the cost per DRG, which is the inpatient full reimbursement rate per hospital discharge weighted to reflect the intensity of the principal diagnosis, secondary diagnoses, procedures, patient age, etc. involved. The average cost per Relative Weighted Product (RWP) for large urban, other urban/rural, and overseas facilities will be published annually as an inpatient adjusted standardized amount (ASA) (see paragraph I.A.1., above). The ASA will be applied to the RWP for each inpatient case, determined from the DRG weights, outlier thresholds, and payment rules published annually for hospital reimbursement rates under CHAMPUS pursuant to 32 CFR 199.14(a)(1), including adjustments for length of stay (LOS) outliers. Each military treatment facility (MTF) providing inpatient care has a separate ASA rate. The MTF-specific ASA rate is the published ASA rate adjusted for area wage differences and indirect medical education (IME) for the discharging hospital (see Attachment 1). The MTF-specific ASA rate submitted on the claim is the rate that payers will use for reimbursement purposes. An example of

how to apply a specific military treatment facility's ASA rate to a DRG standardized weight to arrive at the costs to be recovered is contained in paragraph I.A.3., below.

3. Example of Adjusted Standardized Amounts for Inpatient Stays

Figure 1 shows examples for a non-teaching hospital (Reynolds Army Community Hospital) in an Other Urban/Rural area.

a. The cost to be recovered is the MTF's cost for medical services provided. Billings will be at the third party rate.

b. DRG 020: Nervous System Infection Except Viral Meningitis. The RWP for an inlier case is the CHAMPUS weight of 2.1159. (DRG statistics shown are from FY 2002.)

c. The FY 2003 MTF-applied ASA rate is $7,152.00 (Reynolds Army Community Hospital's third party rate as shown in Attachment 1).

d. The MTF cost to be recovered is the RWP factor (2.1159) in subparagraph 3.b., above, multiplied by the amount ($7,152.00) in subparagraph 3.c., above.

e. Cost to be recovered is $15,134.00.

FIGURE 1.—THIRD PARTY BILLING EXAMPLES

DRG No.	DRG description	DRG weight	Arithmetic mean LOS	Geometric mean LOS	Short stay threshold	Long stay threshold
020	Nervous System Infection Except Viral Meningitis	2.1159	7.6	5.5	1	29

Hospital	Location	Area wage rate index	IME adjustment	Group ASA	MTF-applied ASA
Reynolds Army Community Hospital	Other Urban/Rural	.8251	1.0	$7,575.00	$7,152.00

Patient	Length of stay	Days above threshold	Relative weighted product			TPC amount***
			Inlier*	Outlier**	Total	
#1	7 days	0	2.1159	000	2.1159	$15,134.00
#2	21 days	0	2.1159	000	2.1159	15,134.00
#3	35 days	6	2.1159	.7617	2.8776	20,581.00

* DRG Weight.
** Outlier calculation = 33 percent of per diem weight × number of outlier days.
=.33 (DRG Weight/Geometric Mean LOS) × (Patient LOS − Long Stay Threshold).
=.33 (2.1159/5.5) × (35–29).
=.33 (.38471) × 6 (extend to five decimal places).
=.12695 × 6 (extend to five decimal places).
=.7617 (extend to four decimal places).
*** MTF-Applied ASA x Total RWP.

II. Outpatient Rates[2 3 4]

A. *CMAC Rates.* The CHAMPUS Maximum Allowable Charge (CMAC) rates, established under 32 CFR 199.14(h), are used for determining the appropriate charge for services in an itemized format, based on Healthcare Common Procedure Coding System (HCPCS) methodology. The CMAC rates are available on the TMA UBO Web site at *http://www.tricare.osd.mil/ebc/rm_home/ubo_documents_rates_tables.cfm.* The CMAC rate tables contain the rates for radiology, laboratory, clinic procedures/services, and Evaluation and Management (E/M) Current Procedural Terminology (CPT) codes.

CMAC is organized by 90 distinct ''localities,'' which account for differences in geographic regions based on demographics, cost of living, and population. Each MTF Defense Military Information System identification (DMIS ID) will map to a locality code to obtain the correct rates. For the complete DMIS ID locality table please refer to the DMIS ID Web site at *http://www.dmisid.com/cgi-dmis/default.*

In each locality, there are three subtables of rates: CMAC, Component, and Non-CMAC. The CMAC rate table determines the payment for individual professional services and procedures identified CPT and HCPCS codes. The Component rate table is based on component rates comprising professional, technical and global rates. The Non-CMAC rate table captures pricing for procedure codes at the local or state level. Each state/locality does not have the same set of prevailing rates. When rates are pulled from the Non-CMAC table, the prevailing local fee is used in all cases.

Within the CMAC tables, the rates are based not only on HCPCS but on a ''Provider Class'' based on medical specialty of the provider. Each provider is mapped to a provider class to calculate the correct rate.

B. *Per Clinic Visit.* With implementation of OIB, an all-inclusive rate per clinic visit will no longer be charged. Instead, charges will be based on services provided and will be itemized.

C. *Ambulatory Procedure Visit (APV)—Per Visit*[5]. APV charges are based on the CPT codes of the procedures performed. An itemized bill will be produced for the charges associated with the APV including ancillaries and anesthesia as applicable.

III. Other Rates and Charges

A. *Immunization* The charge for immunizations, allergen extracts, allergic condition tests, and the administration of certain medications when these services are provided in a separate immunization or shot clinic, are based on CMAC rates in cases in which such rates are available. In cases in which such rates are not available, rates will be based on the average full cost of these services, exclusive of any costs considered for purposes of any outpatient visit. A separate charge shall be made for each immunization, injection or medication administered. If there is no CMAC rate available for an immunization or injection then the flat rate of $34.00 will be billed.

B. *Subsistence Rate*[6]. The standard and discount rates for subsistence are available from the DoD Comptrollers Web site, Tab G: *http://www.dod.mil/comptroller/ratesindex2003.html.*

C. *Family Member Rate* $12.72 (with exception of spouses and other

dependents of enlisted personnel in pay grades E–1 through E–4, who are charged the discount meal rate—See Comptrollers Web site, Tab G: *http://www.dod.mil/comptroller/ratesindex2003.html.*

D. *Pharmacy*[7]. All medications, both internal and external, are billable. The rates for pharmacy are based on the average full cost of these drugs. These rates will be updated quarterly. These rates in this table are based on National Drug Code (NDC) codes. This rate table may be found on the TMA UBO Web site at *http://www.tricare.osd.mil/ebc/rm_home/ubo_documents_rates_tables.cfm.*

E. *Ancillary Services. Per Procedure*[8]. All Laboratory and Radiology procedures will be billed per CMAC Rates, including those associated with a clinic visit.

F. *Dental Rate—Per Procedure*[9].

CDT/CPT	Clinical service	International military education and training (IMET)	Interagency and other Federal agency sponsored patients	Other (full/third party)
	Dental Services ADA code weight multiplier	$26.00	$60.00	$63.00

G. *Ambulance Rate—Per Hour*[10].

CDT/CPT	Clinical service	International military education and training (IMET)	Interagency and other Federal agency sponsored patients	Other (full/third party)
A0999	Ambulance	$102.00	$140.00	$147.00

H. *AirEvac Rate—Per Trip (24-hour period)*[11].

Clinical Service	International military education & training (IMET)	Interagency & other Federal agency sponsored patients	Other (full/third party)
AirEvac Services—Ambulatory	$361.00	$494.00	$518.00
AirEvac Services—Litter	1,047.00	1,435.00	1,503.00

I. *Observation Rate—Per Hour*[12]. Under OIB, observation services will be billed according to applicable CPT codes.

J. *Anesthesia* The flat rate for anesthesia services is based on an average DoD cost of service in all MTFs. The range of HCPCS codes for anesthesia is 00100–01999. The flat rate for anesthesia will be $174.00.

K. *Durable Medical Equipment/Durable Medical Supplies (DME/DMS)* Durable Medical Equipment (DME) and Durable Medical Supplies (DMS) are based on the Medicare Fee Schedule floor rate. The HCPCS codes contained in this table are for A4212–A7509, E0100–E2101, K0001–K0551, L0100–L8670, and V2020–V2780. This rate table may be found on the TMA UBO Web Site at *http://www.tricare.osd.mil/ebc/rm_home/ubo_documents_rates_tables.cfm.*

IV. Elective Cosmetic Surgery Procedures and Rates 13/

Cosmetic surgery procedure	Current procedural terminology (CPT)[e]	FY 2003 charge	Amount of charge
Abdominoplasty	15831	Inpatient Charge per DRG or CPT	(a b c)
Blepharoplasty	15820, 15821, 15822, 15823	Inpatient Charge per DRG or CPT	(a b c)
Botox Injection for rhytids	J0585	Inpatient Charge per DRG or CPT	(a b c)
Brachioplasty	15836	Inpatient Charge per DRG or CPT	(a b c)
Brow Lift	15824, 15839	Inpatient Charge per DRG or CPT	(a b c)
Buttock Lift	15835	Inpatient Charge per DRG or CPT	(a b c)
Canthopexy	21282, 67950	Inpatient Charge per DRG or CPT	(a b c)
Cervicoplasty	15819	Inpatient Charge per DRG or CPT	(a b c)
Chemical Peel	15788, 15789, 15792, 15793	Inpatient Charge per DRG or CPT	(a b c)
Collagen Injection, subcutaneous	11950, 11951, 11952, 11954	Inpatient Charge per DRG or CPT	(a b c)
Dermabrasion	15780, 15781, 15782, 15783	Inpatient Charge per DRG or CPT	(a b c)
Arm/Thigh Dermolipectomy	15836, 15832	Inpatient Charge per DRG or CPT	(a b c)

Cosmetic surgery procedure	Current procedural terminology (CPT)[e]	FY 2003 charge	Amount of charge
Excision/destruction of minor benign skin lesions.	11400, 11401, 11402, 11403, 11404, 11406, 11420, 11421, 11422, 11423, 11424, 11426, 11440, 11441, 11442, 11443, 11444, 11446, 17000, 17003, 17004, 17106, 17107, 17108, 17110, 17111, 17250.	Inpatient Charge per DRG or CPT	(a b c)
Facial Rhytidectomy	15824, 15825, 15826, 15828, 15829	Inpatient Charge per DRG or CPT	(a b c)
Genioplasty	21120, 21121	Inpatient Charge per DRG or CPT	(a b c)
Hair Restoration	15775, 15776	Inpatient Charge per DRG or CPT	(a b c)
Hip Lift	15834	Inpatient Charge per DRG or CPT	(a b c)
Laser Resurfacing	17999	Inpatient Charge per DRG or CPT	(a)
Lipectomy Suction per region	15876, 15877, 15878, 15879	Inpatient Charge per DRG or CPT	(a b c f)
Malar Augmentation	21270	Inpatient Charge per DRG or CPT	(a b c)
Mammaplasty—augmentation	19318, 19324, 19325,	Inpatient Charge per DRG or CPT	(a b)
Mandibular or Maxillary Repositioning	21194	Inpatient Charge per DRG or CPT	(a b c)
Mastopexy	19316	Inpatient Charge per DRG or CPT	(a b c)
Mentoplasty (Augmentation/Reduction)	21208, 21209	Inpatient Charge per DRG or CPT	(a b c)
Otoplasty	69300	Inpatient Charge per DRG or CPT	(a b c)
Refractive surgery (see the following two procedures):			
Radial Keratotomy	65771	CPT	(b c d)
Other Procedure (if applies to laser or other refractive surgery).	66999	CPT	(b c d)
Rhinoplasty	30400, 30410, 30430, 30435, 30450, 30460, 30462.	Inpatient Charge per DRG or CPT	(a b c)
Scar Revisions beyond CHAMPUS	13120, 13121, 13122, 13131, 13132, 13133, 13150, 13152, 13153.	Inpatient Charge per DRG or CPT	(a b c)
Sclerotherapy	36468, 36469, 36470, 36471, 15780, 15781, 15782, 15783, 15786.	Inpatient Charge per DRG or CPT	(a b c)
Tattoo Removal	15780, 15783, 17999	Inpatient Charge per DRG or CPT	(a b c)
Thigh Lift	15832	Inpatient Charge per DRG or CPT	(a b c)
Vein Stripping	37720, 37730, 37735	Inpatient Charge per DRG or CPT	(a b c)

Notes on Cosmetic Surgery Charges:

[a] Charges for Inpatient surgical care services are based on the cost per DRG.

[b] Charges for outpatient surgical care services are based on the cost per CPT code.

[c] All required DoD guidelines and instructions for APVs must be followed. An ambulatory procedure visit is defined in DoD Instruction 6025.8, ''Ambulatory Procedure Visit (APV),'' dated September 23, 1996, as immediate (day of procedure) pre-procedure and immediate post-procedure care requiring an unusual degree of intensity and provided in an ambulatory procedure unit (APU). An APU is a location or organization within an MTF (or freestanding outpatient clinic) that is specially equipped, staffed, and designated for the purpose of providing the intensive level of care associated with APVs. Care is required in the facility for less than 24 hours. All expenses and workload are assigned to the MTF-established APU associated with the referring clinic.

[d] Refer to Office of the Assistant Secretary of Defense (Health Affairs) policy on Vision Correction Via Laser Surgery For Non-Active Duty Beneficiaries, April 7, 2000, for further guidance on billing for these services. The policy can be downloaded from: *http://www.ha.osd.mil/policies/2000/00_003.pdf.*

[e] The attending physician is to document and record the appropriate DRG/CPT code to indicate the procedure followed during cosmetic surgery. It is up to the physician to decide whether or not the services are considered medically necessary or elective.

[f] Each regional lipectomy shall carry a separate charge. Regions include head and neck, abdomen, flanks, and hips.

Notes on Reimbursable Rates

[1] The cost per Diagnosis Related Group (DRG) is based on the inpatient full reimbursement rate per hospital discharge, weighted to reflect the intensity of the principal and secondary diagnoses, surgical procedures, and patient demographics involved. The ASA per RWP for use in the direct care system is comparable to procedures used by the Centers for Medicare and Medicaid Services (CMS) and CHAMPUS. These expenses include all direct care expenses associated with direct patient care. The average cost per RWP for large urban, other urban/rural, and overseas will be published annually as an adjusted standardized amount (ASA) and will include the cost of inpatient professional services. The DRG rates will apply to reimbursement from all sources, not just third party payers.

MTFs without inpatient services, whose providers are performing inpatient care in a civilian facility for a DoD beneficiary, can bill payers the percentage of the charge that represents professional services as provided above. The ASA rate used in these cases, based on the absence of an ASA rate for the facility, will be based on the average ASA rate for the type of metropolitan statistical area the MTF resides, large urban, other urban/rural, or overseas (see paragraph I.A.1.). The UBO must receive documentation of care provided in order to produce a bill.

[2] Percentages can be applied when preparing bills for inpatient services. Pursuant to the provisions of 10 U.S.C. 1095, the inpatient Diagnosis Related Groups percentages are 96 % hospital and 4% professional charges. When preparing bills for outpatient services, professional fees are based on the E/M charges, the hospital fees are based on the charges for ancillary services, pharmacy and supplies.

[3] The Medical Expense and Performance Reporting System (MEPRS) code is a three digit code which defines the summary account and the subaccount within a functional category in the DoD medical system. MEPRS codes are used to ensure that consistent expense and operating performance data is reported in the DoD military medical system. An example of the MEPRS hierarchical arrangement follows:

	MEPRS Code
Outpatient Care (Functional Category).	B
Medical Care (Summary Account).	BA
Internal Medicine (Subaccount) ..	BAA

[4] The following chart of MEPRS work centers are DoD approved for outpatient itemized billing. Claims can be generated for encounters, ancillaries, pharmacy, DME/DMS, etc. from these workcenters.

MEPRS code	Clinical service
BAA	Internal Medicine.

MEPRS code	Clinical service
BAB	Allergy.
BAC	Cardiology.
BAE	Diabetic.
BAF	Endocrinology (Metabolism).
BAG	Gastroenterology.
BAH	Hematology.
BAI	Hypertension.
BAJ	Nephrology.
BAK	Neurology.
BAL	Outpatient Nutrition.
BAM	Oncology.
BAN	Pulmonary Disease.
BAO	Rheumatology.
BAP	Dermatology.
BAQ	Infectious Disease.
BAR	Physical Medicine.
BAS	Radiation Therapy.
BAT	Bone Marrow Transplant.
BAU	Genetic.
BAV	Hyperbaric.
BBA	General Surgery.
BBB	Cardiovascular and Thoracic Surgery.
BBC	Neurosurgery.
BBD	Ophthalmology.
BBE	Organ Transplant.
BBF	Otolaryngology.
BBG	Plastic Surgery.
BBH	Proctology.
BBI	Urology.
BBJ	Pediatric Surgery.
BBK	Peripheral Vascular Surgery.
BBL	Pain Management.
BBM	Vascular and Interventional Radiology.
BCA	Family Planning.
BCB	Gynecology.
BCC	Obstetrics.
BCD	Breast Cancer Clinic.
BDA	Pediatric.
BDB	Adolescent.
BDC	Well Baby.
BEA	Orthopedic.
BEB	Cast.
BEC	Hand Surgery.
BEE	Orthotic Laboratory.
BEF	Podiatry.
BEZ	Chiropractic.
BFA	Psychiatry.
BFB	Psychology.
BFC	Child Guidance.
BFD	Mental Health.
BFE	Social Work.
BFF	Substance Abuse.
BGA	Family Practice.
BHA	Primary Care.
BHC	Optometry.
BHD	Audiology.
BHE	Speech Pathology.
BHF	Community Health.
BHG	Occupational Health.
BHH	TRICARE Outpatient.
BHI	Immediate Care.
BIA	Emergency Medical.
BKA	Underseas Medicine.
BLA	Physical Therapy.
BLB	Occupational Therapy.

MEPRS code	Other billable services
DAA	Pharmacy.
DBA	Clinical Pathology.
DBB	Anatomical Pathology.
DBD	Cytogenetic Laboratory.
DBE	Molecular Genetic Laboratory.
DBF	Biochemical Genetic Laboratory.
DCA	Diagnostic Radiology.
FBI	Immunizations.
FBN	Hearing Conservation (MSA Billing Only).
FC	Pharmacy, Laboratory and Radiology (External Civilian Ancillary and Support to other Military and Federal), except in cases where there is a specific VA/DoD MOU.
FEA	Ambulance.

[5] Ambulatory procedure visit is defined in DoD Instruction 6025.8, ''Ambulatory Procedure Visit (APV),'' dated September 23, 1996, as immediate (day of procedure) pre-procedure and immediate post-procedure care requiring an unusual degree of intensity and provided in an ambulatory procedure unit (APU). An APU is a location or organization within an MTF (or freestanding outpatient clinic) that is specially equipped, staffed, and designated for the purpose of providing the intensive level of care associated with APVs. Care is required in the facility for less than 24 hours. All expenses and workload are assigned to the MTF-established APU associated with the referring clinic.

[6] Subsistence is billed under the Medical Services Account (MSA) Program only. The MSA office shall collect subsistence charges from all persons, including inpatients and transient patients not entitled to food service at Government expense. Please refer to DoD 6010.15–M, Military Treatment Facility UBO Manual, April 1997, and the DoD 7000.14–R, ''Department of Defense Financial Management Regulation,'' Volume 12, Chapter 19 for guidance on the use of these rates.

[7] Third party payers (such as insurance companies) shall be billed for prescription services when beneficiaries who have medical insurance obtain medications from MTFs that are prescribed by providers both internal and external to the MTF (*e.g.*, physicians and dentists). Eligible beneficiaries (family members or retirees with medical insurance) are not liable personally for this cost and shall not be billed by the MTF. Medical Services Account (MSA) patients, who are not beneficiaries as defined in 10 U.S.C. 1074 and 1076, are charged at the ''Other'' rate if they are seen by an outside provider and only come to the MTF for prescription services. The standard cost of medications includes the DoD-wide average cost of the drug, calculated by lowest cost for the generic drugs with the same dosage and strength. The prescription charge is calculated by multiplying the number of units (*e.g.*, tablets or capsules) by the unit cost and adding $6.00 for the cost of dispensing the prescription. Dispensing costs include overhead, supplies, and labor, etc. to fill the prescription.

The list of drug reimbursement rates is too large to include in this document. Those rates are available from the TMA's UBO Web site, *http://www.tricare.osd.mil/ebc/rm_home/ubo_documents_rates_tables.cfm.*

[8] Charges for ancillary services requested by an internal (associated with a clinic visit) or an outside provider (*e.g.*, physicians and dentists) are relevant to the Third Party Collection Program. Third party payers (such as insurance companies) shall be billed for ancillary services when beneficiaries who have medical insurance obtain services from the MTF which are prescribed by providers external to the MTF.

Eligible beneficiaries (family members or retirees with medical insurance) are not personally liable for this cost and shall not be billed by the MTF. MSA patients, who are not beneficiaries as defined by 10 U.S.C. 1074 and 1076, are charged at the ''Other'' rate if they are not seen by an outside provider and only come to the MTF for ancillary services.

[9] Dental service rates are based on a dental rate multiplied by the DoD established weight for the American Dental Association (ADA) code performed. For example, for ADA code 00270, bite wing single film, the weight is 0.15. The weight of 0.15 is multiplied by the appropriate rate, IMET, IAR, or Full/Third Party rate to obtain the charge. If the Full/Third Party rate is used, then the charge for this ADA code will be $9.45 ($63 x .15 = $9.45).

The list of CY 2003 ADA codes and weights for dental services is too large to include in this document. This rate table may be found on the TMA's UBO Web site at *http://www.tricare.osd.mil/ebc/rm_home/ubo_documents_rates_tables.cfm.*

[10] Ambulance charges shall be based on hours of service in 15-minute increments. The rates listed in section III.G. are for 60 minutes or 1 hour of service. Providers shall calculate the charges based on the number of hours (and/or fractions of an hour) that the ambulance is logged out on a patient run. Fractions of an hour shall be rounded to the next 15-minute increment (*e.g.*, 31 minutes shall be charged as 45 minutes).

[11] Air in-flight medical care reimbursement charges are determined by the status of the patient (ambulatory or litter) and are per patient during a 24-hour period. The appropriate charges are billed only by the Air Force Global Patient Movement Requirement Center (GPMRC). These charges are only for the cost of providing medical care. Flight charges are billed by GPMRC separately.

[12] Observation Services are billed based on applicable CPTs. If the status of a patient changes to inpatient, the charges for observation services are added to the DRG assigned to the case and not separately billed. If a patient is released from observation status and is sent to an APV, the charges for observation services are not billed separately but are added to the APV rate to recover all expenses.

[13] Family members of active duty personnel, retirees and their family members, and survivors shall be charged elective cosmetic surgery rates. Elective cosmetic surgery procedure information is contained in section IV. The patient shall be charged the rate as specified in the CY 2003 reimbursable rates. The charges for elective

cosmetic surgery are at the full reimbursement rate (designated as the ''Other'' rate) for inpatient care services based on the cost per DRG or CPT. The patient is responsible for the cost of the implant(s) and the prescribed cosmetic surgery rate. (**Note:** The implants and procedures used for the augmentation mammaplasty are in compliance with Federal Drug Administration guidelines.)

ATTACHMENT 1.—FY 2003 ADJUSTED STANDARDIZED AMOUNTS (ASA) BY MILITARY TREATMENT FACILITY

DMIS ID	MTF name	Serv	Full rate	IAR rate	IMET rate	TPC rate
0003	Lyster AH—Ft. Rucker	A	$7,032	$6,676	$4,007	$7,032
0005	Bassett ACH—Ft. Wainwright	A	7,794	7,399	4,441	7,794
0006	3 Med Grp—Elmendorf AFB	F	7,624	7,237	4,344	7,624
0009	56th Med Grp—Luke AFB	F	6,734	6,421	3,514	6,734
0014	60th Med Grp—Travis AFB	F	10,529	9,995	6,000	10,529
0024	NH Camp Pendleton	N	8,189	7,808	4,274	8,189
0028	NH Lemoore	N	7,554	7,171	4,304	7,554
0029	NMC San Diego	N	10,268	9,790	5,359	10,268
0030	NH Twentynine Palms	N	6,820	6,502	3,559	6,820
0032	Evans ACH—Ft. Carson	A	7,564	7,181	4,310	7,564
0033	10th Med Grp—USAF Academy	F	7,574	7,190	4,316	7,574
0035	NH Groton	N	7,575	7,191	4,316	7,575
0037	Walter Reed AMC—Washington DC	A	10,415	9,930	5,435	10,415
0038	NH Pensacola	N	9,119	8,656	5,196	9,119
0039	NH Jacksonville	N	8,580	8,180	4,477	8,580
0042	96th Med Grp—Eglin AFB	F	9,580	9,095	5,459	9,580
0045	6th Med Grp—MacDill AFB	F	6,748	6,434	3,521	6,748
0047	Eisenhower AMC—Ft. Gordon	A	9,312	8,839	5,306	9,312
0048	Martin ACH—Ft. Benning	A	8,315	7,893	4,738	8,315
0049	Winn ACH—Ft. Stewart	A	7,564	7,180	4,310	7,564
0052	Tripler AMC—Ft. Shafter	A	10,248	9,728	5,839	10,248
0053	366th Med Grp—Mtn Home AFB	F	7,560	7,176	4,308	7,560
0055	375th Med Grp—Scott AFB	F	8,671	8,268	4,525	8,671
0056	NH Great Lakes	N	6,802	6,486	3,550	6,802
0060	Blanchfield ACH—Ft. Campbell	A	7,025	6,669	4,003	7,025
0061	Ireland ACH—Ft. Knox	A	6,620	6,311	3,454	6,620
0064	Bayne-Jones ACH—Ft. Polk	A	6,987	6,633	3,981	6,987
0066	89th Med Grp—Andrews AFB	F	8,944	8,527	4,667	8,944
0067	NNMC Bethesda	N	10,397	9,913	5,426	10,397
0073	81st Med Grp—Keesler AFB	F	10,103	9,591	5,757	10,103
0075	Wood ACH—Ft. Leonard Wood	A	7,179	6,815	4,091	7,179
0078	55th Med Grp—Offutt AFB	F	9,972	9,466	5,682	9,972
0079	99th Med Grp—Nellis AFB	F	6,763	6,448	3,529	6,763
0086	Keller ACH—West Point	A	8,234	7,816	4,692	8,234
0089	Womack AMC—Ft. Bragg	A	8,079	7,669	4,604	8,079
0091	NH Camp LeJeune	N	7,352	6,980	4,190	7,352

Beginning May 1, 2003, the rates prescribed herein superceded those established by the Director of the Office of Management and Budget, December 9, 2002 (FR Doc. 02–31024). 6

Joshua B. Bolten,

Director, Office of Management and Budget.

[FR Doc. 03–27360 Filed 10–30–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48706; File No. SR–Amex–2003–65]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to Enhanced Corporate Governance Requirements Applicable to Listed Companies

October 27, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 23, 2003, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On September 9, 2003, the Exchange filed 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Claudia Crowley, Vice President, Listing Qualifications, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulations, Commission, dated September 5, 2002 (''Amendment No. 1''). In Amendment No. 1, Amex added p;roposed rule language to paragraph (c) of Section 801 to clarify that although the corporate governance requirements contained in Part 8 are not applicable to passive business organizations (such as royalty trusts) or to derivatives and special purpose securities listed pursuant to Amex Rules 1000, 10000A and 1200 and Sections 106, 107 and 118B, issuers of such securities are required to comply with Sections 121 and 803 to the extent required by Rule 10A–3 under the Act.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Sections 101, 110, 120, 121, 401, 402, 610 and 1009 of the Amex *Company Guide,* and adopt new Sections 801 through 808 of the Amex *Company Guide* to enhance the corporate governance requirements applicable to listed companies. Below is the text of the proposed rule change. Proposed new language is in *italics;* proposed deletions are in brackets.

American Stock Exchange Company Guide

Sec. 101, General

No change.

Commentary

.01 Corporate Governance Standards

In addition to the numerical listing standards, the Exchange has adopted certain corporate governance listing standards, which are set forth in Part 8.

.0[1]*2* Future Priced Securities—No change.

Sec. 110, Securities of Foreign Companies

The Exchange recognizes that every corporate entity must operate in accordance with the laws and customary practices of its country of origin or incorporation. Therefore, in evaluating the eligibility for listing of a foreign based entity, the Exchange will consider the laws, customs and practices of the applicant's country of domicile*, to the extent not contrary to the federal securities laws (including but not limited to Rule 10A–3 under the Securities Exchange Act of 1934),* regarding such matters as: (i) The election and composition of the Board of Directors; (ii) the issuance of quarterly earnings statements; (iii) shareholder approval requirements; and (iv) quorum requirements for shareholder meetings. A company seeking relief under these provisions should provide written certification from independent local counsel that the non-complying practice is not prohibited by home country law. *In addition, the company must provide English language disclosure of any significant ways in which its corporate governance practices differ from those followed by domestic companies pursuant to the Exchange's standards. This disclosure may be provided either on the company's Web site and/or in its annual report as distributed to shareholders in the U.S. If the disclosure is only available on the Web site, the annual report must so state and provide the web address at which the information may be obtained.*

Since business practices may vary among foreign companies, the following information is presented solely as a guide rather than as a set of inflexible rules:

(a) through (e)—No change.

Policies—[Conflicts of Interest] Related Party Transactions, Independent Directors and Audit Committees, [and] Voting Rights, Quorum Requirements and Limited Partnerships

Sec. 120, [Conflicts of Interest] Certain Relationships and Transactions

Related party transactions must be subject to appropriate review and oversight by the company's Audit Committee or a comparable body of the Board of Directors. [Each company shall conduct an appropriate review of all related party transactions on an ongoing basis and shall utilize the company's Audit Committee or a comparable body of the Board of Directors for the review of potential conflict of interest situations where appropriate.]

Sec. 121, Independent Directors and Audit Committee

A. Independent Directors:

[The Exchange requires that] *Each* [domestic] listed company[ies] must have a sufficient number of independent directors on *its* [the company's] Board of Directors *(a) such that at least a majority of such directors are independent directors (subject to the exceptions set forth in Section 801 and, with respect to small business filers, Section 121B(2)(c)), and (b)* to satisfy the audit committee requirement set forth below. [Independent directors are not officers of the company and are, in the view of the company's board of directors, free of any relationship that would interfere with the exercise of independent judgment.] *''Independent director'' means a person other than an officer or employee of the company or its subsidiaries. No director qualifies as independent unless the Board of Directors affirmatively determines that the director does not have a material relationship with the listed company that would interfere with the exercise of independent judgment. In addition, audit committee members must also comply with the requirements set forth in paragraph B(2) below.* The following *is a non-exclusive list of* persons *who* shall not be considered independent:

(a) A director who is*, or during the past three years was,* employed by the *company or by any parent or subsidiary of the company* [corporation or any of its affiliates for the current year or any of the past three years]; *

(b) A director who accepts *or has an immediate family member who accepts* any [compensation] *payments* from the *company* [corporation] or any [of its affiliates] *parent or subsidiary of the company* in excess of $60,000 during the *current or* previous fiscal year, other than compensation for board service, *payments arising solely from investments in the company's securities, compensation paid to an immediate family member who is an employee of the company or a parent or subsidiary of the company (but not if such person is an executive officer of the company or any parent or subsidiary of the company), or* benefits under a tax-qualified retirement plan, or non-discretionary compensation; *

(c) A director who is a*n* [member of the] immediate family *member* of an individual who is, or has been in any of the past three years, employed by the *company* [corporation] or any [of its affiliates] *parent or subsidiary of the company* as an executive officer[. Immediate family includes a person's spouse, parents, children, siblings, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, and anyone who resides in such person's home]; *

(d) A director who is a partner in, or a controlling shareholder or an executive officer of, any [for-profit business] organization to which the *company* [corporation] made, or from which the *company* [corporation] received, payments (other than those arising solely from investments in the *company's* [corporation's] securities) that exceed 5% of the *recipient's* [corporation's or business organization's] consolidated gross revenues for that year, or $200,000, whichever is more, in any of the [past] most recent three *fiscal* years; *

(e) A director *of the listed company* who is employed as an executive *officer* of another entity where any of the *listed* company's executive[s] *officers* serve on that entity's compensation committee*;*

*(f) A director who is or was a partner or employee of the company's outside auditor, and worked on the company's audit engagement, during the past three fiscal years.**

** During the three years immediately following [insert effective date of rule change] the applicable ''look back'' period shall be the period since [insert effective date of the rule change] for independent directors who are not members of the Audit Committee.*

B. Audit Committee:

([a]*1*) Charter

Each Issuer must certify that it has adopted a formal written audit committee charter and that the Audit

Committee has reviewed and reassessed the adequacy of the formal written charter on an annual basis. The charter must specify [the following]:

([i]*a*) The scope of the audit committee's responsibilities, and how it carries out those responsibilities, including structure, processes, and membership requirements;

([ii]*b*) The audit committee's responsibility for ensuring its receipt from the outside auditors of a formal written statement delineating all relationships between the auditor and the company, consistent with Independence Standards Board Standard 1, and the audit committee's responsibility for actively engaging in a dialogue with the auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the auditor and for taking, or recommending that the full board take, appropriate action to oversee the independence of the outside auditor; and

([iii]*c*) [the outside auditor's ultimate accountability to the board of directors and the audit committee, as representatives of shareholders, and these shareholder representatives' ultimate authority and responsibility to select, evaluate, and, where appropriate, replace the outside auditor (or to nominate the outside auditor to be proposed for shareholder approval in any proxy statement)] *That the audit committee is vested with all responsibilities and authority required by Rule 10A–3 under the Securities Exchange Act of 1934.*

([b]*2*) Composition

([i]*a*) Each issuer must have, and certify that it has and will continue to have, an *A*[a]udit *C*[c]ommittee of at least three members, [comprised solely of independent directors] each of whom [is]*:*

(i) *Satisfies the independence standards specified in Section 121A and Rule 10A–3 under the Securities Exchange Act of 1934; and*

(ii) *Is* able to read and understand fundamental financial statements, including a company's balance sheet, income statement, and cash flow statement [or will become able to do so within a reasonable period of time after his or her appointment to the audit committee]. Additionally, each issuer must certify that it has, and will continue to have, at least one member of the audit committee [that] *who* has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including *but not limited to* being or having been a chief executive officer, chief financial officer, [or] other senior officer with financial oversight responsibilities*, or an active participant on one or more public company audit committees.*

([ii]*b*) Notwithstanding paragraph ([i]*a*), one director who is not independent as defined in Section 121A, *but who satisfies the requirements of Rule 10A–3 under the Securities Exchange Act of 1934 (see sub-paragraph (a)(i)),* and is not a current *officer or* employee or an immediate family member of such *person* [employee], may be appointed to the *A*[a]udit *C*[c]ommittee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the *company*[corporation] and its shareholders, and the board discloses, in the next annual *meeting* proxy statement *(or in its next annual report on SEC Form 10–K or equivalent if the issuer does not file an annual proxy statement)* subsequent to such determination, the nature of the relationship and the reasons for that determination. *A director appointed to the Audit Committee pursuant to this exception may not serve for in excess of two consecutive years and may not chair the Audit Committee.*

([iii]*c*) [Exception for] Small Business Filers—[Paragraphs (b)(i) and (b)(ii) do not apply to] *I*[iI]ssuers that file reports under SEC Regulation S–B[. Such issuers] *are subject to all requirements specified in this Section, except that such issuers are only required to maintain a Board of Directors comprised of at least 50% independent directors,* [must establish] and [maintain] an Audit Committee of at least two [members, a majority of the members of which shall be] *members, comprised solely of* independent directors *who also meet the requirements of Rule 10A–3 under the Securities Exchange Act of 1934.*

See also Section 803.

** * * Commentary*

.01 ''Immediate family member'' includes a person's spouse, parents, children, siblings, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, and anyone who resides in such person's home or is financially dependent upon such person.

.02 ''Parent'' or ''subsidiary'' includes entities that are consolidated with the issuer's financial statements.

.03 ''Officer'' shall have the meaning specified in Rule 16a–1(f) under the Securities Exchange Act of 1934, or any successor rule.

.04 ''Executive Officer'' shall have the meaning specified in Rule 3b-7 under the Securities Exchange Act of 1934, or any successor rule.

.05 Foreign companies are permitted to follow home country practice in lieu of the audit committee requirements specified in this Section and in accordance with the provisions of Section 110, except that such companies must comply with Rule 10A–3 under the Securities Exchange Act of 1934.

Sec. 401, Outline of Exchange Disclosure Policies

The Exchange considers that the conduct of a fair and orderly market requires every listed company to make available to the public information necessary for informed investing and to take reasonable steps to ensure that all who invest in its securities enjoy equal access to such information. In applying this fundamental principle, the Exchange has adopted the following [seven] *eight* specific policies concerning disclosure, each of which is more fully discussed (in a Question and Answer format) in § 402:

(a) through (g)—No change.

(h) Receipt of Audit Opinion with Going Concern Qualification—A company is required to publicly disclose that it has received an audit opinion that contains a going concern qualification. (See Section 610(b).)

Sec. 402, Explanation of Exchange Disclosure Policies

(a) Immediate Public Disclosure of Material Information

Q. What standard should be employed to determine whether disclosure should be made?

A. Immediate disclosure should be made of information about a company's affairs or about events or conditions in the market for its securities when either of the following standards are met:

(i) Where the information is likely to have a significant effect on the price of any of the company's securities; or

(ii) Where such information (including, in certain cases, any necessary interpretation by securities analysts or other experts) is likely to be considered important by a reasonable investor in determining a choice of action.

Q. What kinds of information about a company's affairs should be disclosed?

A. Any material information of a factual nature that bears on the value of a company's securities or on decisions as to whether or not to invest or trade in such securities should be disclosed.

Included is information known to the company concerning:

(i) Its property, business, financial condition and prospects;

(ii) Mergers and acquisitions;

(iii) Dealings with employees, suppliers, customers and others; and

(iv) Information concerning a significant change in ownership of the company's securities by insiders, principal shareholders, or control persons.

In those instances where a company deems it appropriate to disclose internal estimates or projections of its earnings or of other data relating to its affairs, such estimates or projections should be prepared carefully, with a reasonable factual basis, and should be stated realistically, with appropriate qualifications. Moreover, if such estimates or projections subsequently appear to have been mistaken, they should be promptly and publicly corrected.

Q. What kinds of events and conditions in the market for a company's securities may require disclosure?

A. The price of a company's securities (as well as a reasonable investor's decision whether to buy or sell those securities) may be affected as much by factors directly concerning the market for the securities as by factors concerning the company's business. Factors directly concerning the market for a company's securities may include such matters as the acquisition or disposition by a company of a significant amount of its own securities, an event affecting the present or potential dilution of the rights or interests of a company's securities, or events materially affecting the size of the ''public float'' of its securities.

While, as noted above, a company is expected to make appropriate disclosure about significant changes in insider ownership of its securities, the company should not indiscriminately disclose publicly any knowledge it has of the trading activities of outsiders, such as trading by mutual funds or other institutions, for such outsiders normally have a legitimate interest in preserving the confidentiality of their securities transactions.

Q. What are some specific examples of a company's affairs or market conditions typically requiring disclosure?

A. The following events, while not comprising a complete list of all the situations which may require disclosure, are particularly likely to require prompt announcements:[;]

- A joint venture, merger or acquisition;
- The declaration or omission of dividends or the determination of earnings;
- A stock split or stock dividend;
- The acquisition or loss of a significant contract;
- A significant new product or discovery;
- A change in control or a significant change in management;
- A call of securities for redemption;
- The borrowing of a significant amount of funds;
- The public or private sale of a significant amount of additional securities;
- Significant litigation;
- The purchase or sale of a significant asset;
- A significant change in capital investment plans;
- A significant labor dispute or disputes with subcontractors or suppliers;
- An event requiring the filing of a current report under the Securities Exchange Act;
- Establishment of a program to make purchases of the company's own shares;
- A tender offer for another company's securities;
- An event of technical default or default on interest and/or principal payments;[.]
- *Board changes and vacancies; and*
- *Receipt of an audit opinion that contains a going concern qualification (see also Section 610(b)).*

Q. When may a company properly withhold material information?

A. Occasionally, circumstances such as those discussed below may arise in which—provided that complete confidentiality is maintained—a company may temporarily refrain from publicly disclosing material information. These situations, however, are limited and constitute an infrequent exception to the normal requirement of immediate public disclosure. Thus, in cases of doubt, the presumption must always be in favor of disclosure.

(i) When immediate disclosure would prejudice the ability of the company to pursue its corporate objectives.

Although public disclosure is generally necessary to protect the interests of investors, circumstances may occasionally arise where disclosure would prejudice a company's ability to achieve a valid corporate objective. Public disclosure of a plan to acquire certain real estate, for example, could result in an increase in the company's cost of the desired acquisition or could prevent the company from carrying out the plan at all. In such circumstances, if the unfavorable result to the company outweighs the undesirable consequences of non-disclosure, an announcement may properly be deferred to a more appropriate time.

(ii) When the facts are in a state of flux and a more appropriate moment for disclosure is imminent.

Occasionally, corporate developments give rise to information which, although material, is subject to rapid change. If the situation is about to stabilize or resolve itself in the near future, it may be proper to withhold public disclosure until a firm announcement can be made, since successive public statements concerning the same subject (but based on changing facts) may confuse or mislead the public rather than enlighten it.

For example, in the course of a successful negotiation for the acquisition of another company, the only information known to each party at the outset may be the willingness of the other to hold discussions. Shortly thereafter, it may become apparent to the parties that it is likely an agreement can be reached. Finally, agreement in principle may be reached on specific terms. In such circumstances (and assuming the maintenance of strict confidentiality), a company need not issue a public announcement at each stage of the negotiations, describing the current state of constantly changing facts, but may await agreement in principle on specific terms. If, on the other hand, progress in the negotiations should stabilize at some other point, disclosure should then be made if the information is material.

Whenever material information is being temporarily withheld, the strictest confidentiality must be maintained, and the company should be prepared to make an immediate public announcement, if necessary. During this period, the market action of the company's securities should be closely watched, since unusual market activity frequently signifies that a ''leak'' may have occurred. This is one reason why it is important to keep the company's Listing Qualifications Analyst fully apprised of material corporate developments.

Note: Federal securities laws may restrict the extent of permissible disclosure before or during a public offering of securities or a solicitation of proxies. In such circumstances (as more fully discussed below), a company should discuss the disclosure of material information in advance with the Exchange and the Securities and Exchange Commission. It is the Exchange's experience that the requirements of both the securities laws and regulations and the Exchange's disclosure policy can be met even in those instances where their thrust appears to be different.

Q. What action is required if rumors occur while material information is being temporarily withheld?

A. If rumors concerning such information should develop, immediate public disclosure becomes necessary. (See also ''Clarification or Confirmation of Rumors and Reports'', Section 402(c).)

Q. What action is required if insider trading occurs while material information is being temporarily withheld?

A. Immediate public disclosure of the information in question must be effected if the company should learn that insider trading, as defined in § 402(f) has taken or is taking place. In unusual cases, where the trading is insignificant and does not have any influence on the market, and where measures sufficient to halt insider trading and prevent its recurrence are taken, exemptions might be made following discussions with the Exchange. The company's Listing Qualifications Analyst, through the facilities of the Exchange's Stock Watch Department, can provide current information regarding market activity in the company's securities and help assess the significance of such trading.

Q. How can confidentiality best be maintained?

A. Information that is to be kept confidential should be confined, to the extent possible, to the highest possible echelons of management and should be disclosed to officers, employees and others on a ''need to know'' basis only. Distribution of paperwork and other data should be held to a minimum. When the information must be disclosed more broadly to company personnel or others, their attention should be drawn to its confidential nature and to the restrictions that apply to its use, including the prohibition on insider trading. It may be appropriate to require each person who gains access to the information to report any transaction which he effects in the company's securities to the company. If counsel, accountants, financial or public relations advisers or other outsiders are consulted, steps should be taken to ensure that they maintain similar precautions within their respective organizations to maintain confidentiality.

In general, it is recommended that a listed company remind its employees on a regular basis of its policies on confidentiality.

(b)—No change.

Sec. 610, Publication of Annual Report

(a) A listed company is required to publish and furnish to its shareholders (or to holders of any other listed security when its common stock is not listed on a national securities exchange) an annual report containing audited financial statements prepared in conformity with the requirements of the Securities and Exchange Commission. The company must disclose in its annual report to security holders, for the year covered by the report: (a) The number of unoptioned shares available at the beginning and at the close of the year for the granting of options under an option plan; and (b) any changes in the exercise price of outstanding options, through cancellation and reissuance or otherwise, except price changes resulting from the normal operation of anti-dilution provisions of the options. Three copies of the report must be filed with the Exchange.

(b) A listed company that receives an audit opinion that contains a going concern qualification must make a public announcement through the news media disclosing the receipt of such qualified opinion. Prior to the release of the public announcement, the listed company must provide such announcement to the Amex's StockWatch and Listing Qualifications Departments. The public announcement shall be made as promptly as possible, but not more than seven calendar days following the filing of such audit opinion in a public filing with the Securities and Exchange Commission.*

* Notification should be provided to the Amex's StockWatch Department at (212) 306–8383 (telephone), (212) 306–1488 (facsimile), and to the Listing Qualifications Department at (212) 306–1331 (telephone), (212)–306–5325 (facsimile).

Part 8. Corporate Governance Requirements

Sec. 801, General

In addition to the quantitative listing standards set forth in Part 1, this Part 8 specifies certain corporate governance listing standards. These standards apply to all listed companies, subject to the following exceptions, to the extent not inconsistent with Rule 10A–3 under the Securities Exchange Act of 1934:

(a) *Controlled Companies—A company in which over 50% of the voting power is held by an individual, a group or another company (a ''controlled company'') is not required to comply with Sections 802(a), 804 or 805. A controlled company that chooses to take advantage of any or all of these exceptions must disclose in its annual meeting proxy statement (or in its next annual report on SEC Form 10–K or equivalent if the issuer does not file an annual proxy statement) that it is a controlled company and the basis for that determination.*

(b) *Limited Partnerships and Companies in Bankruptcy—Limited partnerships and companies in bankruptcy are not required to comply with Sections 802(a), 804 or 805.**

(c) *Other entities—Part 8 is not applicable to passive business organizations (such as royalty trusts) or to derivatives and special purpose securities listed pursuant to Amex Rules 1000, 1000A and 1200 and Sections 106, 107 and 118B. However, issuers of such securities are required to comply with Sections 121 and 803 to the extent required by Rule 10A–3 under the Securities Exchange Act of 1934.*[4]

(d) *Closed-End Management Companies—Such issuers are subject to extensive federal regulation and are therefore only required to comply with the audit committee requirements specified in Section 121 and 803 to the extent required by Rule 10A–3 under the Securities Exchange Act of 1934.*

(e) *Foreign Issuers—See Section 110.*

(f) *Preferred and debt listings—Companies listing only preferred or debt securities on the Exchange are only required to comply with Sections 121 and 803 to the extent required by Rule 10A–3 under the Securities Exchange Act of 1934.*

** If a limited partnership is managed by a general partner rather than a board of directors, the audit committee requirements applicable to the listed entity should be satisfied by the general partner.*

Sec. 802, Board of Directors

(a) At least a majority of the directors on the Board of Directors of each listed company must be independent directors as defined in Section 121A, except for (i) a controlled company (see Section 801), and (ii) a Small Business filer (see Section 121B(2)(c)).

(b) Each company shall hold meetings of its Board of Directors on at least a quarterly basis. The independent directors shall meet on a regular basis as often as necessary to fulfill their responsibilities, including at least annually in executive session without the presence of non-independent directors and management.

*(c) The Board of Directors of each listed company may not be divided into more than three classes. Where the company's charter provides for classes, they should be of approximately equal size and tenure and directors' terms of office should not exceed three years.**

(d) A listed company is not permitted to appoint or permit an Exchange

[4] *See* Amendment No. 1, *supra* note 3.

employee or Floor Member to serve on its Board of Directors.

(e) Listed companies are urged to develop and implement continuing education programs for all directors, including orientation and training programs for new directors (see also Commentary .01 to Section 807)

** Paragraph (c) is not intended to restrict the number of terms of office that a director may serve, whether consecutive or otherwise.*

Sec. 803, Independent Directors and Audit Committee

(a) *No security is eligible for listing unless the issuer is in compliance with the audit committee requirements of Rule 10A–3 under the Securities Exchange Act of 1934, subject to an opportunity to cure any defects thereof in accordance with the procedures set forth in Section 1009 and Part 12. If a member of the issuer's audit committee ceases to be independent in accordance with the requirements of Rule 10A–3 under the Securities Exchange Act of 1934 (and the corresponding provisions of Section 121B(2)(a)(i)) for reasons outside the member's reasonable control, that person, with notice to the Exchange, may remain an audit committee member of the issuer until the earlier of the next annual shareholders meeting of the issuer or one year from the occurrence of the event that caused the member to be no longer independent. The text of Rule 10A–3 under the Securities Exchange Act of 1934 is reproduced in Commentary .01.*

(b) *A listed issuer must notify the Exchange promptly after an executive officer of the issuer becomes aware of any material noncompliance by the listed issuer with the requirements of paragraph (a).*

(c) *Any notification required pursuant to paragraphs (a) or (b) should be provided to the Exchange's Listing Qualifications Department at (212) 306–1331 (telephone), (212)-306–5325 (facsimile).*

(d) *The requirements of paragraphs (a) and (b) are operative as of*

(i) *July 31, 2005 for foreign private issuers and small business issuers (as defined in Rule 12b–2 under the Securities Exchange Act of 1934); or*

(ii) *For all other listed issuers, the earlier of the listed issuer's first annual shareholders meeting after January 15, 2004 or October 31, 2004.*

See also Section 121.

*Commentary * * **

.01 For the convenience of listed companies, the text of Rule 10A–3 under the Securities Exchange Act of 1934 is reproduced below (as adopted April 25, 2003). Rule 10A–3—Listing standards relating to audit committees.

(a) Pursuant to section 10A(m) of the Act (15 U.S.C. 78j–1(m)) and section 3 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7202):

(1) National securities exchanges. The rules of each national securities exchange registered pursuant to section 6 of the Act (15 U.S.C. 78f) must, in accordance with the provisions of this section, prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of this section.

(2) National securities associations. The rules of each national securities association registered pursuant to section 15A of the Act (15 U.S.C. 78o–3) must, in accordance with the provisions of this section, prohibit the initial or continued listing in an automated inter-dealer quotation system of any security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of this section.

(3) Opportunity to cure defects. The rules required by paragraphs (a)(1) and (a)(2) of this section must provide for appropriate procedures for a listed issuer to have an opportunity to cure any defects that would be the basis for a prohibition under paragraph (a) of this section, before the imposition of such prohibition. Such rules also may provide that if a member of an audit committee ceases to be independent in accordance with the requirements of this section for reasons outside the member's reasonable control, that person, with notice by the issuer to the applicable national securities exchange or national securities association, may remain an audit committee member of the listed issuer until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

(4) Notification of noncompliance. The rules required by paragraphs (a)(1) and (a)(2) of this section must include a requirement that a listed issuer must notify the applicable national securities exchange or national securities association promptly after an executive officer of the listed issuer becomes aware of any material noncompliance by the listed issuer with the requirements of this section.

(5) Implementation.

(i) The rules of each national securities exchange or national securities association meeting the requirements of this section must be operative, and listed issuers must be in compliance with those rules, by the following dates:

(A) July 31, 2005 for foreign private issuers and small business issuers (as defined in § 240.12b–2); and

(B) For all other listed issuers, the earlier of the listed issuer's first annual shareholders meeting after January 15, 2004, or October 31, 2004.

(ii) Each national securities exchange and national securities association must provide to the Commission, no later than July 15, 2003, proposed rules or rule amendments that comply with this section.

(iii) Each national securities exchange and national securities association must have final rules or rule amendments that comply with this section approved by the Commission no later than December 1, 2003.

(b) Required standards.

(1) Independence.

(i) Each member of the audit committee must be a member of the board of directors of the listed issuer, and must otherwise be independent; provided that, where a listed issuer is one of two dual holding companies, those companies may designate one audit committee for both companies so long as each member of the audit committee is a member of the board of directors of at least one of such dual holding companies.

(ii) Independence requirements for non-investment company issuers. In order to be considered to be independent for purposes of this paragraph (b)(1), a member of an audit committee of a listed issuer that is not an investment company may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee:

(A) Accept directly or indirectly any consulting, advisory, or other compensatory fee from the issuer or any subsidiary thereof, provided that, unless the rules of the national securities exchange or national securities association provide otherwise, compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the listed issuer (provided that such compensation is not contingent in any way on continued service); or

(B) Be an affiliated person of the issuer or any subsidiary thereof.

(iii) Independence requirements for investment company issuers. In order to be considered to be independent for purposes of this paragraph (b)(1), a member of an audit committee of a listed issuer that is an investment company may not, other than in his or

her capacity as a member of the audit committee, the board of directors, or any other board committee:

(A) Accept directly or indirectly any consulting, advisory, or other compensatory fee from the issuer or any subsidiary thereof, provided that, unless the rules of the national securities exchange or national securities association provide otherwise, compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the listed issuer (provided that such compensation is not contingent in any way on continued service); or

(B) Be an ''interested person'' of the issuer as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)).

(iv) Exemptions from the independence requirements.

(A) For an issuer listing securities pursuant to a registration statement under section 12 of the Act (15 U.S.C. 78l), or for an issuer that has a registration statement under the Securities Act of 1933 (15 U.S.C. 77a et seq.) covering an initial public offering of securities to be listed by the issuer, where in each case the listed issuer was not, immediately prior to the effective date of such registration statement, required to file reports with the Commission pursuant to section 13(a) or 15(d) of the Act (15 U.S.C. 78m(a) or 78o(d)):

(1) All but one of the members of the listed issuer's audit committee may be exempt from the independence requirements of paragraph (b)(1)(ii) of this section for 90 days from the date of effectiveness of such registration statement; and

(2) A minority of the members of the listed issuer's audit committee may be exempt from the independence requirements of paragraph (b)(1)(ii) of this section for one year from the date of effectiveness of such registration statement.

(B) An audit committee member that sits on the board of directors of a listed issuer and an affiliate of the listed issuer is exempt from the requirements of paragraph (b)(1)(ii)(B) of this section if the member, except for being a director on each such board of directors, otherwise meets the independence requirements of paragraph (b)(1)(ii) of this section for each such entity, including the receipt of only ordinary-course compensation for serving as a member of the board of directors, audit committee or any other board committee of each such entity.

(C) An employee of a foreign private issuer who is not an executive officer of the foreign private issuer is exempt from the requirements of paragraph (b)(1)(ii) of this section if the employee is elected or named to the board of directors or audit committee of the foreign private issuer pursuant to the issuer's governing law or documents, an employee collective bargaining or similar agreement or other home country legal or listing requirements.

(D) An audit committee member of a foreign private issuer may be exempt from the requirements of paragraph (b)(1)(ii)(B) of this section if that member meets the following requirements:

(1) The member is an affiliate of the foreign private issuer or a representative of such an affiliate;

(2) The member has only observer status on, and is not a voting member or the chair of, the audit committee; and

(3) Neither the member nor the affiliate is an executive officer of the foreign private issuer.

(E) An audit committee member of a foreign private issuer may be exempt from the requirements of paragraph (b)(1)(ii)(B) of this section if that member meets the following requirements:

(1) The member is a representative or designee of a foreign government or foreign governmental entity that is an affiliate of the foreign private issuer; and

(2) The member is not an executive officer of the foreign private issuer.

(F) In addition to paragraphs (b)(1)(iv)(A) through (E) of this section, the Commission may exempt from the requirements of paragraphs (b)(1)(ii) or (b)(1)(iii) of this section a particular relationship with respect to audit committee members, as the Commission determines appropriate in light of the circumstances.

(2) Responsibilities relating to registered public accounting firms. The audit committee of each listed issuer, in its capacity as a committee of the board of directors, must be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed issuer, and each such registered public accounting firm must report directly to the audit committee.

(3) Complaints. Each audit committee must establish procedures for:

(i) The receipt, retention, and treatment of complaints received by the listed issuer regarding accounting, internal accounting controls, or auditing matters; and

(ii) The confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters.

(4) Authority to engage advisers. Each audit committee must have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(5) Funding. Each listed issuer must provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of:

(i) Compensation to any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed issuer;

(ii) Compensation to any advisers employed by the audit committee under paragraph (b)(4) of this section; and

(iii) Ordinary administrative expenses of the audit committee that are necessary or appropriate in carrying out its duties.

(c) General exemptions.

(1) At any time when an issuer has a class of securities that is listed on a national securities exchange or national securities association subject to the requirements of this section, the listing of other classes of securities of the listed issuer on a national securities exchange or national securities association is not subject to the requirements of this section.

(2) At any time when an issuer has a class of common equity securities (or similar securities) that is listed on a national securities exchange or national securities association subject to the requirements of this section, the listing of classes of securities of a direct or indirect consolidated subsidiary or an at least 50% beneficially owned subsidiary of the issuer (except classes of equity securities, other than non-convertible, non-participating preferred securities, of such subsidiary) is not subject to the requirements of this section.

(3) The listing of securities of a foreign private issuer is not subject to the requirements of paragraphs (b)(1) through (b)(5) of this section if the foreign private issuer meets the following requirements:

(i) The foreign private issuer has a board of auditors (or similar body), or has statutory auditors, established and selected pursuant to home country legal or listing provisions expressly requiring

or permitting such a board or similar body;

(ii) The board or body, or statutory auditors is required under home country legal or listing requirements to be either:

(A) Separate from the board of directors; or

(B) Composed of one or more members of the board of directors and one or more members that are not also members of the board of directors;

(iii) The board or body, or statutory auditors, are not elected by management of such issuer and no executive officer of the foreign private issuer is a member of such board or body, or statutory auditors;

(iv) Home country legal or listing provisions set forth or provide for standards for the independence of such board or body, or statutory auditors, from the foreign private issuer or the management of such issuer;

(v) Such board or body, or statutory auditors, in accordance with any applicable home country legal or listing requirements or the issuer's governing documents, are responsible, to the extent permitted by law, for the appointment, retention and oversight of the work of any registered public accounting firm engaged (including, to the extent permitted by law, the resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer; and

(vi) The audit committee requirements of paragraphs (b)(3), (b)(4) and (b)(5) of this section apply to such board or body, or statutory auditors, to the extent permitted by law.

(4) The listing of a security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q–1) or that is exempt from the registration requirements of section 17A pursuant to paragraph (b)(7)(A) of such section is not subject to the requirements of this section.

(5) The listing of a standardized option, as defined in § 240.9b–1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q–1) is not subject to the requirements of this section.

(6) The listing of securities of the following listed issuers are not subject to the requirements of this section:

(i) Asset-Backed Issuers (as defined in § 240.13a–14(g) and § 240.15d–14(g));

(ii) Unit investment trusts (as defined in 15 U.S.C. 80a–4(2)); and

(iii) Foreign governments (as defined in § 240.3b-4(a)).

(7) The listing of securities of a listed issuer is not subject to the requirements of this section if:

(i) The listed issuer, as reflected in the applicable listing application, is organized as a trust or other unincorporated association that does not have a board of directors or persons acting in a similar capacity; and

(ii) The activities of the listed issuer that is described in paragraph (c)(7)(i) of this section are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

(d) Disclosure. Any listed issuer availing itself of an exemption from the independence standards contained in paragraph (b)(1)(iv) of this section (except paragraph (b)(1)(iv)(B) of this section), the general exemption contained in paragraph (c)(3) of this section or the last sentence of paragraph (a)(3) of this section, must:

(1) Disclose its reliance on the exemption and its assessment of whether, and if so, how, such reliance would materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of this section in any proxy or information statement for a meeting of shareholders at which directors are elected that is filed with the Commission pursuant to the requirements of section 14 of the Act (15 U.S.C. 78n); and

(2) Disclose the information specified in paragraph (d)(1) of this section in, or incorporate such information by reference from such proxy or information statement filed with the Commission into, its annual report filed with the Commission pursuant to the requirements of section 13(a) or 15(d) of the Act (15 U.S.C. 78m(a) or 78o(d)).

(e) Definitions. Unless the context otherwise requires, all terms used in this section have the same meaning as in the Act. In addition, unless the context otherwise requires, the following definitions apply for purposes of this section:

(1)(i) The term affiliate of, or a person affiliated with, a specified person, means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(ii)(A) A person will be deemed not to be in control of a specified person for purposes of this section if the person:

(1) Is not the beneficial owner, directly or indirectly, of more than 10% of any class of voting equity securities of the specified person; and

(2) Is not an executive officer of the specified person.

(B) Paragraph (e)(1)(ii)(A) of this section only creates a safe harbor position that a person does not control a specified person. The existence of the safe harbor does not create a presumption in any way that a person exceeding the ownership requirement in paragraph (e)(1)(ii)(A)(1) of this section controls or is otherwise an affiliate of a specified person.

(iii) The following will be deemed to be affiliates:

(A) An executive officer of an affiliate;

(B) A director who also is an employee of an affiliate;

(C) A general partner of an affiliate; and

(D) A managing member of an affiliate.

(iv) For purposes of paragraph (e)(1)(i) of this section, dual holding companies will not be deemed to be affiliates of or persons affiliated with each other by virtue of their dual holding company arrangements with each other, including where directors of one dual holding company are also directors of the other dual holding company, or where directors of one or both dual holding companies are also directors of the businesses jointly controlled, directly or indirectly, by the dual holding companies (and, in each case, receive only ordinary-course compensation for serving as a member of the board of directors, audit committee or any other board committee of the dual holding companies or any entity that is jointly controlled, directly or indirectly, by the dual holding companies).

(2) In the case of foreign private issuers with a two-tier board system, the term board of directors means the supervisory or non-management board.

(3) In the case of a listed issuer that is a limited partnership or limited liability company where such entity does not have a board of directors or equivalent body, the term board of directors means the board of directors of the managing general partner, managing member or equivalent body.

(4) The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(5) The term dual holding companies means two foreign private issuers that:

(i) Are organized in different national jurisdictions;

(ii) Collectively own and supervise the management of one or more businesses which are conducted as a single economic enterprise; and

(iii) Do not conduct any business other than collectively owning and supervising such businesses and activities reasonably incidental thereto.

(6) The term executive officer has the meaning set forth in § 240.3b–7.

(7) The term foreign private issuer has the meaning set forth in § 240.3b–4(c).

(8) The term indirect acceptance by a member of an audit committee of any consulting, advisory or other compensatory fee includes acceptance of such a fee by a spouse, a minor child or stepchild or a child or stepchild sharing a home with the member or by an entity in which such member is a partner, member, an officer such as a managing director occupying a comparable position or executive officer, or occupies a similar position (except limited partners, non-managing members and those occupying similar positions who, in each case, have no active role in providing services to the entity) and which provides accounting, consulting, legal, investment banking or financial advisory services to the issuer or any subsidiary of the issuer.

(9) The terms listed and listing refer to securities listed on a national securities exchange or listed in an automated inter-dealer quotation system of a national securities association or to issuers of such securities.

Instructions to § 240.10A–3.

1. The requirements in paragraphs (b)(2) through (b)(5), (c)(3)(v) and (c)(3)(vi) of this section do not conflict with, and do not affect the application of, any requirement or ability under a listed issuer's governing law or documents or other home country legal or listing provisions that requires or permits shareholders to ultimately vote on, approve or ratify such requirements. The requirements instead relate to the assignment of responsibility as between the audit committee and management. In such an instance, however, if the listed issuer provides a recommendation or nomination regarding such responsibilities to shareholders, the audit committee of the listed issuer, or body performing similar functions, must be responsible for making the recommendation or nomination.

2. The requirements in paragraphs (b)(2) through (b)(5), (c)(3)(v), (c)(3)(vi) and Instruction 1 of this section do not conflict with any legal or listing requirement in a listed issuer's home jurisdiction that prohibits the full board of directors from delegating such responsibilities to the listed issuer's audit committee or limits the degree of such delegation. In that case, the audit committee, or body performing similar functions, must be granted such responsibilities, which can include advisory powers, with respect to such matters to the extent permitted by law, including submitting nominations or recommendations to the full board.

3. The requirements in paragraphs (b)(2) through (b)(5), (c)(3)(v) and (c)(3)(vi) of this section do not conflict with any legal or listing requirement in a listed issuer's home jurisdiction that vests such responsibilities with a government entity or tribunal. In that case, the audit committee, or body performing similar functions, must be granted such responsibilities, which can include advisory powers, with respect to such matters to the extent permitted by law.

4. For purposes of this section, the determination of a person's beneficial ownership must be made in accordance with § 240.13d–3.

Sec. 804, Board Nominations

(a) Each listed company (except for a controlled company as defined in Commentary .01 to Section 121) must obtain approval of Board of Director nominations either by a Nominating Committee comprised solely of independent directors or by a majority of the independent directors.

(b) Notwithstanding paragraph (a) above, if the Nominating Committee is comprised of at least three members, one director who is not independent as defined in section 121A, and is not a current officer or employee or an immediate family member of such person, may be appointed to the Nominating Committee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement (or in its next annual report on SEC Form 10–K or equivalent if the issuer does not file an annual proxy statement) subsequent to such determination, the nature of the relationship and the reasons for that determination. A director appointed to the Nominating Committee pursuant to this exception may not serve for in excess of two years.

(c) Notwithstanding paragraph (a) above, if the Nominating Committee is comprised of at least three members, and if the exception described in paragraph (b) above is not relied upon, one director who owns 20% or more of the company's common stock or voting power outstanding, and is not independent as defined in section 121A because that director is also an officer, may be appointed to the Nominating Committee if the board determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the next proxy statement subsequent to such determination (or in its next annual report on SEC Form 10–K or equivalent if the issuer does not file an annual proxy statement), the nature of the relationship and the reasons for the determination.

** * * Commentary*

.01 If a company is legally required by contract or otherwise to provide third parties with the ability to nominate and/or appoint directors (e.g., preferred stock rights to elect directors upon dividend default, shareholder agreements, management agreements), the selection and nomination of such directors is not subject to approval by the Nominating Committee or a majority of independent directors.

Sec. 805, Executive Compensation

(a) Each listed company (except for a controlled company as defined in Commentary .01 to section 121) must obtain approval of its Chief Executive Officer's compensation either by a Compensation Committee composed of independent directors or by a majority of the independent directors on its Board of Directors. The Chief Executive Officer, in consultation with such Compensation Committee, or a majority of the independent directors on the company's Board of Directors, as applicable, shall recommend to the Board of Directors for its approval compensation for other officers (see Commentary .04 to section 121).

(b) Notwithstanding paragraph (a) above, if the Compensation Committee is comprised of at least three members, one director who is not independent as defined in section 121A, and is not a current officer or employee or an immediate family member of such person, may be appointed to the Compensation Committee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement (or in its next annual report on SEC Form 10–K or equivalent if the issuer does not file an annual proxy statement) subsequent to such

determination, the nature of the relationship and the reasons for that determination. A director appointed to the Compensation Committee pursuant to this exception may not serve for in excess of two years.

** * * Commentary*

.01 The requirement to obtain approval of either the Compensation Committee or a majority of the independent directors does not preclude a company from seeking board ratification or approval as may be required to comply with applicable tax or State corporate laws.

Sec. 806, Stock Option Plans

See Section 711.

Sec. 807, Code of Conduct and Ethics

Each company shall adopt a Code of Conduct and Ethics, applicable to all directors, officers, and employees, which also complies with the definition of a ''code of ethics'' as set forth in item 406 of SEC Regulation S–K (or item 406 of SEC Regulation S–B with respect to a company which files reports under SEC Regulation S–B).

** * * Commentary*

.01 While each company should determine the appropriate standards and guidelines for inclusion in its Code, all Codes must promote honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; full, fair, accurate, timely, and understandable disclosure in periodic reports and documents required to be filed by the company; compliance with applicable Exchange and governmental rules and regulations; prompt internal reporting of violations of the Code to an appropriate person or persons identified in the Code; and accountability for adherence to the Code.

Sec. 808, Foreign Companies

See Section 110.

Sec. 1009, Continued Listing Evaluation and Follow-Up

(a) The following procedures shall be applied by the Exchange staff to companies identified as being below the Exchange's continued listing policies and standards. Notwithstanding such procedures, when [the Exchange staff deems it] necessary *or appropriate:*

(i) The Exchange staff may issue a Warning Letter to a company with respect to a minor violation of the Exchange's corporate governance or shareholder protection requirements (other than violations of the requirements pursuant to Rule 10A–3 under the Securities Exchange Act of 1934); or

(ii) For the protection of investors, *the Exchange may immediately suspend trading in any security, and make application to the SEC to delist the security* [trading in any security can be suspended immediately, and application made to the SEC to delist the security].

(b) through (i)—No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex 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 is proposing to adopt comprehensive enhancements to the corporate governance requirements applicable to listed companies in order to promote accountability, transparency and integrity by such companies. The proposal encompasses significant changes to the following: board of director composition and independence standards, audit committee composition and authority, compensation and nominating committees, and ethics and disclosure obligations.[5]

Increased Board Independence

Most listed companies would be required to have a board of directors comprised of a majority of independent directors. In addition, the definition of ''independent'' would be tightened. Each listed company's board of directors would be required to affirmatively determine that an independent director has no material relationship with the company that would interfere with the exercise of independent judgment. However, certain specified relationships would preclude a board finding of independence. The current rules already specify certain of these relationships and the proposed changes would expand and clarify the types of relationships included in this category. Finally, independent directors serving on the audit committee would be subject to heightened requirements mandated by SEC Rule 10A–3, as described later.

Pursuant to the proposed rule change, the following individuals would not qualify as independent directors:

- Current officers and employees of the company or its subsidiaries.
- An individual who is or was employed by the company or any parent or subsidiary of the company during the past three years.
- An individual who accepts (or whose immediate family member[6] accepts) any payment from the company (or any parent or subsidiary of the company) in excess of $60,000 during the current or previous fiscal year. Compensation for board service, payments arising solely from investments in the company's securities, compensation paid to an immediate family member who is a non-executive officer employee of the company (or any parent or subsidiary of the company), or benefits under a tax-qualified retirement plan or non-discretionary compensation will not be included in the $60,000.
- An individual who is a partner, controlling shareholder or executive officer of any organization to which or from which the company made or received payments that exceed five percent of the recipient's consolidated gross revenues or $200,000 (whichever is more) in any of the most recent three fiscal years.
- An individual who is an immediate family member of an individual who is or has been employed by the company (or any parent or subsidiary of the company) as an executive officer during any of the past three years.
- An individual who is an executive officer of another entity where any of the listed company's executive officers serve on the compensation committee.
- An individual who is or was a partner or employee of the company's outside auditor, and worked on the audit engagement, during any of the past three fiscal years.

In view of the significant difficulties which many listed companies may face

[5] The Commission notes that the Amex has committed to consider appropriate revisions to its proposed rule change to achieve consistency with corporate governance listing standards approved by the Commission for other SROs. Telephone conference between Claudia Corwley, Vice President, Listing Qualitifcation, Amex, and Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commision, on October 27, 2003.

[6] The definition of ''immediate family member'' would be expanded to include anyone who resides in the director's home or is financially dependent upon the director, as well as the currently specified family relationships.

in recruiting enough independent directors to maintain a board with a majority of independent directors, the three year ''look back'' periods contained in certain of the independence requirements would be applied prospectively for independent directors who are not members of the audit committee. Thus for the first three years after the requirement becomes effective, the applicable ''look back'' period would be to the date the requirement to have a board comprised of a majority of independent directors becomes effective.

Listed companies would also be required to hold board meetings on at least a quarterly basis, and the independent directors serving on the board would be required to meet in executive session (*i.e.,* without the presence of non-independent directors) as often as necessary but at least once a year.

Audit Committees

The Exchange is proposing to adopt the rule changes mandated by Commission Rule 10A–3 under the Act to prohibit the listing of any security of an issuer that is not in compliance with the specified minimum audit committee standards with respect to independence and responsibilities. These standards would be incorporated into Sections 121 and 803 of the Amex *Company Guide.* In accordance with SEC Rule 10A–3, a listed company would be required to notify the Exchange promptly after an executive officer of the company becomes aware of any material noncompliance by the company, and any company not in compliance with the specified requirements would be afforded an opportunity to cure any defects thereof in accordance with the procedures set forth in Section 1009 and Part 12 of the Amex *Company Guide.* In addition, if a member of a listed company's audit committee ceases to meet the heightened audit committee independence requirements for reasons outside the member's reasonable control, with notice to the Exchange, that person would be permitted to remain an audit committee member until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the member to be no longer independent.

Listed companies (other than small business filers as discussed below) would continue to be required to maintain an audit committee of at least three independent directors. However, each director would now be required to satisfy both the general Amex independence standards as well as the heightened standards applicable to audit committee members as mandated by SEC Rule 10A–3. In addition, the Exchange would continue to require that each member of the audit committee be financially literate and that one member be financially sophisticated. While a listed company would continue to be able to appoint one non-employee director to the audit committee who does not meet the general Amex independence definition, pursuant to the ''exceptional and limited circumstances'' exception,[7] the proposed changes would permit the director in question to serve on the audit committee for only two years, and this director would not be permitted to not chair the audit committee. Anyone appointed pursuant to this exception would, of course, need to be qualified to serve on the committee under the heightened audit committee independence standards. Additionally, the audit committee responsibilities and charter requirements would be expanded to specify that the audit committees must be vested with all responsibilities and authority required by SEC Rule 10A–3.

Finally, audit committees would be required to hold meetings on at least a quarterly basis.

Compensation and Nominating Committees

The proposed rule changes would also increase the role of independent directors in the nomination and compensation decision-making process. For most listed companies, board nominations and chief executive officer compensation would have to be approved by a committee composed entirely of independent directors or by a majority of the independent directors on the company's board. One non-independent director would be permitted to be appointed to the compensation committee and/or the nominating committee pursuant to the ''exceptional and limited circumstances exception'' noted above. In addition, a director who is not independent as a result of being an officer of the company but who owns 20% or more of the company's stock could be appointed to the nominating committee in lieu of utilizing the ''exceptional and limited circumstances'' exception.

Ethics and Disclosure

The proposed changes would impose increased ethics and disclosure requirements in a number of respects. First, all Amex employees and Floor members would be prohibited from serving on the board of directors of any listed company. The Exchange believes that this prohibition is imperative in order to avoid even the appearance of a conflict of interest that could potentially interfere with its regulatory role and responsibilities. Second, all Amex listed companies would be required to adopt a code of ethics that meets the definition of a ''code of ethics'' under the Sarbanes-Oxley Act of 2002.[8] Third, listed companies would be required to issue a press release disclosing receipt of an audit opinion that contains a going concern qualification from the company's outside auditor, as well as any board changes and vacancies. And fourth, as discussed below, foreign issuers that elect to comply with certain home country corporate governance practices in lieu of Amex requirements would be required to provide disclosure thereof.

Applicability

The new corporate governance listing standards would apply to all listed companies with the exception of passive business organizations (such as royalty trusts) and derivatives and special purpose securities listed pursuant to Amex Rules 1000, 1000A and 1200 and Sections 106, 107 and 118B of the Amex *Company Guide.* Because of the nature and structure of such issuers, the Exchange does not believe that it is necessary or appropriate to apply the enhanced corporate governance requirements to them. However, issuers of some securities would be required to comply with Commission Rule 10A–3 to the extent required of them. In addition, the following types of issuers would be subject to limited exceptions as follows:

• Controlled Companies: A company in which over 50% of the voting power is held by an individual, a group or another company would not be required to comply with the requirement to have a board of directors comprised of a majority of independent directors, or with the compensation and nominating committee requirements. However, a controlled company that chooses to take advantage of any or all of these exceptions would be required to disclose in its annual meeting proxy that it is a controlled company and the basis for that determination. Controlled companies would, however, be subject to all other corporate governance requirements including those pertaining to audit committees.

• Limited Partnerships and Companies in Bankruptcy: Limited

[7] *See* Section 121B(2)(b) of the Amex *Company Guide.*

[8] See Item 406 of Regulation S–K and Item 406 of Regulation S–B.

partnerships and companies in bankruptcy would not be required to comply with the requirement to have a board of directors comprised of a majority of independent directors, or with the compensation and nominating committee requirements.

• Closed-End Management Companies: These issuers would be required to comply with the Exchange's audit committee requirements only to the extent required by SEC Rule 10A–3. Because closed-end management companies are subject to pervasive federal regulation relating, to among other things, their management structure and governance, the Exchange does not believe it is necessary or appropriate to apply the remaining corporate governance requirements to such issuers.

• Foreign Issuers: Foreign listed companies would be permitted to comply with home country practices as set forth in Section 110 of the Amex *Company Guide,* to the extent that such practices are not contrary to the federal securities laws. However, a foreign issuer would be required to provide English language disclosure of any significant ways in which its corporate governance practices differ from those followed by domestic companies pursuant to the Exchange's standards.

• Preferred and Debt Listings: Companies listing only preferred or debt securities on the Exchange would have to comply only with the Exchange's audit committee requirements to the extent required by SEC Rule 10A–3.

• Small Business Filers: The requirements applicable to small business filers would be enhanced. Under the proposed changes, such companies would be subject to the new corporate governance requirements, except that they would only be required to have a board of directors comprised of at least 50% independent directors and an audit committee of at least two independent directors. Such issuers would, of course, be required to comply with SEC Rule 10A–3.

The proposed changes would also authorize the Exchange staff to issue a public warning letter to a listed company for a minor violation of the Exchange's corporate governance and shareholder protection requirements. Amex rules do not currently provide for any sanction other than delisting for a company that has violated a corporate governance or shareholder protection requirement. Because delisting is obviously an extreme sanction that can be detrimental to a company's shareholders—the intended beneficiaries of such requirements—exchanges often do not have an appropriate approach to deal with these violations. Accordingly, the proposed changes would authorize Amex staff to issue a warning letter to a listed company for a minor corporate governance violation. Issuance of such letters would be subject to appropriate due process (*i.e.*, the staff would be required to advise the company of the apparent violation with an opportunity to respond prior to issuance of the warning letter) and would also require public disclosure by the company and correction within an appropriate time frame. Flagrant or repeat violations may subject the company to delisting.

Transition

The Exchange believes that many listed companies would face significant obstacles in complying with the enhanced board composition requirements. Therefore, other than for the audit committee requirements mandated by SEC Rule 10A–3, the new requirements, which require changes to board and committee composition and structure, would become effective two years following Commission approval. However, if a company already has a staggered board in place, and a change is required with respect to a director whose term does not expire during the two-year period, the company would have an additional year to fully comply with the board composition requirement. Companies listing in connection with an initial public offering or transferring from another marketplace that does not have substantially similar standards would be required to comply within two years of listing. Companies transferring from another marketplace which does have substantially similar standards would be given at least as long as any transition period afforded by that marketplace to comply.

The proposals that do not require changes to board composition would become effective six months following Commission approval. These changes include disclosure requirements, code of ethics requirements, and meeting requirements.

The public warning letter provision and the prohibition on Amex employees and Floor members serving on listed company boards will be effective upon SEC approval.

The audit committee changes implementing SEC Rule 10A–3 would become operative as required, on July 31, 2005 for foreign private issuers and small business filers, and for all other issuers by the earlier of either the issuer's first annual shareholders meeting after January 15, 2004 or October 31, 2004.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6 of the Act [9] in general and furthers the objectives of Section 6(b)(5)[10] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Specifically, the Exchange represents that the proposed rule change, as amended, is designed to increase investor protection by promoting accountability, transparency, and integrity by listed companies.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange did not receive any written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve the proposed rule change, as amended, or

B. Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. The Commission is also

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

interested in commenters' views on whether it is appropriate to permit small business filers to maintain a Board comprised of at least 50 percent independent directors, rather than a majority of independent directors, and to have an audit committee comprised of only two independent directors. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex.

All submissions should refer to the File No. SR–Amex–2003–65 and should be submitted by November 21, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–27460 Filed 10–30–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48665; File No. SR–Amex–2003–85]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Adoption of a per Contract Licensing Fee for Transactions in Options on iShares Lehman U.S. Aggregate Bond Fund (AGG)

October 20, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on October 1, 2003, the American Stock Exchange LLC (''Exchange'' or ''Amex'') 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 Amex. 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

Amex proposes to amend its options fee schedule by adopting a per contract license fee in connection with specialist and registered options traders (''ROTs'') transactions in options on iShares Lehman U.S. Aggregate Bond Fund (AGG).[3]

The text of the proposed rule change is available at Amex and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex 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. Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and 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''). Many agreements require the Exchange to pay a significant licensing fee to issuers or index owners as a condition to the listing and trading of these ETF options 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 or a ROT is a party. The licensing fee currently imposed on specialists and ROTs is as follows: (1) $0.10 per contract side for options on the Nasdaq-100 Index Tracking Stock (QQQ), the Nasdaq-100 Index (NDX), the Mini-NDX (MNX), the iShares Goldman Sachs Corporate Bond Fund (LQD), the iShares Lehman 1–3 Year Treasury Bond Fund (SHY), iShares Lehman 7–10 Year Treasury Bond Fund (IEF), and iShares Lehman 20+ Year Treasury Bond Fund (TLT); (2) $0.09 per contract side for options on the iShares Cohen & Steers Realty Majors Index Fund (ICF); and (3) $0.05 per contract side for options on the S&P 100 iShares (OEF).[4]

The purpose of the proposed fee is for the Exchange to recoup its costs in connection with the index license fee for the trading of options on the iShares Lehman U.S. Aggregate Bond Fund. The proposed licensing fee will be collected on every option transaction of the iShares Lehman U.S. Aggregate Bond Fund in which the specialist or ROT is a party. The Exchange proposes to charge $0.10 per contract side for options on the iShares Lehman U.S. Aggregate Bond Fund. 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 consistent with the rules of the Exchange and the Act. 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 iShares Lehman U.S. Aggregate Bond Fund and the ROTs trading such product, is efficient and consistent with the intent of the Exchange to pass on its non-reimbursed costs to those market participants that are the beneficiaries.

Amex notes that in recent years it has increased a number of member fees to better align Exchange fees with the actual cost of delivering services and reduce Exchange subsidies of such services.[5] Amex believes that implementation of this proposal is consistent with the reduction and/or elimination of these subsidies.

The Exchange asserts that the proposed license fee will provide additional revenue for the purpose of recouping Amex's costs associated with the trading of options on the iShares Lehman U.S. Aggregate Bond Fund. In addition, Amex believes that this fee

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission notes that Amex is also deleting reference in its Options Fee Schedule to an expired three-month pilot program that reduced specialist and ROT transaction fees for equity and QQQ options. *See* Securities Exchange Act Release No. 48111 (June 30, 2003), 68 FR 40726 (July 8, 2003).

[4] *See* Securities Exchange Act Release Nos. 45163 (December 18, 2001), 66 FR 66958 (December 27, 2001), 47432 (March 3, 2003), 68 FR 11420 (March 10, 2003), 47431 (March 3, 2003), 68 FR 11882 (March 12, 2003), and 47956 (May 30, 2003), 68 FR 34687 (June 10, 2003).

[5] *See* Securities Exchange Act Release Nos. 45360 (January 29, 2002), 67 FR 5626 (February 6, 2002), and 44286 (May 9, 2001), 66 FR 27187 (May 16, 2001).

will help to allocate to those specialists and ROTs transacting in options on the iShares Lehman U.S. Aggregate Bond Fund, a fair share of the related costs of offering such options. Accordingly, the Exchange believes that the proposed fee is reasonable.

2. Basis

The Exchange believes the proposed rule change is consistent with Section 6 of the Act,[6] in general, and with Section 6(b)(4) of the Act,[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members.

B. Self-Regulatory Organization's Statement on Burden on Competition

Amex does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it establishes or changes a due, fee, or other charge.

At any time within 60 days of October 1, 2003, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[10]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of Amex. All submissions should refer to File No. SR-Amex-2003–85 and should be submitted by November 21, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–27462 Filed 10–30–03; 8:45 am]

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[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] *See* 15 U.S.C. 78s(b)(3)(C).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48702; File No. SR–CBOE–2003–36])

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. To Adopt a New Rule Relating to Trading Crowd Space Dispute Resolution Procedures

October 27, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on October 20, 2003, the Chicago Board Options Exchange, Inc. (''CBOE'' 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 CBOE. 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 CBOE proposes to adopt new CBOE Rule 24.21, ''Index Crowd Space Dispute Resolution Procedures,'' which establishes guidelines and procedures for resolving disputes between members over the right to occupy a particular space in an index option trading crowd. In addition, the CBOE proposes to revise its fee schedule to include a proposed trading crowd dispute resolution fee.

The text of new CBOE Rule 24.21, and the revised fee schedule, appear below. Proposed new language is *italicized.*

* * * * *

Chicago Board Options Exchange, Incorporated

Rules

CHAPTER XXIV

Index Options

* * * * *

Index Crowd Space Dispute Resolution Procedures

Rule 24.21

This Rule applies only to members who trade OEX, SPX, DJX and DIA options on the floor of the Exchange, or who trade any other index option not located at a station shared with equity options as determined by the appropriate Floor Procedure Committee.

(a) *Crowd Space Disputes Subject to Resolution.* A member may request the assistance of the Exchange to resolve a dispute over the ability to use a trading space in an index option trading crowd where the space is currently being occupied by another member, or where the space has been abandoned or unoccupied, and more than one member now wish to trade there.

(b) *Requesting the Assistance of the Exchange. A member shall request the assistance of the Exchange in resolving a crowd space dispute by calling the Office of the Secretary of the Exchange, which shall promptly refer the request in writing to the Chairman of the appropriate Floor Procedure Committee that governs trading in the trading station where the dispute has arisen (hereafter ''the Chairman'').*

(c) *Mediation by the Chairman. When the Chairman receives the request from the Office of the Secretary, the Chairman or an individual designated by the Chairman (hereafter ''the Chairman's designee'') shall attempt to mediate an amicable resolution of the dispute among the members involved. All members involved in the dispute shall cooperate with the Chairman or the Chairman's designee in his efforts to mediate.*

(d) *Temporary Resolution. If the Chairman, the Chairman's designee, or two Floor Officials determine that the maintenance of a fair and orderly market requires an immediate temporary resolution of a crowd space dispute, the Chairman, the Chairman's designee, or two Floor Officials in consultation with the Chairman or the Chairman's designee may instruct the*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

parties to the dispute on where to stand until the outcome of further proceedings under this Rule. This temporary resolution may be revised by the individual(s) issuing it, but is otherwise not subject to appeal.

(e) *Hearing Requests and Hearing Fee. If the Chairman or the Chairman's designee is unable to mediate an amicable resolution of the dispute among the members involved, any of them may request a hearing in the dispute by completing and submitting a Hearing Request form to the Office of the Secretary along with the payment of a Hearing Fee. The amount of the Hearing Fee shall be a minimum of one thousand dollars ($1,000) per member, and may be greater under certain circumstances set forth in this subsection. The Exchange may increase the Minimum Hearing Fee periodically pursuant to Exchange Rule 2.22 in order to maintain the Minimum Hearing Fee at a level that the Exchange deems sufficient to encourage amicable resolution of crowd space disputes. Upon receipt of the Hearing Request form and Hearing Fee, the Office of the Secretary shall instruct the Exchange to collect the appropriate Hearing Fee from each additional party to the dispute pursuant to Exchange Rule 3.23. For any party who has previously been a party to a crowd dispute resolution hearing within the past twelve months, the Hearing Fee that party will pay for being a party to a subsequent hearing within twelve months of the last hearing will be twice the Hearing Fee that party paid for the previous hearing. After the hearing on the dispute is held and all rights of appeal are exhausted, only the prevailing party in the dispute shall obtain a refund of the Hearing Fee from the Exchange. A prevailing party who becomes a party in a subsequent hearing within twelve months of the hearing in which he prevailed shall not pay a higher Hearing Fee because of the hearing in which he prevailed.*

(f) *Limitations on Hearing Requests. No member may request a hearing involving the same parties that participated in a prior hearing unless the requesting member makes an adequate preliminary showing in his subsequent hearing request that new circumstances warrant another hearing involving the same parties, based upon the Crowd Dispute Resolution Guidelines contained in this Rule. The Chairman shall exercise sole and final judgment as to the adequacy of this preliminary showing.*

(g) *CSDR Panel. After the member submits his Hearing Fee to the Office of the Secretary, the Chairman shall select a Crowd Space Dispute Resolution Panel (''Panel'') composed of seven Exchange members to hear and resolve the dispute. The Chairman shall select two members of the Panel from members of the Chairman's Floor Procedure Committee (other than the Chairman himself), and four members of the Panel from members of the Exchange who are not members of the Chairman's Floor Procedure Committee. Two of the latter four members of the Panel shall be members who trade in the trading station where the dispute has arisen and two shall be members who do not trade in the trading station where the dispute has arisen. In selecting the Panel members who are not members of the Chairman's Floor Procedure Committee, preference will be given to members who serve on another Floor Procedure Committee or a Market Performance Committee. Notwithstanding such preference, the selection of all Panel members will be according to the sole discretion of the Chairman. The seventh Panel member shall be the Chairman of the Floor Officials Committee, or another member of the Floor Officials Committee designated by the Chairman of the Floor Officials Committee. The Chairman shall also designate the Panel member who shall serve as the Panel Chairman. In the event the Chairman must recuse himself from the dispute (see subsection (h) below), then the Vice Chairman of the Chairman's Committee will designate the Panel and the Panel Chairman. If the Vice-Chairman of the Chairman's Committee must also recuse himself, then the Vice-Chairman of the Exchange will designate the Panel and the Panel Chairman.*

(h) *Recusals and Challenges of Panel Members. The Exchange's recusal rules and policies shall apply with respect to participation by the Chairman, Panel members, and others in the crowd space dispute resolution process pursuant to this Rule. Parties to the dispute shall be informed of the composition of the Panel, as well as the date, time, and place of the hearing, at least 72 hours prior to the scheduled hearing in the matter by the Chairman. A Party may challenge the selection of one or more Panel members no later than 48 hours prior to the scheduled hearing in the matter by providing to the Chairman or the Panel Chairman a brief written statement explaining why the challenged Panel member has a conflict of interest or any other reason that would make the Panel member unable to participate in a fair and impartial manner. Notice of any replacement Panel member will be provided to the parties no later than 24 hours prior to the scheduled hearing. A Party may challenge the selection of any replacement Panel member no later than 8 hours prior to the scheduled hearing. The Chairman shall have sole and final authority to rule on any challenge and replace any Panel member.*

(i) *Hearings. The hearing shall be held at such time and place as may be designated by the Panel. In hearings before the Panel, the Parties to the dispute will be allowed to present witnesses and/or documentary evidence to argue their claim, provided that they have furnished a list of all such witnesses and a copy of all such documents to the Panel Members and to all opposing parties at least 48 hours prior to the date of the hearing. The legal counsel to the Chairman's Committee, or another attorney designated by the legal counsel to the Chairman's Committee, shall act as legal counsel to the Panel. The Panel shall determine all questions concerning admissibility of evidence, and shall otherwise regulate the conduct of the hearing. Formal rules of evidence shall not apply. The Panel shall decide any issues of fact based on the evidence admitted at the hearing, and shall apply the Crowd Space Dispute Resolution Guidelines set forth below to each dispute. The party receiving at least a majority vote by the Panel will prevail.*

(j) *Crowd Space Dispute Resolution Guidelines. In resolving a crowd space dispute, the Panel's guiding principles shall be: (i) to determine what shall ''best promote a liquid and competitive market'', (ii) to give no preference to market-makers, floor brokers, or representatives of DPMs merely because of their status as such, and (iii) to recognize and apply the principles that no member has any ownership ''rights'' in any crowd space, and that no member may sell or assign any supposed ''right'' to use a particular space in a trading crowd. The Panel shall examine the following factors and determine, in the Panel's sole judgment, how each relates to each of the parties competing for the space (the numerical ranking of the factors does not necessarily indicate the relative importance to be given to any particular factors in any particular case):*

1. *Quality and Quantity of Business:*

The Panel shall review the quality and quantity of business that each party to the dispute conducts. Evidence of the quality and quantity of each party's business shall include, but is not limited to, evidence of the average daily number of contracts traded, the percentage of transactions that are traded in-person,

participation on RAES, and the typical size of markets made by each party.

2. *Tenure in the trading crowd:*

''Tenure'' refers to the length of time each party has spent in the trading crowd where the space in dispute is located.

3. *Association/affiliation with a member firm that has occupied the space:*

If a nominee or employee of a member firm has had to leave a space, then the Panel will consider to what extent there will be a negative impact on the trading in the crowd if another nominee of the member firm is or is not permitted to continue to use the space.

4. *Need for accommodation:*

The Panel will consider to what extent each party's existing business is already satisfied by their existing space or whether the new space is needed to facilitate either existing or anticipated new business.

5. *Proximity of competing parties:*

The Panel will give consideration to whether any party stood near the spot in question, or whether any party occupied the space in the past.

6. *Sight lines or Access:*

The Panel will consider to what extent each party needs sight lines or access to other parts of the crowd or the trading floor.

7. *Technology considerations:*

The Panel will consider to what extent each party's needs may be satisfied by trading technology or communication technology.

8. *Equitable considerations:*

In addition to the above factors, the Panel will consider any other factor it deems relevant in order to achieve a fair and equitable resolution.

(k) *Panel Decision. The Panel Chairman shall communicate the Panel's decision to the Chairman and all parties to the dispute. The Panel decision shall take effect on the first trading day after all parties have been notified of the decision by the Panel Chairman. The Panel shall also promptly provide a written Statement of Decision explaining the reason(s) for its decision. However, the effective date of the Panel's decision shall not be postponed until the release of the Statement of Decision. If the Panel makes its decision about a party's right to use a space contingent upon that party's satisfaction of certain conditions, those conditions shall be set forth in the Statement of Decision.*

(l) *Appeal. Any party may appeal the decision of the Panel to the Appeals Committee pursuant to Chapter XIX of the Exchange Rules by filing an Application pursuant to CBOE Rule 19.2(a) within thirty days after the date of release of the Panel's Statement of Decision. The Panel decision, however, shall remain in effect during any such appeal.*

(m) *Failure to Comply. Any member or person associated with a member who fails to comply with a decision reached through these Crowd Space Dispute Resolution Procedures, or who otherwise fails to comply with any provision of this CBOE Rule 24.21, may be subject to disciplinary proceedings in accordance with Chapter 17 of the CBOE Rules for violation of this rule and Rule 4.1 (''Just and Equitable Principles of Trade'').*

* * * * *

FEE SCHEDULE

1. –15. Unchanged.

16. MISCELLANEOUS

Crowd Space Dispute Resolution Hearing Fee (per hearing, per member (10)): $1,000

17–18. Unchanged.

MEMBER TRANSACTION FEE POLICIES AND REBATE PROGRAMS

Unchanged.

Footnotes

(1)–(9) Unchanged.

(10) The Crowd Space Dispute Resolution Hearing Fee is $1,000 per hearing for each party to the dispute and will escalate under certain circumstances pursuant to CBOE Rule 24.21(e). After the hearing is held and all rights of appeal are exhausted, the prevailing party in the dispute shall obtain a refund of the Hearing Fee from the Exchange.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule and discussed any comments it received on the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

CBOE proposes to adopt new CBOE Rule 24.21, which establishes guidelines to resolve disputes concerning the right of Exchange members to occupy a certain space in an index option trading pit and procedures through which these disputes may be resolved. Over the past several years, an increase in the trading volume and the size of trading crowds for certain index options has created a lack of trading spots in certain trading pits. Up until this point, the Exchange has never adopted any formal policy about the right of members to occupy particular spaces on the trading floor. In the past, members have been able to resolve amicably disputes concerning the right to trade from a particular location in the pit. Also, the Exchange's SPX Floor Procedure Committee has been successful in mediating such disputes when they have occurred in the SPX trading crowd.

The Exchange believes it is appropriate at this time to adopt a rule to give the Chairman of the appropriate Floor Procedure Committee (''FPC'') the authority to mediate, and if necessary, to convene hearing panels of members to resolve space disputes in index option trading crowds, and the Exchange the ability to enforce the results of any such mediation. Proposed CBOE Rule 24.21 shall apply only to members who trade OEX, SPX, DJX and DIA options on the floor of the Exchange, or who trade any other index option not located at a station shared with equity options as determined by the appropriate FPC.

Mediation by the FPC Chairman

The proposed rule provides that a member may seek the assistance of the Exchange to resolve a crowd space dispute and the Chairman of the appropriate FPC or his designee shall attempt to mediate an amicable resolution of the dispute among the members involved.[3] The proposed rule also provides for immediate temporary resolutions of crowd space disputes pending the outcome of further proceedings under the rule.[4] The proposed rule is designed to encourage amicable, mediated settlements, as opposed to hearings, by requiring mediation first by the FPC Chairman (or his designee) before members may resort to the hearing process provided for under the proposed rule.

Initiation of Hearings

In the event members cannot come to a resolution on the use of a trading space, a member may initiate a hearing by completing and submitting a Hearing

[3] *See* paragraphs (a), (b), and (c) of proposed CBOE Rule 24.21.

[4] *See* proposed CBOE Rule 24.21(d).

Request form to the Office of the Secretary along with the payment of a Hearing Fee, which shall be a minimum of one thousand dollars ($1,000) per member.[5] The Exchange also proposes to amend the CBOE Fee Schedule to provide for a Crowd Space Dispute Resolution Hearing Fee of $1,000. Hearing fees will escalate for those members who frequently use the hearing process to resolve such disputes, again with the purpose of encouraging amicable, mediated settlements. Repetitive, meritless claims involving the same parties are prohibited.[6]

Hearing Panel

The FPC Chairman shall select a Crowd Space Dispute Resolution Panel (''Panel'') composed of seven Exchange members to hear and resolve the dispute.[7] The Chairman shall select two members of the Panel from members of the Chairman's FPC (other than the Chairman himself), and four members of the Panel from members of the Exchange who are not members of the Chairman's FPC. Two of the latter four members of the Panel shall be members who trade in the trading station where the dispute has arisen and two shall be members who do not trade in the trading station where the dispute has arisen. In selecting the Panel members who are not members of the Chairman's FPC, preference will be given to members who serve on another Floor Procedure Committee or a Market Performance Committee. The seventh Panel member shall be the Chairman of the Floor Officials Committee, or another member of the Floor Officials Committee designated by the Chairman of the Floor Officials Committee. The Exchange's recusal rules and policies shall apply with respect to participation by the Chairman, Panel members, and others in the crowd space dispute resolution process under the proposed rule.[8]

Guidelines for Resolving Disputes

In resolving a crowd space dispute, the Panel's guiding principles shall be: (i) To determine what shall ''best promote a liquid and competitive market'', (ii) to give no preference to market-makers, floor brokers, or representatives of DPMs merely because of their status as such, and (iii) to recognize and apply the principles that no member has any ownership ''rights'' in any crowd space, and that no member may sell or assign any supposed ''right'' to use a particular space in a trading crowd.[9] The Panel will examine eight factors (set forth in proposed CBOE Rule 24.21(j)) and determine, in the Panel's sole judgment, how each relates to each of the parties competing for the space.

Procedures for Hearings

The hearing shall be held at such time and place as may be designated by the Panel. In hearings before the Panel, the Parties to the dispute will be allowed to present witnesses and/or documentary evidence to argue their claim. The legal counsel to the Chairman's Committee, or another attorney designated by the legal counsel to the Chairman's Committee, shall act as legal counsel to the Panel. The Panel shall determine all questions concerning admissibility of evidence, and shall otherwise regulate the conduct of the hearing. Formal rules of evidence shall not apply. The Panel shall decide any issues of fact based on the evidence admitted at the hearing, and shall apply the Crowd Space Dispute Resolution Guidelines set forth in proposed CBOE Rule 24.21(j). The party receiving at least a majority vote by the Panel will prevail.[10]

The Panel Chairman shall communicate the Panel's decision to the Chairman of the Exchange and all parties to the dispute. The Panel decision shall take effect on the first trading day after all parties have been notified of the decision by the Panel Chairman. The Panel shall also promptly provide a written Statement of Decision explaining the reason(s) for its decision.[11] Any party may appeal the decision of the Panel to the Appeals Committee pursuant to Chapter XIX of the Exchange Rules.[12] Any member or person associated with a member who fails to comply with a decision reached through proposed CBOE Rule 24.21, or who otherwise fails to comply with any provision of the proposed rule, may be subject to disciplinary proceedings.[13]

2. Statutory Basis

By establishing guidelines and procedures for the amicable resolution of pit space disputes, CBOE believes the proposed rule change is consistent with and furthers the objectives of section 6(b)(5) of the Act,[14] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market, and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE–2003–36 and should be submitted by November 21, 2003.

[5] *See* proposed CBOE Rule 24.21(e).
[6] *See* proposed CBOE Rule 24.21(f).
[7] *See* proposed CBOE Rule 24.21(g).
[8] *See* proposed CBOE Rule 24.21(h).
[9] *See* proposed CBOE Rule 24.21(j).
[10] *See* proposed CBOE Rule 24.21(i).
[11] *See* proposed CBOE Rule 24.21(k).
[12] *See* proposed CBOE Rule 24.21(l).
[13] *See* proposed CBOE Rule 24.21(m).
[14] 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–27461 Filed 10–30–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48701; File No. SR–NASD–99–60]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment Nos. 1 Through 4 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 5 Thereto by the National Association of Securities Dealers, Inc. Relating to Restrictions on the Purchases and Sales of Initial Public Offerings of Equity Securities

October 24, 2003.

I. Introduction

On October 15, 1999, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change that would govern purchases and sales of ''hot equity'' offerings. On December 21, 1999, the NASD submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on January 18, 2000.[4] On October 11, 2000, the NASD submitted Amendment No. 2 to the proposal [5] which, among other things, changed the subject of the proposed rule from ''hot issues'' to ''new issues.'' Amendment No. 2 was published for comment in the **Federal Register** on December 6, 2000.[6] The NASD submitted Amendment No. 3 to the proposal on March 20, 2001,[7] and Amendment No. 4 to the proposal on June 27, 2002.[8] The Commission published the proposal as revised by Amendment Nos. 3 and 4 in the **Federal Register** on December 10, 2002.[9] On October 23, 2003, the NASD submitted Amendment No. 5 to the proposal.[10] This notice and order approves the proposed rule change and Amendment Nos. 1 to 4 thereto, solicits comment on Amendment No. 5, and approves Amendment No. 5 on an accelerated basis.

II. Executive Summary

Currently, NASD Interpretative Material (''IM'') 2110–1, commonly known as the ''Free-Riding and Withholding Interpretation'' (''Interpretation''), governs the manner in which NASD members may distribute ''hot issues.'' The NASD has proposed to restructure and make substantive amendments to the Interpretation; the result would be codified as new NASD Rule 2790. The NASD has stated that the new rule, like the Interpretation it would replace, is designed to protect the integrity of the public offering process by ensuring that: (1) NASD members make *bona fide* public offerings of securities at the offering price; (2) members do not withhold securities in a public offering for their own benefit or use such securities to reward persons who are in a position to direct future business to members; and (3) industry insiders, including NASD members and their associated persons, do not take advantage of their ''insider'' position to purchase new issues for their own benefit at the expense of public customers. The NASD believes that the proposed rule is better designed to further the purposes of the Interpretation, while at the same time being easier to understand.

Under new NASD Rule 2790, an NASD member generally would be prohibited from selling a ''new issue'' to any account in which a ''restricted person'' had a beneficial interest. As discussed further below, the term ''restricted person'' would include most broker-dealers, most owners and affiliates of a broker-dealer, and certain other classes of person. The proposed rule would require a member, before selling a new issue to any account, to meet certain ''preconditions for sale.'' These preconditions generally would require the member to obtain a representation from the beneficial owner of the account that the account is eligible to purchase new issues in compliance with the rule. The rule would provide several general exemptions, the basic rationale of which is that sales to and purchases by entities that have numerous beneficial owners—and, therefore, are likely to have only a small percentage of restricted persons owners—are not the types of transactions the rule should proscribe. The details of proposed NASD Rule 2790 are discussed in Section IV below.

III. Procedural History and Comments Received

The proposal, as revised by Amendment No. 1, was published for comment in the **Federal Register** on January 18, 2000.[11] The Commission received 24 comments on the original notice.[12] In response to these comments,

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Gary L. Goldsholle, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated December 20, 1999 (''Amendment No. 1'').

[4] Securities Exchange Act Release No. 42325 (January 10, 2000), 65 FR 2656.

[5] *See* Letter from Alden S. Adkins, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated October 10, 2000 (''Amendment No. 2'').

[6] Securities Exchange Act Release No. 43627 (November 28, 2000), 65 FR 76316.

[7] *See* Letter from Patrice M. Gliniecki, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated March 20, 2001 (''Amendment No. 3'').

[8] *See* Letter from Gary L. Goldshalle, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated June 27, 2002 (''Amendment No. 4'').

[9] *See* Securities Exchange Act Release No. 46942 (December 4, 2002), 67 FR 75889.

[10] *See* Letter from Gary L. Goldsholle, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated October 22, 2003 (''Amendment No. 5'').

[11] *See supra* note 4.

[12] *See* Letter from Willkie Farr & Gallagher to Jonathan G. Katz, SEC, dated January 28, 2000 (''Willkie''); Letter from Faith Colish to Jonathan G. Katz, SEC, dated January 31, 2000 (''Colish''); Letter from Katten Muchin Zavis to Jonathan G. Katz, SEC, dated January 28, 2000 (''Katten''); Letter from Sandra K. Smith to Jonathan G. Katz, SEC, dated February 1, 2000 (''Smith''); Letter from Driehaus Capital Management, Inc. to Jonathan G. Katz, SEC, dated February 4, 2000 (''Driehaus''); Letter from Cadwalader, Wickersham & Taft to Jonathan G. Katz, SEC, dated February 4, 2000 (''Cadwalader''); Letter from Fu Associates, Ltd. to Jonathan G. Katz, SEC, dated February 7, 2000 (''Fu''); Letter from Schulte Roth & Zabel LLP to Jonathan G. Katz, SEC, dated February 7, 2000 (''Schulte''); Letter from Rosenman & Colin LLP to Jonathan G. Katz, SEC, dated February 7, 2000 (''Rosenman''); Letter from Ropes & Gray to Jonathan G. Katz, SEC, dated February 8, 2000 (''Ropes''); Letter from The Washington Group to Jonathan G. Katz, SEC, dated February 8, 2000 (''Washington''); Letter from Testa, Hurwitz & Thibeault, LLP to Jonathan G. Katz, SEC, dated February 8, 2000 (''Testa''); Letter from Northern Trust Global Advisors, Inc. to Jonathan G. Katz, SEC, dated February 13, 2000 (''Northern Trust''); Letter from Chicago Board Options Exchange to Jonathan G. Katz, SEC, dated February 14, 2000 (''CBOE''); Letter from Sullivan & Cromwell to Jonathan G. Katz, SEC, dated February 15, 2000 (''Sullivan''); Letter from Charles Schwab to Jonathan G. Katz, SEC, dated February 15, 2000 (''Schwab''); Letter from Sidley & Austin to Jonathan G. Katz, SEC, dated February 16, 2000 (''Sidley''); Letter from North American Securities Administrators Association, Inc. to Jonathan G. Katz, SEC, dated February 18, 2000 (''NASAA''); Letter from Securities Industry Association to Jonathan G. Katz, SEC, dated February 18, 2000 (''SIA''); Letter from Mayor, Day, Caldwell & Keeton, L.L.P. to SEC, dated March 8, 2000 (''Mayor Day''); Letter from Morgan Stanley Dean Witter to Jonathan G. Katz, SEC, dated March 17, 2000 (''MSDW''); Letter from Covington & Burling to Jonathan G. Katz, SEC, dated April 14, 2000 (''Covington''); Letter from Orrick, Herrington & Sutcliffe LLP to Jonathan G. Katz, SEC, dated May 2, 2000 (''Orrick''); Letter from Fried, Frank, Harris, Shriver & Jacobson to Jonathan G. Katz, SEC, dated May 9, 2000 (''Fried'').

the NASD submitted Amendment No. 2, which was published for comment in the **Federal Register** on December 6, 2000.[13] Between December 2000 and March 2001, the Commission received 14 comment letters on the proposed rule change.[14] The NASD reviewed the 14 comment letters and made various revisions to proposed NASD Rule 2790 in Amendment Nos. 3 and 4. After the NASD had filed Amendment No. 4 with the Commission, the Commission received two additional comment letters that, among other things, advocated publication of Amendment No. 4 in the **Federal Register**.[15] The proposal, as revised by Amendment Nos. 3 and 4, was published for comment in the **Federal Register** on December 10, 2002.[16] The Commission received four comments on the proposal after December 10, 2002,[17] and responded to those comments in Amendment No. 5. The proposed rule change, and the evolution of its various provisions through the five amendments, are described below.

[13] *See supra* note 6.

[14] *See* Letter from The Washington Group to Jonathan G. Katz, SEC, dated December 21, 2000 (''Washington 2''); Letter from Fried, Frank, Harris, Shriver & Jacobson to Jonathan G. Katz, SEC, dated December 22, 2000 (''Fried 2''); Letter from Capital International, Inc. to Jonathan G. Katz, SEC, dated December 22, 2000 (''CII''); Letters from Cadwalader, Wickersham & Taft to Jonathan G. Katz, SEC, dated December 22, 2000 and January 4, 2001 (''Cadwalader 2''); Letter from Testa, Hurwitz & Thibeault to Jonathan G. Katz, SEC, dated December 26, 2000 (''Testa 2''); Letter from Managed Funds Association to Jonathan G. Katz, SEC, dated December 26, 2000 (''MFA''); Letter from Mayor, Day, Caldwell & Keeton, L.L.P. to Jonathan G. Katz, SEC, dated December 26, 2000 (''Mayor Day 2''); Letter from Sullivan & Cromwell to Jonathan G. Katz, SEC, dated December 29, 2000 (''Sullivan 2''); Letter from Willkie Farr & Gallagher to Jonathan G. Katz, SEC, dated January 8, 2001 (''Willkie 2''); Letter from Securities Industry Association to Margaret H. McFarland, SEC, dated January 10, 2001 (''SIA 2''); Letter from Chicago Board Options Exchange to Jonathan G. Katz, SEC, dated January 12, 2001 (''CBOE 2''); Letter from Morgan Stanley Dean Witter to Secretary, SEC, dated January 31, 2001 (''MSDW 2''); Letter from The Washington Group to Laura S. Unger, SEC, dated March 27, 2001 (''Washington 3'').

[15] *See* Letter from Willkie Farr & Gallagher to SEC dated September 24, 2002 (''Willkie 3''); Letter from Managed Funds Association to SEC dated October 15, 2002 (''MFA 2'').

[16] *See supra* note 9.

[17] *See* Letter from Willkie Farr & Gallagher to Jonathan G. Katz, SEC, dated December 13, 2002 (''Willkie 4''); Letter from Managed Funds Association to Jonathan G. Katz, SEC, dated December 31, 2002 (''MFA 3''); Letter from Sidley Austin Brown & Wood to Jonathan G. Katz, SEC, dated January 9, 2003 (''Sidley 2''); Letter from Mayer Brown Rowe & Maw to Jonathan G. Katz, SEC, dated January 13, 2003 (''Mayer Brown'').

IV. Description of Proposal

A. Primary Differences Between NASD Rule 2790 and NASD IM–2110–1

1. ''New Issues'' Versus ''Hot Issues''

The Interpretation applies to any ''hot issue,'' defined as a public offering of a security that trades at a premium whenever secondary market trading begins.[18] The proposed rule, in contrast, would apply to any ''new issue,'' defined as an initial public offering of an equity security.[19] The initial proposal would have retained the concept of ''hot issues'' but revised the Interpretation's definition to provide a clearer standard for when an issue becomes ''hot'' (*i.e.*, when it trades at the required premium). The NASD initially proposed to define ''hot issue'' as a security that is part of a public offering where the volume-weighted price during the first five minutes of trading in the secondary market is 5% or more above the public offering price.

The proposed 5% threshold generated several comments. Three commenters supported the NASD's proposal for a clear and measurable standard for determining whether an issue becomes ''hot'' but believed that the 5% threshold was too low.[20] Several commenters questioned whether the methodology proposed by the NASD would be effective in identifying those offerings that should be subject to the proposed rule.[21]

Two commenters suggested an approach even more straightforward than a 5% threshold: prohibiting allocations of all IPOs to restricted persons.[22] One of these commenters noted a significant drawback to any definition that included a numerical threshold: prudent firms would have to treat all IPOs as subject to the rule because they would not be able to anticipate which offerings would trade through the threshold.[23] The second commenter agreed that, in practice, many firms would treat all IPOs as subject to the rule even if many of them were not hot issues.[24] The second commenter added that, although the Interpretation contains a cancellation provision, many firms do not avail themselves of it because of the administrative costs of tracking and canceling hot issue sales, the risks of noncompliance associated with selling hot issues to restricted persons, and the ill will generated by having to cancel a customer's allocation.

Based on these comments, the NASD in Amendment No. 2 revised the proposed rule to cover the purchase and sale of all initial equity public offerings, not just those that open above a designated premium. The NASD believes that this approach would be easier to understand and would avoid many of the complexities associated with the cancellation provision.

2. Elimination of Cancellation Provision

Currently, a member that sells a hot issue to a restricted person or account will not be considered to have violated the Interpretation if the member: (1) Cancels the trade before the end of the first business day following the date on which secondary market trading commences for that issue; and (2) reallocates such security at the public offering price to a non-restricted person or account.[25] This provision allows members to cancel trades in the event an issue unexpectedly becomes ''hot.'' With the decision to apply the proposed rule to all new issues, the NASD no longer believes that a cancellation provision is necessary. The NASD would expect members to determine the status of all prospective purchasers prior to selling a new issue.

3. Elimination of ''Conditionally Restricted Person'' Status

Another significant difference between the proposed rule and the Interpretation is the elimination of ''conditionally restricted person'' status and the decision to treat all persons as either restricted or non-restricted. Although the term ''conditionally restricted person'' is not used in the Interpretation, the concept generally includes: (1) Members of the immediate family of an associated person who are not supported directly or indirectly by the associated person; (2) finders in respect to the public offering; (3) any person acting in a fiduciary capacity to the managing underwriter (including accountants, attorneys, and consultants); and (4) senior officers and directors of a bank, savings and loan

[18] *See* NASD IM–2110–1(a)(1).

[19] *See* paragraph (i)(10) of proposed NASD Rule 2790. This provision would in turn define ''equity security'' to have the same meaning as in Section 3(a)(11) of the Act, 15 U.S.C. 78c(a)(11).

[20] *See* Driehaus; MSDW; Sullivan.

[21] *See* Colish (stating that the NASD should supply data to support the numerical thresholds chosen in the proposed rule); Driehaus (recommending use of a threshold based on a security's volume-weighted price on the first day, not just the first five minutes of trading or any other short period of time during the trading day); MSDW; NASAA; SIA (recommending a percentage based on the first half hour of trading that occurs away from the lead underwriter).

[22] *See* Schwab; SIA (arguing in the alternative for a higher threshold premium).

[23] *See* SIA.

[24] *See* Schwab.

[25] *See* NASD IM–2110–1(a)(3).

institution, insurance company, investment company, investment advisory firm, or any other institutional-type account, or any person in the securities department of any of the foregoing entities, or any other employee who may influence, or whose activities directly or indirectly involve or are related to, the function of buying or selling securities for any of the foregoing entities.[26] Under the Interpretation, a conditionally restricted person generally may purchase hot issues if: (1) The securities are sold to that person in accordance with the person's normal investment practice; (2) the amount of securities sold to such person is insubstantial; and (3) the member's aggregate sales to conditionally restricted persons is insubstantial and not disproportionate in amount as compared to sales to other members of the public.

Several commenters urged the NASD to retain the concept of conditionally restricted persons.[27] The NASD believes, however, that treating a person as conditionally restricted is, in many cases, contrary to the public interest: although certain conditionally restricted persons—such as investment advisers, hedge fund managers, and other investment managers—may have the requisite investment history to qualify for the exemption, they still may be in a position to direct future business to a member. The NASD does not believe that meeting the conditionally restricted person criteria alleviates these concerns. The NASD now prefers a bright-line approach and, therefore, has proposed to eliminate conditionally restricted person status. The NASD acknowledges that, by doing so, certain persons who may purchase hot issues under the Interpretation would be restricted persons under the new rule. However, the rule contains new provisions that would address some of their concerns.

4. Introduction of 10% *De Minimis* Threshold for Restricted Person Participation

The NASD has stated that some of the persons who previously benefited from conditionally restricted person status could instead benefit from a proposed *de minimis* threshold: restricted persons would be permitted to hold interests in a collective investment account that purchases new issues, provided that such persons account for no more than 10% of the account's beneficial ownership.

The NASD initially proposed a *de minimis* threshold of 5%. Several commenters urged the NASD to raise the threshold from 5% to 10% or more.[28] These commenters generally maintained that restricted persons should be permitted to hold interests in an account that purchases new issues, provided that they exercise no investment authority over the account.[29] The NASD responded that for many years it has received similar requests to establish what would in effect be a ''passive investor exemption.'' The NASD believes that such an exemption would allow persons who are not public investors to receive substantial allocations of new issues, which would be fundamentally at odds with the purposes of the rule. The NASD believes, moreover, that participation by restricted persons in an account might be known or inferred by an NASD member allocating a new issue and, thus, create a temptation for the member to reward that account in the hope of receiving future business. For these reasons, the NASD has declined to adopt a blanket exemption for passive investors.

Early commenters noted that investors generally expect a hedge fund manager to make significant investments in the fund to align the manager's interests with those of the investors; these commenters urged the NASD to raise the *de minimis* threshold to allow such arrangements.[30] However, rather than increase the initially proposed 5% threshold, the NASD in Amendment No. 2 proposed a limited exemption for portfolio managers: a person would not be restricted with respect to a collective investment account for which he or she acted as a portfolio manager.[31]

One commenter argued that this limited exemption for portfolio managers would not further the interests of the proposed rule because a portfolio manager who benefits from the purchase of new issues through an account that he or she manages would have far greater incentive and opportunity to direct future business to an NASD member than the restricted persons who were merely passive investors.[32] In Amendment No. 4, the NASD responded by reinstating portfolio managers as restricted persons in all cases, including with respect to accounts for which they act as portfolio manager, but raising the *de minimis* threshold to 10%. Under this new approach, an account managed by a portfolio manager would be permitted to invest in new issues, provided that the interest of all restricted persons in the account (including the portfolio manager) did not exceed 10%.[33] The NASD observed that this approach comported with earlier recommendations made by three commenters.[34]

Three commenters criticized this new approach and urged the NASD to return to its earlier proposal of a 5% *de minimis* threshold and deeming the portfolio manager as a non-restricted person with respect to the fund that he or she manages.[35] These commenters again emphasized their view that portfolio managers should be required, as one commenter put it, to ''eat their own cooking.''[36] They also argued that the new approach would put the manager of a collective investment account in competition with investors for ownership of interests in the account because the manager would wish to obtain the entire 10% for himself or herself. Further, the commenters stated that the revised approach would create an incentive for portfolio managers to cash out investors in their funds and manage their own money separately. Finally, the commenters argued that the NASD did not offer any public policy rationale or cite any instances of actual abuse that would support this revision.

In Amendment No. 5, the NASD declined to revise the *de minimis* exemption and the proposed treatment of portfolio managers in the manner suggested by the three commenters. The NASD believes that giving portfolio managers unrestricted access to new issues—if only through the funds that they manage—is inconsistent with the purposes of the proposed rule. The NASD stated that portfolio managers are in a position to direct substantial business to members and accordingly may seek to use this influence to obtain access to IPOs. The Interpretation,

[26] *See* NASD IM–2110–1(b)(5).

[27] *See* Mayor Day 2; MFA; Washington 2.

[28] *See* Cadwalader; MSDW; Ropes; Schulte; Sidley.

[29] *See* Cadwalader 2; Fried; Mayor; Ropes.

[30] *See* Cadwalader; Katten; Northern Trust; Schulte; Sullivan; Washington; Willkie.

[31] In any event, a portfolio manager would still be prohibited from purchasing new issues through a personal account.

[32] *See* Mayor 2.

[33] In Amendment No. 2, the NASD also proposed a requirement that no restricted person who had an interest in a collective investment account could receive through that account more than 100 shares of any new issue on a notional *pro rata* basis. This limit was designed to reduce the incentive for self-dealing and the appearance that restricted persons were receiving shares at the expense of public investors. However, in Amendment No. 4, the NASD eliminated the 100-share limitation to simplify application of the proposed rule. Thus, member firms would not need to track the interest of the largest restricted person or to perform calculations to determine on an offering-by-offering basis whether that person would receive more than 100 shares on a notional *pro rata* basis.

[34] *See* Katten; Rosenman; Schulte.

[35] *See* MFA 2; Sidley 2; Willkie 3; Willkie 4.

[36] Sidley 2.

recognizing this potential conflict, seeks to limit purchases of IPOs by these persons by treating them as ''conditionally restricted.'' Proposed NASD Rule 2790, in turn, seeks to limit IPO purchases by portfolio managers by treating them as restricted persons, subject to the 10% *de minimis* exemption. Furthermore, the NASD does not believe that the proposed rule would cause portfolio managers to cash out other investors in their funds and to manage their own money separately. The NASD expects that the fees received by portfolio managers for managing money far exceed the profits that they receive from greater participation in IPOs.

Finally, two commenters [37] asked whether the establishment of the *de minimis* exemption would eliminate carve-outs, which are contemplated by the Interpretation.[38] Such carve-out procedures allow a manager of an account who wishes to purchase IPOs for such account to segregate the interests of restricted persons from non-restricted persons. The NASD responded that carve-outs would continue to be available. Therefore, a collective investment account in which restricted persons held an interest of 10% or greater could continue to invest in new issues, provided that such restricted persons received no more than 10% of the notional *pro rata* proceeds of the new issue. Therefore, the NASD believes that the proposed rule would not prevent portfolio managers from continuing to pool their money and sharing the same investment risks with respect to every type of asset—except new issues.

In administering the procedures in the Interpretation, the NASD has recognized that accounts may employ a variety of methods to carve out the interests of restricted persons and that specifying a particular method could exclude other equally effective methods. The NASD has concluded, therefore, that the proposed rule should not prescribe a particular manner for carving out the interests of restricted persons. However, in Amendment No. 5 the NASD represented that it intends to offer detailed guidance concerning the use of carve-out accounts in a Notice to Members to be published after approval of the proposed rule change.

5. Preconditions for Sale

Under the proposed rule, a member would not be permitted to sell a new issue to an account until the member had met the rule's preconditions for sale. Paragraph (b) of the proposed rule would require a member to obtain a representation from the account holder(s), or a person authorized to represent the beneficial owner(s) of the account, that the account is eligible to purchase new issues in compliance with the rule. If an interest in the account were held by a bank, foreign bank, broker-dealer, investment adviser, or other conduit, the member would be required to obtain from that conduit a representation that all purchases of new issues would be in compliance with the rule.[39] Paragraph (b) also would provide that a member may not rely on a representation that it believes, or has reason to believe, is inaccurate. Furthermore, the member would be required to retain a copy of all records and information relating to whether an account is eligible to purchase new issues for at least three years following the member's last sale of a new issue to that account. Finally, paragraph (b) would require the member to obtain these representations within the 12 months prior to a sale of new issues to the account.[40]

Several commenters had reservations about the proposed preconditions for sale provisions.[41] One of these commenters believed that these provisions would impose significant and unnecessary administrative burdens on members, especially those that distribute shares to a large number of retail customers.[42] Another commenter feared that these provisions would require an annual mailing to all customers who might be interested in purchasing new issues and would prohibit the use of electronic communications.[43] These two commenters stated that firms should be permitted to develop their own methods to verify the status of a customer, including the use of oral representations, so long as such representations are documented internally. A third commenter urged that NASD members be permitted to continue to qualify accounts orally and to maintain records of these oral representations.[44] Finally, various commenters suggested lengthening the verification period or allowing members to rely on ''negative consents.''[45]

In Amendment No. 5, the NASD reiterated that the initial verification of a person's status under the proposed rule must be a positive affirmation of non-restricted status, but that it intends to permit annual verification of a person's status to be conducted though the use of negative consents. The NASD noted that the Commission's new books and records rules allow a firm to furnish a customer with account information and ask that he or she verify that the information is correct. The NASD believes, therefore, that similar disclosure, confirming that an person is not a restricted person, would be appropriate. The NASD also would allow the use of electronic communications for eligible customers but, consistent with the Rule 17a-3 under the Act,[46] a member would not be permitted to verify customer account information orally.

Certain commenters questioned how the documentation requirement would apply given the possibility that a customer's status or percentage of ownership in an account may change over the course of a year.[47] One commenter stated that a member should not be in violation of the proposed rule if the member were unaware that an account is beneficially owned by a restricted person due to false information provided by the customer.[48] In response, the NASD revised paragraph (b) expressly to provide that a member may rely upon the information it receives from a customer unless it believes, or has reason to believe, that the information is inaccurate. Another commenter recommended that the proposed rule expressly state that a member may rely upon representations made by a person who the member ''reasonably believes'' is authorized to represent the beneficial owners of the account.[49] In Amendment

[37] *See* MFA 2; MFA 3; Sidley.

[38] *See* NASD IM–2110–1(g).

[39] One commenter expressed concern that the proposed rule, in the form presented in Amendment No. 2, would not adequately address sales to intermediaries such as domestic banks, foreign banks, broker-dealers, investment advisers, and other conduits that purchase new issues on behalf of their customers. *See* Sullivan 2. In response to these concerns, the NASD expanded the preconditions for sale provisions to address such conduits, as described above.

[40] The existing preconditions for sale provisions are scattered throughout the Interpretation. *See* NASD IM–2110–1(b)(2), (b)(5), (b)(7), and (f). The proposed rule change would revise and consolidate these various provisions into a single paragraph of the new rule.

[41] *See* Cadwalader; MSDW; Schwab; SIA.

[42] *See* Schwab.

[43] *See* MSDW.

[44] *See* SIA.

[45] Under a negative consent procedure, a broker-dealer member would send notices to its customers asking if there had been a change in their restricted status, and the broker-dealer would be permitted to rely on its existing information regarding a particular customer unless the customer affirmatively replied that his or her status had changed. *See* MSDW; MSDW 2; SIA; Sullivan.

[46] 17 CFR 240.17a-3.

[47] *See* Cadwalader; NASAA (suggesting a verification period significantly shorter than one year to reflect possible changes in ownership that could occur within that period); Ropes.

[48] *See* Schwab.

[49] *See* Fried.

No. 5, the NASD stated that members should use an appropriate level of diligence to determine whether an individual is authorized to represent the beneficial owners of the accounts, and that it is unnecessary to include the language suggested by this commenter.

Several commenters sought guidance on what type of information a member would be required to review to ascertain whether an account is beneficially owned by restricted persons, especially in the context of a fund-of-funds.[50] For example, one commenter urged the NASD to eliminate the need to ''look through'' multiple layers of investors to determine whether restricted persons are somewhere in the chain of ownership.[51] In Amendment No. 5, the NASD explained that a person authorized to represent the beneficial owners of the master fund (*i.e.*, the fund that purchases the new issues from the member directly) is required to represent that the fund is able to purchase new issues. The NASD expects that any such person, in making such representation, would ascertain the status of investors in the feeder funds (*i.e.*, funds that invest in the master fund). If the representative of the master fund is unable to ascertain the status of investors in a feeder fund, the master fund must deem such feeder fund to be restricted and ensure that the profits from new issues are not allocated to that fund (or consider whether any other exemption, such as the *de minimis* exemption, might apply to that feeder fund). Also in Amendment No. 5, the NASD stated that it would address this matter further in a Notice to Members following Commission approval of the proposed rule change.

B. Other Aspects of NASD Rule 2790

1. Securities Excluded From the Rule

a. *Securities Issued as Part of a Secondary Offering.* The proposed rule would not apply to secondary offerings, although the proposed rule does not contain a specific exemption for them. The exemption is implicit in the definition of ''new issue,'' which includes any *initial* public offering of an equity security.

The NASD initially proposed to subject a secondary offering to the new rule if it were ''hot'' (*i.e.*, it traded at a 5% premium). Allowing secondary issues to be considered hot issues would represent a reversal of the position taken by the NASD under the Interpretation,[52] and several commenters criticized this aspect of the original proposal.[53] These commenters questioned why the proposed rule should apply to secondary offerings if the NASD believed that most secondary offerings do not trade at a premium.[54] They also stated that, without a clear exemption for secondary issues, member firms generally would bar allocations of all secondary offerings to restricted persons out of concern that they could become hot.

With the decision to apply the proposed rule to new issues rather than hot issues, secondary offerings would not be subject to the rule. The NASD continues to believe that secondary offerings rarely if ever trade at a significant premium to the public offering price and agrees with the commenters that the negative consequences of applying the rule to secondary offerings would outweigh any benefits.

b. *Debt Securities.* Another significant difference between the proposed rule and the Interpretation is the treatment of debt securities. Originally, the Interpretation applied to equity and debt securities. However, as part of the 1998 amendments, the NASD exempted from the Interpretation most types of investment-grade debt and investment-grade asset-backed securities from the definition of ''hot issue.'' [55] The NASD is now going one step further and proposing to eliminate application of the rule to all debt securities, including those that are not investment-grade.[56]

One commenter recommended that the definition of ''new issue'' exclude offerings of securities of closed-end funds that invest solely in debt securities.[57] The commenter reasoned that, if offerings of debt securities were excluded, offerings of funds that invest solely in debt securities also should be excluded. In Amendment No. 4, the NASD stated that offerings of such funds would be exempt from the proposed rule pursuant to the exemption for offerings of securities of investment companies registered under the Investment Company Act of 1940.[58]

c. *Other Securities Exempt From NASD Rule 2790.* Paragraph (i)(10)(A) of the proposed rule would exclude from the definition of ''new issue'' offerings of securities that are restricted under various provisions of the Securities Act of 1933 [59] and the Securities Exchange Act of 1934.[60] Paragraph (i)(10)(B) would exclude offerings of ''exempt securities,'' as defined in Section 3(a)(12) of the Securities Exchange Act of 1934.[61]

Paragraph (i)(10)(C) would exclude from the definition of ''new issue'' offerings of securities of a commodity pool operated by a commodity pool operator, as defined in Section 1a(5) of the Commodity Exchange Act.[62] The original proposal did not contain such an exemption. Two commenters argued that offerings of securities of commodity pools should be excluded from the definition of ''new issue.''[63] The commenters noted that commodity pool securities, whether offered publicly or privately, generally do not trade in the secondary market, and that investors may redeem their interests from the issuer at net asset value at selected intervals, much like open-end mutual funds, which are exempt from the proposed rule. In addition, they stated that the offering process is similar to that for registered closed-end funds in that the commodity pool operator is generally seeking as large an infusion of capital as possible and that such offerings are rarely oversubscribed. In Amendment No. 3, the NASD agreed and added a new paragraph (C) to paragraph (i)(10) of the proposed rule.

Three commenters recommended that the term ''new issue'' not include rights offerings to existing shareholders, exchange offers, and offerings made pursuant to a merger or acquisition.[64]

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[50] *See* Cadwalader; Katten; Rosenman; Schulte; Sullivan.

[51] *See* Cadwalader.

[52] In 1998, the NASD amended the Interpretation to exempt secondary offerings of actively traded securities, based on its findings that few secondary offerings traded at a premium, and where there was a premium, it was generally very small. *See* Securities Exchange Act Release No. 40001 (May 18, 1998), 63 FR 28535, 28537 (May 26, 1998) (approving SR–NASD–97–95) (''1998 amendments'').

[53] *See* MSDW; Schwab; SIA; Sidley; Sullivan.

[54] *See*, *e.g.*, Schwab (''the remote possibility that an issue could trade at a premium would cause many member firms to prohibit allocations of any secondary issues to restricted customer accounts. As a practical matter, the Rule would exclude broad categories of investors from participating in secondary offerings. The negative consequences to both issuers and customers of such a broad exclusion outweigh any remote benefits associated with secondary offerings in the scope of the Rule'').

[55] *See* 1998 amendments, 63 FR at 28537.

[56] In Amendment No. 5, the NASD acknowledged that, under certain circumstances, the trading characteristics of junk debt more closely resemble that of the issuer's equity securities rather than its debt securities. However, the NASD believes that, for purposes of the new rule, the point in time at which the pricing and trading characteristics of a security are relevant are at the time of offering. The NASD continues to believe that, at the time of an offering, even junk debt will trade based primarily on interest rates and the creditworthiness of the issuer and, therefore, that the junk debt should not be treated in the same manner as equity securities under the proposed rule.

[57] *See* Schwab.

[58] *See infra* notes 70–72 and accompanying text.

[59] 15 U.S.C. 77a *et seq.*

[60] 15 U.S.C. 78a *et seq.*

[61] 15 U.S.C. 78c(a)(12).

[62] 7 U.S.C. 1a(5).

[63] *See* MFA; Cadwalader.

[64] *See* MSDW; SIA; Sullivan.

The NASD agreed, and this revision is reflected in paragraph (i)(10)(D) of the proposed rule.

Paragraph (i)(10)(E) would exclude offerings of investment-grade asset-backed securities from the definition of ''new issue.'' This provision would preserve an exemption in the Interpretation for financing-instrument-backed securities that are rated investment-grade.[65] In Amendment No. 5, the NASD explained that a separate exclusion for asset-backed securities was necessary even though the proposed rule already contains an exclusion for debt securities; certain types of asset-based securities may be considered equity rather than debt and therefore might not be covered by the proposed rule's implicit exemption for debt securities.

Paragraph (i)(10)(F) would exclude offerings of convertible securities. Under the literal terms of the Interpretation, debt securities that are convertible into common or preferred stock may be hot issues.[66] The NASD staff has exercised its exemptive authority[67] to exclude many convertible securities from the Interpretation. The NASD has now proposed to codify this exemption in the proposed rule.[68]

Paragraph (i)(10)(G) would exclude offerings of preferred securities. The NASD has stated that, in connection with the 1998 amendments, it considered—but deferred—an exemption for preferred securities.[69] However, the NASD is now proposing to exempt preferred securities because it believes, on balance, that these securities exhibit pricing and trading behavior more closely resembling that of debt rather than equity securities and, thus, should not be considered ''new issues.''

Paragraph (i)(10)(H) would exclude offerings of securities of an investment company registered under the Investment Company Act of 1940.[70] The NASD initially proposed to exclude only the securities of closed-end investment companies, as defined in Section 5(a)(2) of the Investment Company Act.[71] The NASD believes that these securities typically commence trading at the public offering price with little potential for trading at a premium because the fund's assets at the time of the offering are the capital it has previously raised. The NASD concluded, therefore, that deeming the securities of closed-end funds to be new issues would do little to further the purposes of the proposed rule. One commenter agreed with the NASD's decision to exempt offerings of securities of closed-end investment companies but questioned why the exemption did not extend to any type of investment company registered under the Investment Company Act of 1940.[72] The NASD agreed and revised paragraph (i)(10)(H) accordingly.

Paragraph (i)(10)(I) would exclude an offering of securities (in ordinary share form or American Depository Receipts (''ADRs'') registered on Form F–6) that have a pre-existing market outside the United States. One commenter suggested that the proposed rule should exclude an offering of securities of which the initial public offering price is based primarily on ''exogenous or market factors (such as, a rating by a nationally recognized statistical rating organization or the market price for a related security).''[73] The NASD believes that this suggestion is too broad. However, in the case of an ADR, the NASD agrees that application of the proposed rule is not necessary because the price of the offering will be constrained by the price of the shares in the underlying foreign market. Therefore, in Amendment No. 5, the NASD added new paragraph (i)(10)(I) to the proposed rule. The NASD notes that this exemption would apply only to initial offerings of ADRs that are not part of a global initial public offering.

d. *Miscellaneous Issues Regarding Scope of Term ''New Issue''.* One commenter[74] recommended that the definition of ''new issue'' expressly exempt offerings of securities made pursuant to Regulation S[75] under the Securities Act of 1933. The NASD does not believe that this commenter sufficiently demonstrated that this exemption would be consistent with the purposes of the proposed rule and has determined not to adopt it.

In Amendment No. 2, the definition of ''new issue'' proposed by the NASD included ''other securities distributions of any kind whatsoever, including securities that are specifically directed by the issuer on a non-underwritten basis.'' Several commenters noted that this language was surplusage and potentially misleading.[76] The NASD agreed and deleted this language from the definition.

One commenter recommended that the definition of ''new issue'' exclude any offering of securities for which, at the time of the offering, an organized trading market is not expected to develop.[77] In Amendment No. 5, the NASD responded that it was not necessary to draft a general exemption in the rule, and that offerings of this type might be candidates for specific exemptions granted by the NASD staff pursuant to their authority under paragraph (h) of the proposed rule.[78]

The same commenter[79] argued that the term ''initial public offering'' used in the definition of ''new issue'' should be construed to exclude any offering of securities made on a continuous basis (such as under a ''shelf'' registration statement pursuant to Rule 415 of Regulation C under the Securities Act of 1933[80]). In Amendment No. 5, the NASD agreed that such an offering would not be part of an ''initial public offering'' unless it were the first registered offering of the company's stock.

2. Restricted Persons

Paragraph (a)(1) of proposed NASD Rule 2790 would stipulate that a member or associated person thereof may not sell a new issue to any account in which a restricted person has a beneficial interest, unless such sale qualifies for an enumerated exemption. The scope of the term ''restricted person'' is discussed below.

a. *Broker-Dealers and Their Personnel.* Paragraph (i)(11)(A) of the proposed rule would define ''restricted person'' to include NASD members and other broker-dealers. Paragraph (i)(11)(B)(i) would extend the definition of ''restricted person'' to include any officer, director, general partner, associated person, or employee of a member or any other broker-dealer. Paragraph (i)(10)(B)(ii) would provide that agents of a broker-dealer are not considered restricted persons unless they are engaged in the investment banking or securities business.

[65] *See* NASD IM–2110–1(*l*)(1).

[66] *See id.*

[67] *See* NASD IM–2110–1(a)(5).

[68] One commenter recommended that the proposed rule not apply to debt securities that are convertible into ''actively traded'' equity securities. *See* MSDW. The NASD believes that, in view of the decision to exclude all secondary offerings, all convertible securities, not just those that are convertible into ''actively traded'' securities, should be excluded.

[69] *See* 1998 amendments, 63 FR at 28537.

[70] 15 U.S.C. 80a–1 *et seq.*

[71] 15 U.S.C. 80a–5(a)(2).

[72] *See* Cadwalader 2.

[73] Sidley 2.

[74] *See* Sullivan 2.

[75] 17 CFR 230.901 *et seq.*

[76] *See* MSDW 2 (arguing that non-underwritten securities should not be covered by the proposed rule since, by definition, NASD members would not be involved in the offering); Sullivan 2 (noting that this language would have the effect of including secondary offerings in the rule, even though the NASD's stated intent was to exempt secondary offerings); Willkie 2.

[77] *See* Sidley 2.

[78] *But see infra* note and accompanying text.

[79] *See id.*

[80] 17 CFR 230.415.

b. *Limited Business Broker-Dealers.* Paragraph (i)(11)(B) specifically would exclude from the definition of ''restricted person'' the personnel and agents of a ''limited business broker-dealer.'' Paragraph (i)(8) would define ''limited business broker-dealer'' as a broker-dealer whose authorization to engage in the securities business is limited solely to the purchase and sale of investment company/variable contracts securities and direct participation program securities. These provisions of the proposed rule would preserve an exemption for associated persons of a limited business broker-dealer under the Interpretation.[81] The NASD has emphasized, however, that this exemption would apply *only* to persons associated with such a limited business broker-dealer, not to the limited business broker-dealer itself.

Several commenters argued that the proposed definition of ''limited business broker-dealer'' is too narrow and should be expanded to include broker-dealers that do not have any involvement in the capital formation or equity underwriting business.[82] The NASD has determined, however, not to broaden the scope of this exemption. The NASD believes that even broker-dealers engaged solely in, for example, proprietary trading or merchant banking activities (or the associated persons of such firms) might enter into reciprocal arrangements with other members that could create improprieties that the proposed rule seeks to address. In addition, the NASD believes that a rule requiring members to determine whether a person is engaged in reciprocal arrangements with a broker-dealer would be difficult to administer and enforce and would eliminate the certainty sought by the proposed rule.

One commenter, the Chicago Board Options Exchange (''CBOE''), urged the NASD to revise the proposal to treat CBOE market makers and floor brokers as limited business broker-dealers. CBOE stated that these exchange members should not be considered ''industry insiders'' as they are not in a position to take advantage of their position to participate in IPOs for their own accounts at the expense of public customers. CBOE maintained, therefore, that treating these CBOE members as restricted persons would be unnecessary to accomplish the stated purposes of the rule. CBOE also argued that the proposal would put CBOE members at a competitive disadvantage relative to members of the futures exchanges: Although many futures products are economically similar to options, futures exchange members who trade them would not be restricted persons under the new rule. CBOE suggested alternate rule text that would allow a CBOE member to purchase new issues unless the underwriter of the IPO were an NASD member that executed stock transactions on behalf of the CBOE member.

In response to CBOE's comment, the NASD stated in Amendment No. 2 that the proposed rule should apply generally to all broker-dealers and their associated persons. The NASD believes that a rule requiring analysis of the activities of a particular broker-dealer would be more difficult rule to administer and enforce than a rule based on a firm's authorizations. The NASD recognizes that the Interpretation and the proposed rule make an exception for associated persons and owners of a broker-dealer that engages solely in the purchase and sale of investment company/variable contract securities and direct participation program securities. However, the NASD does not believe that the existence of this exemption for ''limited business broker-dealers'' necessitates additional exemptions.

With respect to the competitive issue between CBOE members and members of futures exchanges that trade financial derivatives, the NASD has acknowledged that futures exchange members would not—solely because of their status as such—be restricted persons under the proposed rule. However, the NASD believes that many futures exchange members would be subject to the proposed rule because of changes to the federal securities laws made by the Commodity Futures Modernization Act of 2000 (''CFMA'').[83] A futures exchange member that wishes to trade security futures products must register as a broker-dealer pursuant to Section 15(b)(11) of the Act, as amended by the CFMA.[84] In Amendment No. 5, the NASD clarified that the proposed rule would treat such futures exchange members the same as ''conventional'' broker-dealers.[85]

Finally, one commenter[86] recommended that the proposed rule include a provision that would allow an NASD member, in determining whether a firm is a limited business broker-dealer, to rely on the information contained in that firm's Form BD.[87] In completing the Form BD, a broker-dealer must list all lines of business that account for 1% or more of its annual revenue. In the initial proposal, the NASD stated that a member ''should look to the Form BD as well as any Restrictive Agreement'' to determine the activities of a broker-dealer. Upon further review, the NASD clarified in Amendment No. 3 that a member *may* look to the Form BD as evidence of a firm's status, but *must* inquire further about whether the firm meets the conditions of a limited business broker-dealer.

c. *Finders and Fiduciaries.* Paragraph (i)(11)(C) of the proposed rule would preserve a provision in the Interpretation that treats finders and fiduciaries of the managing underwriter as restricted persons. The NASD believes that finders and fiduciaries are industry insiders and, therefore, should be subject to the new rule. The NASD believes, moreover, that issuers must be prevented from circumventing the underwriting compensation limits of existing NASD Rule 2710 by offering finders or fiduciaries access to a new issue.[88] However, the NASD has proposed to treat finders and fiduciaries as restricted persons only for those offerings for which they are acting in those capacities. The NASD has added that, in the case of a law firm or consulting firm, the restriction would apply only to those persons working on the particular offering.

d. *Portfolio Managers.* The Interpretation prohibits the sale of hot issues ''to any senior officer of a bank, savings and loan institution, insurance company, investment company, investment advisory firm or any other institutional type account.''[89] These persons are restricted because their position allows them the opportunity to direct business to a member firm.

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[81] *See* NASD IM–2110–1(c).

[82] *See* Colish (suggesting that the definition of ''limited business broker-dealer'' also include broker-dealers that engage only in private placements); Fried (arguing that no broker-dealer should be a restricted person without some nexus to equity IPOs); Washington (suggesting that only broker-dealers that engage in an equity securities business should be restricted).

[83] Pub. L. No. 106–554, Appendix E, 114 Stat. 2763. The CFMA removed the prohibition on single-stock futures and set forth a regulatory scheme whereby entities that trade single-stock futures and other security futures products must register with both the Commission (under the Securities Exchange Act) and the Commodity Futures Trading Commission (under the Commodity Exchange Act).

[84] 15 U.S.C. 78o(b)(11).

[85] CBOE also recommended that members of that exchange who lease their seats and who are not engaged in a securities business not be considered restricted persons. In this matter, the NASD agreed and stated in Amendment No. 5 that it would not treat such persons as restricted persons under the new rule.

[86] *See* Fried 2.

[87] 17 CFR 249.501.

[88] NASD Rule 2710 defines the term ''underwriter and related persons'' to include ''financial consultants'' and ''finders.''

[89] NASD IM–2110–1(b)(4).

However, the NASD does not believe that all senior officers and employees of a securities department of one of these entities need be restricted. Therefore, the NASD devised a function-oriented approach that, in its original form, would have treated as a restricted person ''[a]ny employee or other person who supervises, or whose activities directly or indirectly involve or are related to, the buying or selling of securities'' for one of the listed entities.

In response to the original proposal, three commenters stated that they supported the functional approach but believed that the proposed rule language was too broad and could reach persons whose functions were purely ministerial.[90] These commenters suggested that only to persons who have authority to make investment decisions should be restricted. The NASD agreed and revised the proposed rule text accordingly in Amendment No. 2.[91] Accordingly, paragraph (i)(11)(D)(i) of the proposed rule would define a portfolio manager as any person who has authority to buy or sell securities for a bank, savings and loan institution, insurance company, investment company, investment advisor, or collective investment account.

One commenter sought clarification on whether an investment advisor organized as a non-natural person would be deemed a restricted person.[92] This commenter stated that the proposed rule treats certain employees of an investment advisor as restricted persons but is not clear whether the investment advisor itself is a restricted person. In Amendment No. 5, the NASD observed that the definition of ''portfolio manager'' in paragraph (i)(1)(D)(i) encompasses non-natural persons. Thus, an entity organized as an investment advisor that has authority to buy and sell securities for any of the entities enumerated above would be a portfolio manager for the purposes of the proposed rule and, as such, a restricted person.

Another commenter recommended excluding from the definition of ''portfolio manager'' a hedge fund manager of a fund with less than $200 million in assets.[93] The NASD believes that the reasons for treating hedge fund managers as restricted persons are not limited by the size of the assets under management, especially with amounts as significant as those proposed by the commenter. Therefore, the NASD declined to accept this recommendation.

Finally, one commenter requested that the proposed rule include an exemption for persons who, on a volunteer basis, make investment decisions on behalf of a tax-exempt charitable organization.[94] The NASD believes that the purposes of the rule may be implicated by persons who manage such organizations. The NASD, therefore, declined to accept this suggestion.

e. *Owners of Broker-Dealers.* In the view of the NASD, a prohibition on new issue purchases by a broker-dealer could be circumvented if the broker-dealer's owners were permitted to purchase the new issue. Therefore, the NASD has proposed to deem owners of a broker-dealer as restricted persons as well.

Under the original proposal, the term ''restricted person'' included any natural person (or member of the person's immediate family) who owned 10% or more, or contributed 10% or more of the capital, of a broker-dealer. Many of the commenters believed that this restriction was too broad and would be overly burdensome.[95] In Amendment No. 2, the NASD adopted a new approach that bases ownership of a broker-dealer for purposes of the rule on whether the broker-dealer must report the ownership interest on Form BD. The NASD favors this approach because it would not have to create new concepts of ownership for purposes of the rule: The Form BD reporting requirements are well understood by NASD members, who already maintain such information.

One commenter criticized this approach on the grounds that persons who might in fact have very little voting power or beneficial interest in the broker-dealer would be treated as restricted persons, which would not further the purposes of the rule.[96] A person must be reported on Form BD if it holds a designated percentage of ''a class of voting security'' of the reporting broker-dealer. The commenter noted that, depending on the broker-dealer's capital structure, a particular class of voting security might represent only a small portion of the firm's capital. Nevertheless, a person owning 10% or more of that class would be a restricted person under the proposed rule. The commenter recommended that the ownership interests reported in Schedules A and B of Form BD should be multiplied so that only the actual economic interest would be used to determine whether the person is restricted.

The NASD has determined not to accept the commenter's suggestion. In Amendment No. 4, the NASD stated that it seeks to aid members' compliance efforts by eliminating the need to perform calculations in determining ownership interests in a broker-dealer. In its experience, such calculations are often difficult and frequently raise interpretive issues with various ownership structures. The NASD deliberately sought to eliminate that level of complexity by referencing persons listed on Schedules A and B, noting that there are no special codes or identifiers on Schedule B to identify persons with only a small economic interest.

The same commenter also suggested an exemption from the proposed definition of ''restricted person'' for an entity disclosed on Schedule A or B of Form BD that is listed on a foreign exchange. Pursuant to Form BD, a broker-dealer must report entities that have interests at every level of its ownership structure that exceed designated percentages. However, once a public reporting company is reached, no ownership information further up the chain need be given.[97] Only those public reporting companies that are subject to Sections 12 or 15(d) of the Act[98] may avail themselves of this exclusion. The NASD has proposed to follow the Form BD in this regard; thus, a foreign entity with an ownership interest in a broker-dealer would not be a restricted person if that foreign entity were subject to Sections 12 or 15(d) of the Act.[99]

The general restriction on owners of a broker-dealer would not extend to owners of a limited business broker-dealer. One commenter recommended that, because *associated persons* of a limited business broker-dealer were not restricted, the *owners* of a limited business broker-dealer also should not be restricted.[100] The NASD agreed and revised the proposed rule text accordingly.

f. *Affiliates of Broker-Dealers.* The proposed rule would treat as restricted persons not only owners of a broker-dealer, but also affiliates of the broker-

[90] *See* Ropes; Schwab; Testa.

[91] However, one commenter suggested that a portfolio manager should be restricted based on whether this person ''exercises'' authority to make investment decisions, not whether such person is ''authorized'' to make investment decisions. See Fried. The NASD believes that the alternative standard proposed by this commenter is too narrow and has not made this change.

[92] *See* Katten.

[93] *See* Washington.

[94] *See* Schwab.

[95] *See* Colish; Orrick; SIA; Sidley; Willkie.

[96] *See* Fried 2.

[97] *See* Form BD, Schedule B, Instruction 3.

[98] 15 U.S.C. 78*l* and 78o.

[99] A foreign entity also might be eligible to purchase new issues pursuant to the proposed rule's exemption for publicly traded entities. *See infra* notes—and accompanying text.

[100] *See* Willkie 2.

dealer. While such affiliates would not specifically be included in the definition of ''restricted person,'' paragraph (a)(1) of the proposed rule would provide that a member may not sell a new issue to any account in which a restricted person (such as an owner of a broker-dealer) ''has a beneficial interest.'' The NASD has stated that an owner of a broker-dealer—whom the proposed rule would explicitly deem a restricted person ''would be viewed as having a beneficial interest in an account held by a subsidiary (*i.e.*, a sister company of the broker-dealer).

Several commenters stated that applying the proposed rule to affiliates has no policy justification.[101] These commenters were concerned, in part, that many financial services firms, which currently may invest in hot issues under the Interpretation, would be prohibited from purchasing new issues under the proposed rule simply by the accident of having become affiliated with an NASD member firm in the wake of the Gramm-Leach-Bliley Act,[102] which repealed many restrictions on affiliation among banks, insurance companies, and securities firms.

The NASD believes, nevertheless, that broker-dealer affiliates should be restricted persons. The NASD contends that, if the rule failed to restrict an account in which a restricted person had a beneficial interest, the restricted person could evade the restriction by directing a subsidiary to purchase the new issue instead. However, to offer some relief to entities that could be affected by the restriction on broker-dealer affiliates, the NASD is establishing an exemption for any such affiliate (except another broker-dealer) that is publicly traded.[103]

g. *Family Members.* The proposed rule would restrict various persons based on their functions in the financial services industry. In addition, paragraph (i)(11)(D)(ii) would restrict certain other persons based on their relationship with persons who work in the financial services industry. The NASD believes that these collateral restrictions are necessary to prevent a ''functionally'' restricted person from circumventing the rule by purchasing new issues through the account of an immediate family member. Paragraph (i)(5) would define ''immediate family member'' to include a person's parents, mother-in-law or father-in-law, spouse, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, and children, and any other individual to whom the person provides ''material support.'' This provision is based on a provision in the Interpretation [104] but supplements the existing provision by adding a definition of ''material support'' in paragraph (i)(9): the direct or indirect provision of more than 25% of a person's income in the prior calendar year. Paragraph (i)(9) of the new rule would deem members of the immediate family living in the same household to be providing each other with material support.

The NASD originally proposed that ''material support'' would mean providing 10% of another's income. One commenter supported the addition of a bright-line definition of ''material support'' but recommended that the threshold be raised to 25%, as measured in the prior calendar year.[105] The NASD agreed and revised the proposed rule text accordingly. Another commenter argued that the definition of ''material support'' was over-inclusive, as it was not necessarily based on the economic reality of the situation.[106] The NASD believes, however, that the ''material support'' provisions as proposed are a reasonable means to prevent evasion of the rule, and that, without clear and straightforward standards for collateral restrictions on family members, the rule would become difficult to administer. The NASD stated in Amendment No. 2 that it will not evaluate ''material support'' issues on a case-by-case basis.

In addition, the proposed rule would modify the treatment of sales to members of the immediate family of an officer, director, general partner, employee, or agent of a member or other broker-dealer (collectively referred to as ''associated persons''). Under the Interpretation, members of the immediate family of an associated person may not purchase hot issues from the firm employing the associated person.[107] The proposed rule would expand this prohibition to include affiliates of the firm employing the associated person. The NASD believes that this change is necessary to clarify that immediate family members of associated persons may use neither traditional nor online distribution channels to circumvent the prohibitions on sales to them.

Finally, two commenters pointed out that the original proposal appeared to have instances of faulty drafting where family members should have been exempt from the proposed rule but were not.[108] The NASD agreed with these comments and revised the proposed rule text accordingly.

h. *Investment Clubs and Family Investment Vehicles.* Two commenters urged that the proposed rule not prohibit their investment clubs from purchasing IPOs.[109] In response, the NASD in Amendment No. 4 revised the definition of ''collective investment account'' in paragraph (i)(2) of the proposed rule to exclude ''investment clubs'' (as defined in paragraph (i)(6)) and ''family investment vehicles'' (as defined in paragraph (i)(4)). Therefore, a person who has authority to buy or sell securities on behalf of an investment club or a family investment vehicle would not be a portfolio manager under paragraph (i)(10)(D)(i) and, therefore, not be a restricted person on that basis. In addition, even if an investment club or family investment vehicle included persons who were otherwise restricted (*e.g.*, because they were associated persons of a broker-dealer), such entity could still purchase new issues if it qualified for the *de minimis* exemption of paragraph (c)(4).[110]

Finally, one commenter recommended that the definition of ''family investment vehicle'' be expanded to include long-term family employees.[111] In Amendment No. 5, the NASD stated that the commenter had not presented sufficient reason to exclude such persons and declined to make this change. Moreover, the NASD believes that permitting non-family persons into the exemption for family investment vehicles could open the exemption to abuse.

i. *Joint Back Office Broker-Dealers.* Certain hedge funds, or subsidiaries thereof, have opted to become registered broker-dealers. These entities are generally known as ''joint back office broker-dealers'' (''JBOs'') because they share a back office with another registered broker-dealer. Under the Interpretation, hedge funds that are (or are affiliated with) JBOs are not, solely on such basis, precluded from

[101] *See* MSDW; Orrick; Rosenman; SIA; Sullivan; Willkie.

[102] Pub. L. No. 106–102, 113 Stat. 1338 (1999).

[103] *See* infra notes 127–136 and accompanying text.

[104] *See* NASD IM–2110–1(*l*)(2).

[105] *See* Schwab.

[106] *See* Fried 2 (hypothesizing that two cousins sharing an apartment would be deemed to materially support each other under the proposed rule, even though they might not in fact be materially supporting each other).

[107] *See* NASD IM–2110–1(b)(2)(B).

[108] *See* Sullivan; Testa.

[109] *See* Fu; Smith.

[110] One commenter stated that an earlier version of the proposed rule appeared to inadvertently exclude investment clubs and family partnerships from the *de minimis* exemption. *See* Sullivan. The NASD has clarified that such entities may qualify for the *de minimis* exemption.

[111] *See* Cadwalader 2.

purchasing hot issues on behalf of their investors. The special provisions for JBOs arise from an exemption granted by the NASD staff responding to certain provisions of the 1998 amendments to the Interpretation. Those provisions had the effect of precluding hedge funds registered as JBOs (or with JBO subsidiaries) from purchasing hot issues even if investors in the funds were not restricted. The NASD staff determined that sales of hot issues to a hedge fund should be based on the status of the beneficial owners of the fund, not simply the fund's status as a broker-dealer.[112] The proposed rule seeks to codify this exemption.

The NASD continues to believe that the election by an investment fund to become (or be affiliated with) a JBO should not by itself preclude the purchase of new issues by investors in that fund who are not otherwise restricted persons. The original proposal provided that a collective investment account—including a JBO—could avail itself of the *de minimis* exemption and included a definition of ''joint back office broker-dealer.'' In Amendment No. 2, the NASD removed any explicit references to JBOs. The NASD stated that, as a result of its revisions to the definition of ''beneficial interest'' and ''restricted person,'' the conditions that gave rise to the need for the JBO exemption had been removed. By clarifying that ''beneficial ownership'' includes a financial interest, such as the right to share in gains or losses, the NASD believed it had clarified that a JBO's legal ownership of securities would not constitute a ''beneficial interest'' for purposes of the proposed rule. The NASD, therefore, concluded that a specific exemption for JBOs was no longer necessary.

In Amendment No. 4, the NASD restored a specific reference to JBOs in the *de minimis* exemption, now relocated to paragraph (c)(4) of the proposed rule, as well as a definition of ''joint back office broker-dealer'' in then paragraph (i)(7). Two commenters noted problems with the definition.[113] Under the NASD's final proposal, the NASD devised an alternative manner of exempting purchases of new issues by JBOs. New paragraph (a)(4) would provide an exemption for ''purchases by a broker/dealer (or owner of a broker/dealer), organized as a investment partnership, of a new issue at the public offering price, provided such purchases are credited to the capital accounts of its partners in accordance with paragraph (c)(4).'' This exemption would allow an investment partnership (*e.g.*, a hedge fund) that registers as a broker-dealer or that has a broker-dealer subsidiary to purchase new issues on the same terms as other investment partnerships. This approach is consistent with the relief granted in the original exemptive letter. Under Amendment No. 5, a hedge fund that registers as a broker-dealer or that has a broker-dealer subsidiary could purchase new issues so long as the beneficial interests of restricted persons do not exceed in the aggregate 10% of the fund. Accounts that are beneficially owned by restricted persons in excess of the 10% threshold may use carve-out procedures to prevent the restricted persons from receiving more than 10% of the notional *pro rata* proceeds of a new issue.

One commenter argued that an entity that is a non-natural person should be disregarded for the purposes of determining who holds the beneficial interest in an account, and that the rule should look only to natural persons who may hold beneficial interests in that account.[114] This commenter concluded, therefore, that there is no need for a specific exemption for JBOs. In Amendment No. 5, the NASD responded that the commenter was correct that, in determining whether a person is a restricted person, one should ''look through'' to the persons who have the actual beneficial interests in the account's gains and losses. If one can look through until each of the natural persons is reached and, along the way, encounters no beneficial owners who are restricted persons, the account may purchase new issues. However, if the process of looking through reveals a restricted person identified in paragraph (i)(11) of the proposed rule—be it a natural person or a legal person—then the account may be restricted. The next step in the analysis, according to the NASD, is to determine whether the account qualifies for an exemption under paragraph (c) of the rule. For this reason, the NASD provided an exemption for JBOs: In the absence of an exemption, a JBO would be restricted even if it were beneficially owned entirely by non-restricted persons.

The NASD has stated that the exemption for JBOs would not extend to associated persons of a JBO. Three commenters argued that associated persons of a JBO should not, solely by virtue of their association with the JBO, be restricted persons.[115] The NASD explained in Amendment No. 4 that election to become a JBO bestows certain benefits on the investment account, but also imposes certain obligations, including restrictions on the ability of associated persons to purchase new issues. The NASD further explained in Amendment No. 5 that the act of registering a collective investment account as a JBO should not taint the *investors,* who otherwise might not be restricted persons. However, the NASD does not believe that this necessitates excluding *associated persons* of the JBO from the definition of ''restricted person.''

3. General Prohibitions

Paragraph (a)(1) of the proposed rule sets forth the basic prohibition that a member (or an associated person thereof) may not sell a new issue to an account in which a restricted person has a beneficial interest, except as otherwise permitted under the rule. Paragraph (a)(2) would provide that a member (or associated person thereof) may not purchase a new issue in any account in which such member or associated person has a beneficial interest, except as otherwise permitted under the rule. Paragraph (a)(3) would provide that a member may not continue to hold new issues acquired as an underwriter, selling group member, or otherwise, except as otherwise permitted under the rule.

One commenter stated that these provisions could be read to prohibit accommodation sales (*i.e.*, sales to another broker-dealer at the public offering price to enable that broker-dealer's customer to purchase the new issue at the public offering price) as well as purchases by and among members of the selling group while engaged in the distribution of a new issue.[116] The NASD agreed that neither of these outcomes was intended and, in Amendment No. 3, added a new paragraph (a)(4) to the proposed rule to address these concerns. Paragraph (a)(4)(A) would allow sales or purchases from one member of the selling group [117] to another member that are incidental to the distribution of a new issue to a non-restricted person at the public offering price. Paragraph (a)(4)(B) would allow sales or purchases by a broker-dealer of a new issue at the public offering price as an

[112] *See* letter from Gary Goldsholle, NASD, to David Katz, Sidley & Austin, dated January 20, 1999.

[113] *See* Sidley 2; Willkie 3.

[114] *See* Sidley 2.

[115] *See* Rosenman; Sidley 2; Willkie 3.

[116] *See* SIA.

[117] The term ''selling group'' is defined in existing NASD Rule 0120(p). In Amendment No. 4, the NASD replaced the term ''syndicate'' with the term ''selling group.'' The NASD elected to use the more expansive term ''selling group'' because it did not believe that whether a broker-dealer has made a financial commitment to purchase securities in an IPO is relevant for purposes of the rule.

accommodation to a non-restricted person customer of the broker-dealer.

4. General Exemptions

Paragraph (c) states that the proposed rule's general prohibitions would not apply to sales to or purchases from several classes of persons, whether directly or through accounts in which such persons have a beneficial interest.[118] These classes of person are described below.

a. *Investment Companies.* Paragraph (c)(1) of the proposed rule states that sales of new issues to, or purchases by, an investment company registered under the Investment Company Act of 1940 [119] would not be subject to the rule. This provision would preserve an existing exemption in the Interpretation.[120]

b. *Common Trust Funds and Insurance Companies.* Paragraphs (c)(2) and (c)(3) would provide exemptions for sales of new issues to, or purchases by, certain trust funds and insurance company accounts, respectively. To qualify for these exemptions, a trust fund would have to have investments from 1,000 or more accounts, and an insurance account would have to be funded by premiums from 1,000 or more policyholders (or, if a general account, the insurance company would have to have 1,000 or more policyholders).[121] In addition, the fund or insurance account may not limit its participation principally to restricted persons.[122]

Under the original proposal, the exemption for general, separate, or investment accounts of insurance companies would apply only if the account ''has investments from'' 1,000 or more policyholders. One commenter recommended that the proposed rule use the term ''funded by'' policyholders instead of ''has investments from'' policyholders; an insurance company general account generally is owned by the insurance company itself, so the policyholders do not technically invest in or fund the account.[123] The NASD agreed and in Amendment No. 5 revised the proposed rule text accordingly.

One commenter suggested that the NASD delete the proposed requirement that an insurance company account be funded by premiums from 1,000 or more policyholders, reasoning that an account of any size would not pose a problem under the new rule so long as the policyholders were not, principally, restricted persons.[124] In Amendment No. 5, the NASD stated its intent to retain this numerical threshold because it provides further assurance that new issues purchased by an insurance company account are not targeted for restricted persons. The NASD added that, if an insurance company separate account has only a few policyholders (as suggested in the commenter's hypothetical), it would be appropriate for the insurance company to ascertain whether each of the individual policy holders was a restricted person.

The same commenter also recommended that the new rule specifically confirm that the insurance company account exemption is not limited to life insurance companies, but applies ''across all industries.'' [125] In Amendment No. 5, the NASD stated that paragraph (c)(3) of the proposed rule would apply to all types of insurance companies and that amending the exemption to apply ''across all industries'' could create unintended loopholes.

One commenter recommended that the proposed rule include a general exemption for mutual banks, in the same way that it would exempt mutual insurance companies.[126] In Amendment No. 5, the NASD noted that an exemption similar to the one for insurance company accounts is contained in paragraph (c)(2) of the proposed rule for bank common trust funds. The NASD does not, however, believe that the commenter has articulated a sufficient rationale for an exemption for mutual banks.

c. *Publicly Traded Entities.* Paragraph (c)(5) of the proposed rule would provide a general exemption for publicly traded entities (except broker-dealers and certain affiliates thereof) that are listed on a national securities exchange, are traded on the Nasdaq National Market, or are foreign issuers whose securities meet the quantitative designation criteria for listing on a national securities exchange or the Nasdaq National Market. These entities have broad public ownership and their securities may be purchased by any investor. The NASD believes that an exemption for publicly traded entities recognizes the practical limitations in attempting to identify every beneficial owner of a publicly traded entity and that the benefits of investments in new issues are, indirectly, shared by the public shareholders.

The original proposal would have exempted ''[a] publicly traded corporation [127] (other than an affiliate of a broker/dealer) listed on an exchange or The Nasdaq Stock Market, in which no person with a 10% or more ownership interest is a restricted person.'' Three commenters objected to the 10% proviso; they argued that the publicly traded entity exemption should resemble the exemption for registered investment companies and U.S. employee benefit plans in not requiring member firms to ''look through'' an entity to determine whether the beneficial owners were restricted persons.[128] The NASD agreed with these commenters and eliminated the ''look through'' provision.

As originally proposed, the publicly traded entity exemption did not extend to entities listed on a foreign exchange. One commenter stated that limiting the exemption to publicly traded entities listed on U.S. markets would unfairly discriminate against foreign companies.[129] A second commenter recommended an exemption for an initial equity offering in the United States by an issuer whose equity is publicly traded in another country.[130] In Amendment No. 3, the NASD expanded the proposed exemption to permit purchases of new issues by a publicly traded foreign entity so long as that entity meets the quantitative designation criteria for listing on a national securities exchange or the Nasdaq National Market.

The publicly traded entity exemption would not apply to a publicly traded broker-dealer or an affiliate of the broker-dealer where the broker-dealer is authorized to engage in the public offering of new issues either as underwriter or as a selling group member. Although the shareholders of such publicly traded entities would indirectly receive some of the benefit of

[118] Sullivan expressed concern that the general exemptions, in the form proposed in Amendment No. 2, applied only to the persons specified in the proposed rule and did not extend to the *accounts* of such persons. The NASD agreed that the general exemptions should clearly state that they apply to the specified persons as well as to the accounts of such persons, and revised the proposal accordingly.

[119] 15 U.S.C. 80a–1 *et seq.*

[120] *See* NASD IM–2110–1(f)(1).

[121] *See* paragraphs (c)(2)(A) and (c)(3)(A) of proposed NASD Rule 2790.

[122] *See* paragraphs (c)(2)(B) and (c)(3)(B) of proposed NASD Rule 2790.

[123] *See* Mayer Brown.

[124] *See* Sidley 2.

[125] *Id.*

[126] *See* Fried.

[127] One commenter pointed out that the text of the original proposal referred only to publicly traded *corporations* and suggested that the exemption be extended to legal persons other than corporations. *See* Rosenman. The NASD agreed and revised the proposed rule text accordingly.

[128] *See* Colish; Sidley; Sullivan (''because * * * publicly traded corporations are not likely to be used by restricted persons as vehicles for investments in hot issues, NASD members should be spared the administrative burden of confirming the restricted person ownership of customers that are publicly traded corporations'').

[129] *See* Sidley.

[130] *See* Fried 2.

IPO purchases, the NASD does not believe that allowing such purchases would be consistent with the purposes of the rule. The version of the publicly traded entity exemption proposed in Amendment No. 3 could have been construed to permit, for example, the holding company parent of a broker-dealer to purchase new issues, even if the broker-dealer engaged in a significant amount of investment banking business. The NASD stated that this was never the intent of the proposed exemption. Therefore, in Amendment No. 4, the NASD revised the public entity exemption to apply only to publicly traded entities that are not affiliated [131] with a broker-dealer engaged in the public offering of new issues.

The NASD believes that looking to whether a broker-dealer is authorized to engage in public offerings [132] excludes from the publicly traded entity exemption the ''full service'' broker-dealers and their parent companies that the rule is designed to reach. On the other hand, the proposed rule would allow purchases of new issues by the many publicly traded entities that have broker-dealer affiliates established for limited corporate purposes. The NASD believes that looking into whether a broker-dealer affiliate participates in offerings of new issues is one of many possible tests for determining the scope of the publicly traded entity exemption. The NASD stated that it also considered looking at the percent of profits or revenues a parent holding company derives from broker-dealer activities, but concluded that such information is often difficult to determine and frequently varies from year to year.[133]

One commenter argued that purchases by a private company also should be exempt from the proposed rule, if no more than 10% of its shareholders are restricted persons.[134] The NASD responded that a private company may avail itself of the *de minimis* exemption in paragraph (c)(4).

Finally, one commenter [135] pointed out that the Nasdaq Stock Market currently has an application pending with the Commission to become registered as a national securities exchange pursuant to Section 6 of the Act.[136] If that application is approved, securities traded in both the Nasdaq National Market and the Nasdaq SmallCap Market would be deemed to be traded on a national securities exchange. The commenter stated that the distinction set forth in paragraphs (c)(5)(A) and (B) between a security that is ''listed on a national securities exchange'' versus one that is ''traded on the Nasdaq National Market'' could create confusion as to whether securities traded on the Nasdaq SmallCap Market are exempt from the rule. In Amendment No. 5, the NASD stated that the publicly traded entity exemption does not apply to securities traded on the Nasdaq SmallCap Market. In addition, the NASD represented that it would consider amending the publicly traded entity exemption if and when Nasdaq becomes a national securities exchange.

d. *Foreign Investment Companies.* The Interpretation contains a general exemption for foreign investment companies.[137] A ''foreign investment company'' is defined as a fund company organized under the laws of a foreign jurisdiction that has certified that: (1) The fund has 100 or more investors; (2) it is listed on a foreign exchange or authorized for sale to the public by a foreign regulatory authority; (3) no more than 5% of its assets are invested in a particular hot issue; and (4) no person owning more than a 5% interest in such company is a restricted person.[138] Paragraph (c)(6) of the proposed rule would preserve this exemption, but reduce from four to two the number of criteria that a foreign fund would be required to meet. Under the proposed rule, the investment company must be listed on a foreign exchange or authorized for sale to the public by a foreign regulatory authority, and no person owning more than 5% of the shares of the investment company may be a restricted person.[139] However, as the NASD clarified in Amendment No. 5, a foreign investment company that failed to meet one or both of the criteria for the exemption in paragraph (c)(6) might still qualify for the *de minimis* exemption in paragraph (c)(4).

One commenter [140] suggested exempting any foreign investment company that is traded on a ''designated offshore securities market,'' as defined in Rule 902(b) under the Securities Act.[141] The NASD believes that such an exemption would be too broad and that the definition in Rule 902(b) is not related to the concerns underlying the proposed rule. Moreover, although noting that qualifying as a ''designated offshore securities market'' requires oversight by a governmental or self-regulatory body, the NASD is not confident that such regulation would prevent restricted persons from using foreign investment companies to circumvent the proposed rule. The NASD believes that, because it is difficult to compare foreign investment company laws to those in the United States, particularly as they relate to the purposes of the proposed rule, it is necessary to impose specific conditions on foreign investment companies to qualify for a general exemption.

In a second letter, the same commenter reiterated its recommendation that the proposed rule exempt foreign investment companies that are traded on a ''designated offshore securities market'' because managers of foreign investment companies might be unable to determine whether any 5%

[131] The NASD also stated in Amendment No. 4 that an ''affiliate'' for purposes of this provision would have the same meaning as in NASD Rules 2710 and 2720.

[132] Under NASD member admission rules, a broker-dealer that seeks authority to engage in public offerings must make that part of its membership application. If an existing NASD member that is not authorized to engage in public offerings seeks to do so in the future, such member must make an application under NASD Rule 1017. In Amendment No. 4, the NASD stated that it intends to look to whether a firm is authorized to engage in public offerings of new issues, and that the information on Form BD may help firms identify broker-dealers that are authorized to engage in public offerings. The NASD noted, however, that the information on Form BD will not be conclusive since Item 12 does not require an activity to be reported if it is less than 1% of annual revenue.

[133] In Amendment No. 5, the NASD offered the following example of how the publicly traded entity exemption would work in conjunction with the basic restriction on broker-dealers and their affiliates. Assume that a parent company is publicly traded and has a broker-dealer subsidiary that engages in public offerings. The publicly traded parent company would be restricted under paragraph (i)(11)(E) of the rule and would not qualify for the publicly traded entity exemption. All accounts in which such parent company had a beneficial interest (including entities in which the parent held an interest of 10% or more) also would be restricted persons, even if the business of the subsidiaries was wholly unrelated to the broker-dealer activities. Now assume that the publicly traded parent company has a broker-dealer subsidiary that does not engage in public offerings. The parent company would qualify for the publicly traded entity exemption in paragraph (c)(5) of the rule. The broker-dealer subsidiary would continue to be a restricted person, but the parent company and other non-restricted subsidiaries of the parent company would be eligible to purchase new issues.

[134] *See* Sullivan.

[135] *See* Sidley 2.

[136] 15 U.S.C. 78f.

[137] *See* NASD IM–2110–1(f)(1).

[138] *See* NASD IM–2110–1(l)(6).

[139] The NASD believes that condition (1) in the Interpretation—the 100-investor requirement—addresses the same concerns about concentration of ownership as condition (4). Therefore, the NASD has decided to eliminate the 100-investor requirement. In addition, the NASD believes that condition (3)—the limitation on the size of the purchase in relation to the size of the investment company—is unnecessary and potentially burdensome for members to calculate. The NASD has stated, moreover, that for very large funds the limitation is meaningless, inasmuch as 5% of their total assets would often exceed the size of the entire IPO. Therefore, the NASD has decided to eliminate condition (3).

[140] *See* MSDW.

[141] 17 CFR 230.902(b).

shareholder is a restricted person due to foreign privacy laws preventing them from obtaining the necessary ownership information.[142] Similarly, two other commenters suggested that the NASD eliminate the second requirement of the exemption—that no person owning more than 5% of the foreign investment company be a restricted person '' because of the difficulties in ascertaining the ownership of a foreign investment company.[143] Despite these concerns, the NASD believes that this requirement is necessary to prevent purchases of new issues by funds in which restricted persons have concentrated ownership interests.

e. *ERISA Plans.* Paragraph (c)(7) would provide a general exemption for benefit plans established under the Employee Retirement Income Security Act (''ERISA'') that are qualified under Section 401(a) of the Internal Revenue Code.[144] However, this exemption would not cover ERISA plans sponsored solely by a broker-dealer. The exemption as originally proposed also would have prevented an affiliate of a broker-dealer from using this exemption. Several commenters objected to this provision, arguing that they were unaware of any perceived or actual abuses to cause the NASD to narrow the exemption from the Interpretation.[145] The NASD agreed, and the final proposal would allow an ERISA plan sponsored by a broker-dealer affiliate—although not a plan sponsored by the broker-dealer itself—to benefit from the exemption.

f. *State and Municipal Government Benefits Plans.* Paragraph (c)(8) would provide a general exemption for a state or municipal government plan that is subject to state and/or municipal regulation.

g. *Tax-Exempt Charitable Organizations.* Paragraph (c)(9) would exempt sales of new issues to, and purchases by, tax exempt charities organized under Section 501(c)(3) of the Internal Revenue Code.[146] The NASD believes that new issue sales to charitable organizations are consistent with the purposes of the rule and foster a *bona fide* public distribution.

h. *Church Plans.* Paragraph (c)(10) would provide a general exemption for church plans described in Section 414(e) of the Internal Revenue Code.[147] As originally proposed, the rule included an exemption only for ERISA plans. One commenter stated that the same rationale for exempting ERISA plans also applied to church plans, and recommended that the NASD exempt such plans as well.[148] The NASD agreed and added the new paragraph (c)(10) in Amendment No. 3.

i. *Foreign Employee Benefits Plans.* The same commenter also recommended that the proposed rule include a general exemption for foreign governmental and foreign non-governmental employee benefits plans.[149] The commenter argued that foreign plan participants are not in a position to influence the investment decisions of the plan sponsor even if they might otherwise be restricted persons. The commenter further noted that a number of foreign benefits plans are sponsored by foreign subsidiaries of U.S. corporations, and that a restriction on foreign plans could have illogical results: A U.S.-based employee of a foreign firm might participate in a U.S. plan that is permitted to buy new issues, while an American co-worker based in a foreign country who invests in a foreign plan would not be allowed to participate through the foreign plan in new issue allocations.

In Amendment No. 3, the NASD stated that it had declined to adopt a blanket exemption for foreign employee benefit plans. Since that time, however, the NASD has granted an exemption from the Interpretation to a pension fund operated by the province of Québec. The NASD stated that it granted this exemption on the basis of the large number of plan participants and the small notional *pro rata* allocation of each of the fund's assets to any individual participant. Nevertheless, the NASD does not believe that a blanket exemption for foreign plans would be appropriate. In some cases, the NASD observed, foreign laws may permit benefit plans to allocate new issues only to certain plan participants, may provide for unequal distribution of profits from new issues, or may benefit a very narrow category of restricted person. The NASD stated that it also may be possible for a foreign benefits plan to be constructed as a means to circumvent the rule; for example, a shell corporation that consists entirely or principally of restricted persons could establish a benefits plan that would purchase new issues. The NASD stated in Amendment No. 4 that, as its staff becomes more familiar with various types of foreign investment plans, it may consider issuing additional guidance in this area.

Finally, the NASD has stated that a foreign employee benefits plan that did not receive a specific exemption from the NASD staff could purchase new issues if it qualified for the *de minimis* exemption in paragraph (c)(4).

5. Issuer-Directed Securities

The Interpretation provides that employees and directors of an issuer, a parent of an issuer, a subsidiary of an issuer, or any other entity that controls or is controlled by an issuer, may purchase securities that are part of a public offering that are specifically directed by the issuer to such persons.[150] The Interpretation extends this exemption to potential employees and directors who would result from an intended merger, acquisition, or other business combination. The Interpretation requires, however, that the securities acquired pursuant to the exemption be subject to a three-month lock-up period if a *bona fide* independent market for such securities does not exist.

Under its original proposal, the NASD would have revised the provisions on issuer-directed securities in to two principal ways. First, the scope of the exemption would have been extended to include employees and directors of sister companies. The NASD stated that such action would be consistent with the purposes of the rule and the existing exemption, as well as decisions of the NASD staff rendered pursuant to its exemptive authority. Second, the three-month lock-up period in the Interpretation would have been eliminated. The NASD believes that issuers should be free to set the conditions for sales of their own securities to their employees (or employees of affiliated companies) even if such employees are otherwise restricted persons. While an issuer may decide to impose a lock-up period, the NASD does not believe that such a period should be mandated by the proposed rule. The NASD has stated that eliminating the lock-up period would relieve members of having to investigate the status of employees and directors of the issuer and its affiliated companies, which was previously necessary solely to comply with the lock-up provision. This approach would allow all employees and directors of the issuer and affiliated companies to purchase securities of the issuer on equal terms. By contrast, under the Interpretation, an employee of an issuer who has a spouse in the securities industry must lock up a purchase of a

[142] *See* MSDW 2.

[143] *See* Colish; Sullivan.

[144] 29 U.S.C. 401(a).

[145] *See* MSDW; SIA; Sullivan.

[146] 29 U.S.C. 501(c)(3).

[147] 29 U.S.C. 414(e).

[148] *See* CII.

[149] *See id.*

[150] *See* NASD IM–2110–1(d).

hot issue even though other employees are not required to do so.

In Amendment No. 2, the NASD provided additional detail to the proposed exemption for issuer-directed securities. Pursuant to Amendment No. 2, securities that the issuer specifically directed to persons such as employees, directors, and their friends and family would be exempt, even if such persons were restricted persons. The NASD stated that in recent years it has been presented with situations in which, for example, an employee of an issuer wanted to direct shares of a new issue to his or her parent, but was unable to do so because the parent was a restricted person (and not an employee or director of the issuer). The proposed rule, as revised by Amendment No. 2, would allow directed shares to be sold to the parent in this case.

One commenter recommended that all non-underwritten securities directed by the issuer should be exempt from the proposed rule.[151] The NASD believes, however, that a person who is otherwise restricted should not be allowed to purchase new issues pursuant to the issuer-directed security exemption unless such person (or a member of his or her immediate family) is an employee or director of the issuer, the issuer's parent, or a subsidiary of the issuer or the issuer's parent. In the NASD's view, a general exemption for all issuer-directed or all non-underwritten securities would be readily susceptible to abuse. The NASD also believes that the issuer-directed exemption should apply only when shares are in fact directed by the issuer; if a member firm asks or otherwise suggests that an issuer direct securities to a restricted person, the NASD does not believe that such securities should be exempt from the proposed rule. The NASD has stated that it would continue its practice of holding a managing underwriter responsible for ensuring that all securities in the public offering be distributed in accordance with the proposed rule.

Paragraph (d)(1) of the proposed rule would provide that, for purposes of the issuer-directed security exemption, a parent/subsidiary relationship is established if the parent had the right to vote, sell, or direct 50% or more of a class of voting security of the subsidiary. One commenter argued that a 10% ownership standard should apply instead.[152] The NASD believes that it is not uncommon for a member, through its merchant banking activities, to make venture capital investments that constitute 10% or more of an issuer's capital. The NASD replied that, if it accepted this comment, all employees and directors of the member in such cases would be able to purchase the new issue. The NASD does not believe that exempting broker-dealer personnel by virtue of the broker-dealer's venture capital investments is consistent with the purposes of the proposed rule or the exemption for issuer-directed securities.[153]

One commenter[154] suggested that the scope of permissible purchasers under the issuer-directed exemption should be amended to conform with the permitted categories of offerees set forth in Rule 701 under the Securities Act of 1933.[155] The NASD determined not to act on this suggestion because it believes that the commenter's approach would be more difficult for members to implement.

Paragraph (d)(2) of the proposed rule would provide that the restrictions on the purchase and sale of new issues would not apply to securities that are part of a program sponsored by the issuer, or an affiliate of the issuer, that meets four criteria: (1) The program has at least 10,000 participants; (2) every participant is offered an opportunity to purchase an equivalent number of shares, or will receive a specified number of shares under a predetermined formula applied uniformly across all participants; (3) if not all participants receive shares under the program, the selection of the eligible participants is based on a random or other non-discretionary allocation method; and (4) the class of participants does not contain a disproportionate number of restricted persons. As proposed in Amendment No. 2, paragraph (d)(2) would have had a fifth criterion: that sales of the issuer-directed security not be made to participants who are managing underwriters or broker-dealers (or employees thereof) that are administering the program. One commenter welcomed an exemption for issuer-directed securities but argued that a requirement to investigate the facts about each of 10,000 participants to prevent sales to persons listed in the fifth criterion would vitiate the relief granted.[156] The commenter added that relying on the large number of offerees as a basis for exemption would be consistent with the exemption for publicly traded entities, which is not dependent on any basis other than that a large number of persons would share the benefits of the new issue. The NASD agreed with the commenter and eliminated the fifth criterion.[157]

Another commenter[158] sought guidance on the meaning of the fourth criterion, which requires that ''the class of participants does not contain a disproportionate number of restricted persons as compared to the investing public.'' In Amendment No. 5, the NASD stated that this condition is designed to ensure that a program is not directed to a group composed to a significant extent of restricted persons. The NASD also stated that, if an issuer has any questions about whether a specific program would qualify for this condition, the issuer should contact the NASD's Office of General Counsel for interpretative guidance.

6. Anti-Dilution Provisions

Paragraph (e) of the proposed rule would provide that the rule's basic prohibitions do not apply to an account in which a restricted person has a beneficial interest, if the account meets each of four criteria: (1) The account has held an equity ownership interest in the issuer for a period of one year prior to the effective date of the offering; (2) the sale of the new issue to the account does not increase the account's percentage equity ownership in the issuer above the ownership level as of three months prior to the filing of the registration statement in connection with the offering; (3) the sale of the new issue to the account does not include any special terms; and (4) the new issue purchased pursuant to this exemption is not sold or transferred for three months following the effective date of the offering. Paragraph (e) would supersede a similar provision in the Interpretation[159] and modify it slightly to allow an equity holder, for purposes of meeting the requirement that the interest in the issuer be held for one year, to count the period in which the

[151] *See* MSDW.

[152] *See* Sullivan. *But see* MSDW (recommending a 50% threshold).

[153] The NASD notes that the proposed rule contains separate provisions that would permit venture capital investors to purchase new issues to avoid dilution in a public offering. *See* paragraph (e) of proposed NASD Rule 2790. The NASD believes that going beyond these protections for venture capital investors would be inconsistent with the purposes of the rule.

[154] *See* Sidley.

[155] 17 CFR 230.701 (providing an exemption from the registration provisions of the Securities Act for offers and sales of securities under certain compensatory benefit plans or written agreements relating to compensation).

[156] *See* Fried 2.

[157] This commenter also noted that the exemption for issuer-directed securities, as proposed in Amendment No. 2, did not expressly permit an issuer to allocate its securities to employees and directors of sister companies, as described in the commentary to the proposed rule change. *See* Fried 2. The NASD has stated that this was an inadvertent omission and corrected the proposed rule text accordingly.

[158] *See* Testa 2.

[159] *See* NASD IM–2110–1(h).

holder had an interest in another company purchased by the issuer. The NASD has stated that this amendment is consistent with an NASD staff interpretative position.

One commenter questioned whether the NASD intended the anti-dilution provisions to apply only to natural persons, arguing that legal persons that have a prior equity ownership interest in an issuer also should be able to avail themselves of this exemption.[160] The NASD stated that the failure to extend the anti-dilution provisions to legal persons was inadvertent and revised the proposal accordingly.[161]

7. Stand-By Purchasers and Under-Subscribed Offerings

The NASD notes that the decision to apply the proposed rule to all new issues, not merely to hot issues, may create difficulties for offerings for which there is insufficient investor demand. Under the Interpretation, such offerings do not typically open at a premium and thus are not hot issues. With a rule that applies to all new issues, however, the rule should address circumstances in which purchases by restricted persons are necessary for the successful completion of an offering. Accordingly, paragraph (g) would provide that nothing in the rule would prohibit an underwriter, pursuant to an underwriting agreement, from placing a portion of a public offering in its investment account if it were unable to sell that portion to the public. In addition, paragraph (f) would provide that the prohibitions on the purchase and sale of new issues do not apply to purchases and sales made pursuant to a stand-by agreement that meets the following four conditions: (1) The stand-by agreement is disclosed in the prospectus; (2) the stand-by agreement is the subject of a formal written agreement; (3) the managing underwriter represents in writing that it is unable to find any other purchasers for the securities; and (4) securities sold pursuant to the stand-by agreement are subject to a three-month lock-up period. Paragraph (f) incorporates the existing exemption for stand-by purchases and sales found in the Interpretation.[162]

Two commenters, although supporting the exemption relating to under-subscribed offerings, believed that it should be extended to permit an underwriter, in lieu of placing the securities in its own investment account, to be able to sell such securities to one or more restricted persons.[163] One of these commenters stated that, if the objective of the proposed rule were to ensure a broad public distribution of securities for which there is significant demand, no regulatory objective would be furthered by restricting sales of offerings for which there is insufficient demand.[164] The NASD disagreed with these comments and stated that the provision was designed to ensure that the rule is consistent with an underwriter's contractual obligations to the issuer. The NASD believes that allowing an underwriter to sell a new issue to a restricted person if the issue turned ''cold'' would, in effect, reinstate the ''hot issue'' concept that the NASD is seeking to replace.

One commenter[165] asked for clarification that the proposed rule would not affect stabilization activities conducted under the Commission's Regulation M.[166] The NASD stated in Amendment No. 3 that the proposed rule would govern activities in connection with the distribution of new issues and would not have any effect on an underwriter's decision to engage in market stabilization activities, which occur after the security has commenced trading in the secondary market.

8. Exemptive Relief

The Interpretation contains a provision that allows the NASD staff to grant an exemption from any or all of the provisions of the Interpretation, if it determines that such exemption is consistent with the purposes of the Interpretation, the protection of investors, and the public interest.[167] Paragraph (h) would reincorporate the exemptive authority of the NASD staff into the new rule.

9. Definitions of Key Terms

a. *Beneficial Interest.* Paragraph (i)(1) of the proposed rule would define the term ''beneficial interest'' as any economic interest, such as the right to share in gains or losses. Consistent with a previously articulated NASD staff position,[168] the definition also would provide that the receipt of a management fee or performance-based fee for operating a collective investment account, or other fees for acting in a fiduciary capacity, would not be considered a beneficial interest in the account.

The term beneficial interest was defined in the original proposal as ''any ownership or other direct financial interest.'' The NASD became aware that members found the reference to ownership, as distinct from a financial interest, unclear. The NASD believes that only those who profit from an account, rather than those legally own it, are of concern to the proposed rule and revised the proposal accordingly.

One commenter argued that the definition of ''beneficial interest'' should specifically exclude management or performance-based fees that are deferred for *bona fide* taxation reasons.[169] This commenter was concerned about the effect that deferred management or performance fees might have on a hedge fund manager's interest in a collective investment account that he or she managed. Another commenter noted that a portfolio manager might receive a management or performance-based fee for operating a hedge fund, the amount of which fees may be based on income from new issues.[170] This commenter asked the NASD to clarify whether these fees, if deferred for income tax purposes, would be deemed to create a beneficial interest in the fund held by the portfolio manager.

The NASD does not believe that it is appropriate to amend the definition of ''beneficial interest'' to expressly exclude performance-based allocations and deferred performance-based fees. In Amendment No. 5, the NASD counseled that the *initial* receipt of the fee would not constitute a beneficial interest in the collective investment account, because the definition of ''beneficial interest'' excludes ''the receipt of a management or performance based fee for operating a collective investment account, or other fees for acting in a fiduciary capacity.''[171] The NASD believes, however, that the accumulation of these payments, if *subsequently* invested in the collective investment account (as a deferred fee arrangement or otherwise) would constitute a beneficial interest in the account. The NASD believes that money invested in a collective investment account is part of a person's beneficial interest in that account even if the source of the money is a deferred fee arrangement. The NASD does not

[160] *See* Testa.

[161] Subsequently, the same commenter noted several drafting errors with respect to the anti-dilution provisions as they appeared in Amendment No. 2. *See* Testa 2. The NASD subsequently made the necessary corrections.

[162] *See* NASD IM–2110–1(e).

[163] *See* MSDW 2; Sullivan 2.

[164] *See* MSDW 2. This commenter also suggested imposing minimum capital contribution requirements for the stand-by provisions and extending the lock-up requirements from three months to one year. The NASD has stated that it does not believe that these additional requirements are necessary.

[165] *See* Testa 2.

[166] 17 CFR 242.100 *et seq.*

[167] *See* NASD IM–2110–1(a)(5).

[168] *See* NASD Notice to Members 97–5.

[169] *See* Rosenman.

[170] *See* Sidley 2.

[171] *See* paragraph (i)(1) of proposed NASD Rule 2790.

believe that a decision to defer recognition of earnings for income tax purposes should alter the analysis of whether a person has a beneficial interest in a collective investment account.

b. *Collective Investment Account.* Paragraph (i)(2) would define ''collective investment account'' as any hedge fund, investment partnership, investment corporation, or any other collective investment vehicle that is engaged primarily in the purchase and/or sale of securities. The original proposal defined ''collective investment account'' as any hedge fund, investment partnership, investment corporation, or any other collective investment vehicle that manages assets of other persons. One commenter pointed out that a hedge fund or other investment partnership typically engages in the purchase and sale of securities for its proprietary account, and that these entities do not necessarily manage the assets of others.[172] This commenter recommended, therefore, that the NASD remove the phrase ''that manages the assets of other persons'' from the definition. The NASD agreed and revised the proposed definition accordingly.

C. Transition Period

Three commenters urged the NASD to allow entities that would be subject to the proposed rule a transition period before coming into full compliance with it.[173] The NASD believes that a transition period would be reasonable and has proposed a three-month period during which members could comply with either the Interpretation or the new rule. This three-month period would begin upon the NASD's publication of a Notice to Members announcing any Commission final action on the proposed rule change. The NASD stated in Amendment No. 5 that it would publish this Notice to Members no later than 60 days following a Commission approval.

V. Discussion

After carefully considering the proposal and all the comments received, the Commission finds that the proposal, as amended, is consistent with the requirements of the Act and the regulations thereunder applicable to a national securities association. In particular, the Commission believes that the proposal is consistent with Sections 15A(b)(6) and 15A(b)(9) of the Act.[174] Section 15A(b)(6) requires, among other things, that the rules of a national securities association be 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. Section 15A(b)(6) also provides that the rules of an association may not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 15A(b)(9) provides that the rules of an association may not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission finds that the proposal will protect investors and is in the public interest. The Commission believes that the proposal is a reasonable means of furthering the NASD's stated aims of ensuring that: (1) NASD members make a *bona fide* public offering of securities at the public offering price; (2) members do not withhold securities in a public offering for their own benefit or use such securities to reward certain persons who are in a position to direct future business to the member; and (3) industry insiders, including NASD members and their associated persons, do not take advantage of their ''insider'' position to purchase new issues for their own benefit at the expense of public customers.

The proposal is to a large extent a reorganization of the existing provisions of NASD IM–2110–1. The Commission has previously opined on many of these provisions and found them to be consistent with the Act.[175] Furthermore, the Commission believes that the proposal furthers the purposes of the Act by making the rule easier to understand and administer. With respect to provisions of new NASD Rule 2790 that were not present in the Interpretation, the Commission finds that they also are consistent with the Act. The most significant of these new provisions are discussed below.

A. Offerings Covered by NASD Rule 2790

The Commission believes that it is reasonable for the new rule to apply to ''new issues'' rather than ''hot issues.'' Under the Interpretation, restrictions are not triggered unless an issue becomes ''hot'' (*i.e.*, it trades at a premium over the offering price). The Commission believes that NASD members generally will find it simpler to treat all new issues in the same manner. The Commission also believes it reasonable to eliminate the cancellation provision; its primary rationale no longer exists because all new issues are subject to the rule from the moment that they are initially offered to the public, not later when they become ''hot.'' Eliminating the cancellation provision will enhance compliance with the new rule by encouraging NASD members to identify all potential restricted persons prior to a new issue.

B. Restricted Persons

The Commission believes that the scope of the term ''restricted person'' in the new rule is reasonable and consistent with the Act. As under the Interpretation, broker-dealers and their associated persons will be restricted. The Commission finds that it is consistent with the Act for the NASD to restrict its members from purchasing new issues from or selling new issues to other broker-dealers. The acquisition by such persons of new issues could give the appearance that an initial public offering was not in fact truly ''public.'' The Commission also believes it is appropriate for the NASD to extend the restriction to agents of a broker-dealer who are engaged in the investment banking or securities business.

Under the new rule, as under the Interpretation, ''limited business broker-dealers'' (*i.e.*, broker-dealers that are authorized to engage only the purchase and sale of investment company/variable contracts securities and direct participation program securities) will not be considered restricted persons. The Commission believes that this provision is consistent with the Act because it exempts only a small class of broker-dealers that, due to the nature of their business, are unlikely to benefit unfairly from the purchase of a new issue.

The Commission has carefully considered CBOE's comment letter and finds that the NASD's decision not to expand the concept of limited business broker-dealers to include CBOE market makers and floor brokers (and their associated persons) is reasonable. CBOE argued that ''options market makers and floor brokers perform specialized, limited functions and should not be considered representative of the typical broker-dealer population.'' However, the NASD's determination not to make additional exemptions for CBOE members and other types of broker-

[172] *See* Sidley.

[173] *See* Ropes (suggesting 90 days); Schulte (six months); Sullivan 2 (90 days).

[174] 15 U.S.C. 78o–3(b)(6) and (9).

[175] *See, e.g.,* Securities Exchange Act Release No. 40001 (May 18, 1998), 63 FR 28535 (May 26, 1998) (SR–NASD–97–95) (approving various revisions to NASD IM–2110–1); Securities Exchange Act Release No. 35059 (December 7, 1994), 59 FR 64455 (December 14, 1994) (SR–NASD–94–15) (same).

dealer is consistent with the new rule's general aim of ensuring that public investors rather than securities industry insiders receive the benefit of new issues. The Commission also agrees with the NASD that an exemption for ''limited business broker-dealers''—based solely on what the firm is authorized to do on its Form BD—is more transparent and easier to administer than the type of standard for exempted broker-dealers advocated by CBOE, which would require an analysis of the activities actually conducted by the broker-dealer.

The Commission also believes that the new rule's treatment of joint back office broker-dealers is consistent with the Act. Under the new rule, a JBO would be able to purchase new issues provided that the interests of restricted persons in the JBO do not exceed 10%, although associated persons of the JBO will be restricted persons. JBOs are hedge funds or hedge fund affiliates that often are active participants in the securities markets. The associated persons of JBOs may be in a position to direct future business to an NASD member, and the purchases by such industry insiders of an IPO could create the appearance that the offering was not truly ''public.''

Under the new rule, restricted person status will extend to any immediate family member of a person who is ''directly restricted'' by the new rule on account of his or her position in the industry (such as an employee of a broker-dealer). The restriction on immediate family members also will apply to persons who receive material support from a directly restricted person. The Commission believes that these provisions are appropriate to prevent evasion of the new rule while not unduly extending the rule's restrictions to persons who could not reasonably be viewed as an alter ego of a directly restricted person.

Similarly, the Commission believes that it is appropriate to extend restricted person status to owners and affiliates of a broker-dealer. In the absence of such a provision, the restriction on the broker-dealer could easily be evaded. The Commission believes that it is reasonable and consistent with the Act for the new rule to assign restricted person status to persons listed on Schedules A and B of a broker-dealer's Form BD. While Schedule A requires reporting of interests of 5% or more in the broker-dealer, the new rule will restrict only those persons appearing on Schedule A who hold interests of 10% or more. The Commission believes that the 10% threshold for ownership interests in a broker-dealer as a criterion for restricted person status is appropriate because it is consistent with the 10% *de minimis* threshold established in the rule's general exemptions. Moreover, basing restricted person status on a 10% interest reported on Schedule A (for direct owners of the broker-dealer) will lessen the likelihood that an entity reported on Schedule B (for indirect owners) will be deemed a restricted person even if the indirect owner has only a small economic interest in the broker-dealer. The Commission believes that the ownership classifications employed by the new rule are reasonably based, are already understood by NASD members, and will facilitate administration of the rule.

The Commission also believes that the publicly traded entity exemption is reasonable and consistent with the Act. The proposed rule assumes that a publicly traded entity generally will have wide public ownership, thus reducing the likelihood that a large percentage of the entity's shareholders are restricted persons who would unfairly benefit from the entity's purchase of new issues. The Commission believes that this assumption is reasonable in light of the quantitative standards that companies must meet to list their securities on a national securities exchange or the Nasdaq Stock Market.[176] Although there may be some publicly traded companies of which restricted persons nevertheless constitute a significant percentage of the shareholders, the Commission believes the general exemption for publicly traded entities strikes an appropriate balance between carrying out the purposes of the rule and minimizing its administrative burdens.

The exemption for publicly traded entities will not cover broker-dealers themselves or affiliates of broker-dealers that are authorized to engage in the public offering of new issues (either as a selling group member or underwriter). A broker-dealer, although publicly traded, is likely to have a higher concentration of restricted persons amongst its ownership. Therefore, the Commission believes that it is reasonable for the NASD not to afford broker-dealers—or affiliates of broker-dealers that sell or underwrite new issues—the benefits of the publicly traded entity exemption. In the absence of such a provision, significant potential to evade the new rule would exist.

Finally, the Commission agrees with the NASD that participation in an investment club, by itself, should not cause a person to be restricted under the new rule, and that the treatment of investment clubs and family investment vehicles under the new rule is consistent with the Act.

C. Elimination of Conditionally Restricted Person Status and New De Minimis Threshold

The new rule will eliminate ''conditionally restricted person'' status and adopt a standard that will render all persons either restricted or non-restricted. The Commission agrees with the NASD that, in some cases, a person may purchase a hot issue pursuant to the Interpretation's ''conditionally restricted person'' exemption even when such purchase appears contrary to the principles underlying the Interpretation. The Commission believes that the proposed rule change will help eliminate such cases, and that the definition of ''restricted person'' in the new rule will be more transparent and easier to administer.

Although all persons under the rule will be either restricted or non-restricted, the NASD has acknowledged that accommodation must be made for some restricted person participation in collective investment accounts. The alternative—prohibiting all new issue purchases by a collective investment account if even a single restricted person is a participant—would be unrealistic. The NASD has proposed, therefore, a 10% *de minimis* limit for restricted person participation in a collective investment account. The Commission agrees with the NASD that the purposes of the rule generally are not implicated if a member sells a new issue to a collective investment account in which restricted persons have only a small interest. The investors who are non-restricted persons will still receive the majority of the new issue's proceeds, and the notional portion of such proceeds accruing to the restricted persons would be sufficiently small as to provide little incentive for them to direct future business to the member as compensation. The Commission, therefore, finds that that the 10% threshold proposed by the NASD is reasonable and consistent with the Act.

Three commenters criticized the NASD's decision to consider hedge fund managers as restricted persons in all cases, even with respect to the funds for which they act as portfolio manager.[177] After carefully considering these comments, the Commission finds that they do not raise any issue that

[176] *See, e.g.*, NASD Rule 4420(a)–(c) (requiring 1,100,000 publicly held shares for inclusion on the Nasdaq National Market); New York Stock Exchange Listed Company Manual Rule 102.01A (requiring 1,100,000 publicly held shares for listing on the NYSE).

[177] *See* MFA 3; Sidley 2; Willkie 3; Willkie 4. *See also infra* notes 35–36 and accompanying text.

precludes approval of the NASD's proposal. The Commission acknowledges that it is reasonable for hedge fund investors to seek to align the interests of hedge fund managers with their own. Contrary to the view taken by these commenters, however, the new rule will not significantly impede that effort. NASD Rule 2790 does not prohibit a hedge fund manager from holding an interest of greater than 10% in a hedge fund that he or she manages because of the availability of the carve-out procedures. These carve-out procedures, which exist under the Interpretation and will be carried over in the new rule, allow the fund to segregate the interests of restricted from non-restricted persons and to direct the proceeds of the fund's investments accordingly. Thus, the rule merely prohibits such a fund from purchasing new issues in a manner that allows the hedge fund manager (and other restricted persons) to receive from such purchases an indirect, *pro rata* benefit that exceeds the lesser of 10% or their actual percentage interest in the fund. NASD Rule 2790 places no restrictions on the ability of a hedge fund—whatever its ownership structure—to purchase any other type of asset. The investors will still be able to align the interests of hedge fund managers with their own with respect to every type of investment opportunity other than new issues. The Commission believes that the potential adverse consequences of preventing the alignment of investor and manager interests with respect to this class of investment are minimal.

By contrast, allowing hedge fund managers unlimited participation in the benefits of new issues through the funds that they manage would be much more likely to compromise investor protection and the public interest. A portfolio manager is in a position to direct business to a member and might be willing to do so in return for having received new issues. The larger a hedge fund manager's interest in the fund, the greater the manager's notional *pro rata* benefit from any particular investment made by the fund and the greater the incentive for the member to sell new issues to that fund in hopes of receiving future business. Furthermore, allowing a portfolio manager to have unlimited participation in a hedge fund that purchases new issues would further the appearance that an industry insider was receiving a disproportionate benefit from new issues. The Commission believes that the proposed rule furthers the appearance, as well as the reality, of fairness in the IPO process and thus will strengthen investor confidence in the securities markets.

The Commission concludes that deeming hedge fund managers and other portfolio managers as restricted persons, subject to the 10% *de minimis* exemption for collective investment accounts, represents a reasonable balance between the principles underlying the new rule and consideration of the structure of the hedge fund industry.

D. Other Provisions

The Commission finds that the preconditions for sale provisions strike a reasonable balance between, on the one hand, ensuring that accounts to which NASD members sell new issues are in fact eligible and, on the other hand, minimizing the administrative burdens on both members and their customers. Specifically, the Commission believes that 12 months is a reasonable time frame within which members should update eligibility information. The Commission also believes that the NASD's proposed use of negative consent procedures is reasonable and consistent with the Act.

With respect to the anti-dilution provisions of the proposed rule, the Commission believes that the acquisition of new issues by restricted persons for the purpose of preventing their existing interests from being diluted does not run counter to either the purposes of the rule or the provisions of the Act. The Commission also believes that the holding period requirements of the anti-dilution provisions are a reasonable means to prevent abuse of these provisions.

The Commission finds that the provisions of the new rule relating to stand-by purchasers and under-subscribed offerings are consistent with the Act. These provisions are a reasonable means to facilitate the distribution of new issues and, although allowing restricted persons to hold beneficial interests in new issues in some circumstances, do not run counter to the purposes of the new rule.

Finally, the Commission believes that it is reasonable for paragraph (h) of new NASD Rule 2790 to allow NASD staff to exempt any person, security, or transaction from the rule, to the extent that such exemption would be consistent with the purposes of the rule, the protection of investors, and the public interest. However, the Commission reminds the NASD that exemptions of general applicability that would impose substantive binding requirements should be done through the notice-and-comment rulemaking process prescribed by Rule 19b–4 under the Act.[178] The only circumstance in which exemptive authority of the NASD should be exercised without employing this process is where the circumstances are truly unique. In most instances, the circumstances involved are so common that the same exemption would in fact be granted to all other similarly situated persons and thus must be handled through the notice-and-comment rulemaking process.[179]

E. Effective Date

The Commission believes that it is reasonable and consistent with the Act to allow NASD members the transition period specified above [180] in which to adjust their compliance programs to accommodate the new rule. The Commission notes that it has approved similar transition periods in previous cases.[181] Accordingly, the proposed rule change will take effect upon the issuance by the NASD of a Notice to Members discussing the new rule, and the NASD has represented that it will publish this Notice to Members no later than 60 days following Commission approval. NASD members may comply with either the Interpretation or new NASD Rule 2790 for three months following publication of the Notice to Members.

F. Accelerated Approval

Pursuant to Section 19(b)(2) of the Act,[182] the Commission finds good cause for approving the proposal, as revised by Amendment No. 5, prior to the thirtieth day after the date of publication of notice of the amended proposal in the **Federal Register**. The Commission believes that Amendment No. 5 does not materially alter the operation of the rule and is intended only to respond to comments and to make certain technical corrections pointed out by certain of the commenters. Accordingly, the Commission is accelerating approval of the proposal, as amended.

G. Impact on Efficiency, Competition, and Capital Formation

In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital

[178] 17 CFR 240.19b–4.

[179] *See* letter to T. Grant Callery, NASD, from Annette L. Nazareth, Division of Market Regulation, SEC, dated March 27, 2003.

[180] *See supra* note and accompanying text.

[181] *See, e.g.*, Securities Exchange Act Release No. 44499 (June 29, 2001), 66 FR 35819, 35822 (July 9, 2001) (SR–NASD–2001–14) (allowing Nasdaq issuers a short period of time to comply with either the old or newly approved listing standards).

[182] 15 U.S.C. 78s(b)(2).

formation.[183] The Commission believes that the proposed rule change will further these aims by helping to ensure public confidence in the IPO process and, thereby, encouraging investment in new issues. The Commission also believes that the proposal will enhance efficiency, competition, and capital formation by streamlining the Interpretation, making it simpler to administer, and reducing the compliance costs of affected persons.

H. Additional Rulemaking Related to IPO Distribution

In a separate filing (SR–NASD–2003–140), the NASD has addressed other issues relating to the IPO distribution process. Specifically, the NASD in SR–NASD–2003–140 is proposing to prohibit ''*quid pro quo* allocations'' (*i.e.*, offering or threatening to withhold allocations of IPO shares as consideration or inducement for the receipt of compensation that is excessive in relation to the services provided by an NASD member) and ''spinning'' (*i.e.*, allocating IPO shares to officers or directors of a company in hopes of winning future investment banking business from that company). In approving this filing (SR–NASD–99–60), the Commission is making no findings and expressing no opinion on the proposals set forth in SR–NASD–2003–140.

VI. Amendment No. 5

Below are the provisions of proposed NASD Rule 2790 that were changed by Amendment No. 5. The base text is that proposed in Amendment No. 4. Text added by Amendment No. 5 is italicized; deleted text is in brackets.

* * * * *

Rule 2790. Restrictions on the Purchase and Sale of Initial Equity Public Offerings

(a) General Prohibitions

(1) A member or a person associated with a member may not sell, or cause to be sold, a new issue to any account in which a restricted person has a beneficial interest, except as otherwise permitted herein.

(2) A member or a person associated with a member may not purchase a new issue in any account in which such member or person associated with a member has a beneficial interest, except as otherwise permitted herein.

(3) A member may not continue to hold new issues acquired by the member as an underwriter, selling group member, or otherwise, except as otherwise permitted herein.

(4) Nothing in this paragraph (a) shall prohibit:

(A) sales or purchases from one member of the selling group to another member of the selling group that are incidental to the distribution of a new issue to a non-restricted person at the public offering price; [or]

(B) sales or purchases by a broker/dealer of a new issue at the public offering price as part of an accommodation to a non-restricted person customer of the broker/dealer*; or*

(C) purchases by a broker/dealer (or owner of a broker/dealer), organized as an investment partnership, of a new issue at the public offering price, provided such purchases are credited to the capital accounts of its partners in accordance with paragraph (c)(4).

(b) Preconditions for Sale

Before selling a new issue to any account, a member must in good faith have obtained within the twelve months prior to such sale, a representation from:

(1) Beneficial Owners

the account holder(s), or a person authorized to represent the beneficial owners of the account, that the account is eligible to purchase new issues in compliance with this rule; or

(2) Conduits

a bank, foreign bank, broker/dealer, or investment adviser, or other conduit that all purchases of new issues are in compliance with this rule.

A member may not rely upon any representation that it believes, or has reason to believe, is inaccurate. A member shall maintain a copy of all records and information relating to whether an account is eligible to purchase new issues in its files for at least three years following the member's last sale of a new issue to that account.

(c) General Exemptions

The general prohibitions in paragraph (a) of this rule shall not apply to sales to and purchases by the following accounts or persons, whether directly or through accounts in which such persons have a beneficial interest:

(1) An investment company registered under the Investment Company Act of 1940;

(2) A common trust fund or similar fund as described in Section 3(a)(12)(A)(iii) of the Act, provided that:

(A) The fund has investments from 1,000 or more accounts; and

(B) The fund does not limit beneficial interests in the fund principally to trust accounts of restricted persons;

(3) An insurance company general, separate or investment account, provided that:

(A) The account [has investments from] *is funded by premiums from 1,000 or more policyholders, or, if a general account, the insurance company has* 1,000 or more policyholders; and

(B) The insurance company does not limit [beneficial interests in] the [account] *policyholders whose premiums are used to fund the account principally to restricted persons, or, if a general account, the insurance company does not limit its policyholders* principally to restricted persons;

(4) An account [or joint back office broker/dealer (''JBO'')]if the beneficial interests of restricted persons do not exceed in the aggregate 10% of such account[or JBO];

(5) A publicly traded entity (other than a broker/dealer or an affiliate of a broker/dealer where such broker/dealer is authorized to engage in the public offering of new issues either as a selling group member or underwriter) that:

(A) Is listed on a national securities exchange;

(B) Is traded on the Nasdaq National Market; or

(C) Is a foreign issuer whose securities meet the quantitative designation criteria for listing on a national securities exchange or trading on the Nasdaq National Market;

(6) An investment company organized under the laws of a foreign jurisdiction, provided that:

(A) The investment company is listed on a foreign exchange or authorized for sale to the public by a foreign regulatory authority; and

(B) No person owning more than 5% of the shares of the investment company is a restricted person;

(7) An Employee Retirement Income Security Act benefits plan that is qualified under Section 401(a) of the Internal Revenue Code, provided that such plan is not sponsored solely by a broker/dealer;

(8) A state or municipal government benefits plan that is subject to state and/or municipal regulation;

(9) A tax exempt charitable organization under Section 501(c)(3) of the Internal Revenue Code; or

(10) A church plan under Section 414(e) of the Internal Revenue Code.

(d) Issuer-Directed Securities

The prohibitions on the purchase and sale of new issues in this rule shall not apply to securities that:

(1) Are specifically directed by the issuer to persons that are restricted under the rule; provided, however, that securities directed by an issuer may not be sold to or purchased by an account in which any restricted person specified in subparagraphs (i)(1*0*[1])(B) or (i)(1*0*[1])(C) of this rule has a beneficial interest, unless such person, or a

[183] *See* 15 U.S.C. 78c(f).

member of his or her immediate family, is an employee or director of the issuer, the issuer's parent, or a subsidiary of the issuer or the issuer's parent. Also, for purposes of this paragraph (d)(1) only, a parent/subsidiary relationship is established if the parent has the right to vote 50% or more of a class of voting security of the subsidiary, or has the power to sell or direct 50% or more of a class of voting security of the subsidiary;

(2) Are part of a program sponsored by the issuer or an affiliate of the issuer that meets the following criteria:

(a) The opportunity to purchase a new issue under the program is offered to at least 10,000 participants;

(b) Every participant is offered an opportunity to purchase an equivalent number of shares, or will receive a specified number of shares under a predetermined formula applied uniformly across all participants;

(c) If not all participants receive shares under the program, the selection of the participants eligible to purchase shares is based upon a random or other non-discretionary allocation method; and

(d) The class of participants does not contain a disproportionate number of restricted persons as compared to the investing public generally; or

(3) Are directed to eligible purchasers who are otherwise restricted under the rule as part of a conversion offering in accordance with the standards of the governmental agency or instrumentality having authority to regulate such conversion offering.

(e) Anti-Dilution Provisions

The prohibitions on the purchase and sale of new issues in this rule shall not apply to an account in which a restricted person has a beneficial interest that meets the following conditions:

(1) The account has held an equity ownership interest in the issuer, or a company that has been acquired by the issuer in the past year, for a period of one year prior to the effective date of the offering;

(2) The sale of the new issue to the account shall not increase the account's percentage equity ownership in the issuer above the ownership level as of three months prior to the filing of the registration statement in connection with the offering;

(3) The sale of the new issue to the account shall not include any special terms; and

(4) The new issue purchased pursuant to this paragraph (e) shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

(f) Stand-By Purchasers

The prohibitions on the purchase and sale of new issues in this rule shall not apply to the purchase and sale of securities pursuant to a stand-by agreement that meets the following conditions:

(1) The stand-by agreement is disclosed in the prospectus;

(2) The stand-by agreement is the subject of a formal written agreement;

(3) The managing underwriter(s) represents in writing that it was unable to find any other purchasers for the securities; and

(4) The securities sold pursuant to the stand-by agreement shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

(g) Under-Subscribed Offerings

Nothing in this rule shall prohibit an underwriter, pursuant to an underwriting agreement, from placing a portion of a public offering in its investment account when it is unable to sell that portion to the public.

(h) Exemptive Relief

Pursuant to the Rule 9600 series, the staff, for good cause shown after taking into consideration all relevant factors, may conditionally or unconditionally exempt any person, security or transaction (or any class or classes of persons, securities or transactions) from this rule to the extent that such exemption is consistent with the purposes of the rule, the protection of investors, and the public interest.

(i) Definitions

(1) ''Beneficial interest'' means any economic interest, such as the right to share in gains or losses. The receipt of a management or performance based fee for operating a collective investment account, or other fees for acting in a fiduciary capacity, shall not be considered a beneficial interest in the account.

(2) ''Collective investment account'' means any hedge fund, investment partnership, investment corporation, or any other collective investment vehicle that is engaged primarily in the purchase and/or sale of securities. A ''collective investment account'' does not include a ''family investment vehicle'' or an ''investment club.''

(3) ''Conversion offering'' means any offering of securities made as part of a plan by which a savings and loan association, insurance company, or other organization converts from a mutual to a stock form of ownership.

(4) ''Family investment vehicle'' means a legal entity that is beneficially owned solely by immediate family members.

(5) ''Immediate family member'' means a person's parents, mother-in-law or father-in-law, spouse, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, and children, and any other individual to whom the person provides material support.

(6) ''Investment club'' means a group of friends, neighbors, business associates, or others that pool their money to invest in stock or other securities and are collectively responsible for making investment decisions.

(7) [''Joint Back Office Broker/Dealer'' means any domestic or foreign private investment fund that has elected to register as a broker/dealer solely to take advantage of the margin treatment afforded under Section 220.7 of Regulation T of the Federal Reserve. The activities of a joint back office broker/dealer must not require that it register as a broker/dealer under Section 15(a) of the Act.]

([8]*7*) ''Limited business broker/dealer'' means any broker/dealer whose authorization to engage in the securities business is limited solely to the purchase and sale of investment company/variable contracts securities and direct participation program securities.

([9]*8*) ''Material support'' means directly or indirectly providing more than 25% of a person's income in the prior calendar year. Members of the immediate family living in the same household are deemed to be providing each other with material support.

([10]*9*) ''New issue'' means any initial public offering of an equity security as defined in Section 3(a)(11) of the Act, made pursuant to a registration statement or offering circular. New issue shall not include:

(A) Offerings made pursuant to an exemption under Section 4(1), 4(2) or 4(6) of the Securities Act of 1933, or SEC Rule 504 if the securities are ''restricted securities'' under SEC Rule 144(a)(3), or Rule 144A or Rule 505 or Rule 506 adopted thereunder;

(B) Offerings of exempted securities as defined in Section 3(a)(12) of the Act, and rules promulgated thereunder;

(C) Offerings of securities of a commodity pool operated by a commodity pool operator as defined under Section 1a(5) of the Commodity Exchange Act;

(D) Rights offerings, exchange offers, or offerings made pursuant to a merger or acquisition;

(E) Offerings of investment grade asset-backed securities;

(F) Offerings of convertible securities;

(G) Offerings of preferred securities; [and]

(H) Offerings of an investment company registered under the Investment Company Act of 1940; *and*

(I) Offerings of securities (in ordinary share form or ADRs registered on Form F–6) that have a pre-existing market outside of the United States.

([11]*10*) ''Restricted person'' means:

(A) Members or Other Broker/Dealers

(B) Broker/Dealer Personnel

(i) Any officer, director, general partner, associated person, or employee of a member or any other broker/dealer (other than a limited business broker/dealer);

(ii) Any agent of a member or any other broker/dealer (other than a limited business broker/dealer) that is engaged in the investment banking or securities business; or

(iii) An immediate family member of a person specified in subparagraph (B)(i) or (ii) if the person specified in subparagraph (B)(i) or (ii):

(a) Materially supports, or receives material support from, the immediate family member;

(b) Is employed by or associated with the member, or an affiliate of the member, selling the new issue to the immediate family member; or

(c) Has an ability to control the allocation of the new issue.

(C) Finders and Fiduciaries

(i) With respect to the security being offered, a finder or any person acting in a fiduciary capacity to the managing underwriter, including, but not limited to, attorneys, accountants and financial consultants; and

(ii) An immediate family member of a person specified in subparagraph (C)(i) if the person specified in subparagraph (C)(i) materially supports, or receives material support from, the immediate family member.

(D) Portfolio Managers

(i) Any person who has authority to buy or sell securities for a bank, savings and loan institution, insurance company, investment company, investment advisor, or collective investment account.

(ii) An immediate family member of a person specified in subparagraph (D)(i) that materially supports, or receives material support from, such person.

(E) Persons Owning a Broker/Dealer

(i) Any person listed, or required to be listed, in Schedule A of a Form BD (other than with respect to a limited business broker/dealer), except persons identified by an ownership code of less than 10%;

(ii) Any person listed, or required to be listed, in Schedule B of a Form BD (other than with respect to a limited business broker/dealer), except persons whose listing on Schedule B relates to an ownership interest in a person listed on Schedule A identified by an ownership code of less than 10%;

(iii) Any person listed, or required to be listed, in Schedule C of a Form BD that meets the criteria of subparagraphs (E)(i) and (E)(ii) above;

(iv) Any person that directly or indirectly owns 10% or more of a public reporting company listed, or required to be listed, in Schedule A of a Form BD (other than a reporting company that is listed on a national securities exchange or is traded on the Nasdaq National Market, or other than with respect to a limited business broker/dealer);

(v) Any person that directly or indirectly owns 25% or more of a public reporting company listed, or required to be listed, in Schedule B of a Form BD (other than a reporting company that is listed on a national securities exchange or is traded on the Nasdaq National Market, or other than with respect to a limited business broker/dealer).

(vi) An immediate family member of a person specified in subparagraphs (E)(i)–(v) unless the person owning the broker/dealer:

(a) Does not materially support, or receive material support from, the immediate family member;

(b) Is not an owner of the member, or an affiliate of the member, selling the new issue to the immediate family member; and has no ability to control the allocation of the new issue.

* * * * *

VII. Solicitation of Comments on Amendment No. 5

Interested persons are invited to submit written data, views, and arguments on Amendment No. 5, including whether the amendment is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–99–60 and should be submitted by November 21, 2003.

VIII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[184] that the proposal (SR–NASD–99–60) and Amendment Nos. 1 to 4 thereto are approved, and that Amendment No. 5 is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[185]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–27463 Filed 10–30–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48700; File No. SR–PCX–2003–35]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. To Amend Its Corporate Governance and Disclosure Policies

October 24, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 14, 2003, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On October 14, 2003, the Exchange filed an amendment to the proposal.[3] The Commission is publishing this notice to solicit comments on the proposed rule

[184] *Id.*

[185] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Steven B. Matlin, Senior Counsel, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated October 8, 2003 (''Amendment No.1''). In Amendment No.1, the Exchange made changes to proposed rule text in PCX Rule 5.3(k)(5)(B)(ii)(a).

change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, through its wholly owned subsidiary, PCX Equities, Inc. (''PCXE''), is proposing to amend its Corporate Governance and Disclosure Policies. The Exchange states that these changes are aimed at helping to restore investor confidence by strengthening listed companies' corporate governance practices.[4] The text of the proposed rule change, as amended, is set forth below.[5] Text in brackets indicates material to be deleted, and text in italics indicates material to be added.[6]

* * * * *

PCX Equities, Inc.

Rule 5

Listings

Rules 5.1–5.2–No change.

Section 3. Corporate Governance and Disclosure Policies

Corporate Governance and Disclosure Policies

Rule 5.3 The Corporation shall require that specific corporate governance and disclosure policies be established by domestic issuers of any equity security listed pursuant to Rule 5.2. *Issuers of securities under the Tier I designation must comply with the provisions of Rules 5.3(c)–(o). Issuers of securities under the Tier II designation must comply with the provisions of Rules 5.3(a)–(i)(4) and 5.3(k)(5). Issuers of any security that is listed pursuant to the Rules of the Corporation must comply with the provisions of Rule 5.3(k)(5).* [The Corporation, however, will not require an issuer of such security under the Tier II designations to comply with the provisions for an audit committee as set forth in this Rule 5.3(b).]

Rule 5.3(a)—No change.

Independent Directors [/Audit Committee]

Rule 5.3(b). Independent Directors [/Audit Committee]

The Corporation shall require that each listed domestic issuer have at least two independent directors on its board of directors. [Such issuer shall maintain an audit committee. All audit committee members shall be independent directors that satisfy the audit committee requirement set forth below.

[(1) Audit Committee Charter. The board of directors must adopt and approve a formal written charter for the audit committee. The audit committee must review and reassess the adequacy of the formal written charter on an annual basis. The charter must specify the following:

[(i) The scope of the audit committee's responsibilities and how it carries out those responsibilities, including structure, processes, and membership requirements;

[(ii) That the outside auditor is ultimately accountable to the board of directors and the audit committee of the company, that the audit committee and board of directors have the ultimate authority and responsibility to select, evaluate, and, where appropriate, replace the outside auditor (or to nominate the outside auditor to be proposed for shareholder approval in any proxy statement); and

[(iii) That the audit committee is responsible for ensuring that the outside auditor submits on a periodic basis to the audit committee a formal written statement delineating all relationships between the auditor and the company and that the audit committee is responsible for actively engaging in a dialogue with the outside auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the outside auditor and for recommending that the board of directors take appropriate action in response to the outside auditors' report to satisfy itself of the outside auditors' independence.

[(2) Composition/Expertise Requirement of Audit Committee Members.

[(i) Each audit committee will consist of at least three independent directors, all of whom have no relationship to the company that may interfere with the exercise of their independence from management and the company (''Independent'');

[(ii) Each member of the audit committee must be financially literate, as such qualification is interpreted by the company's board of directors in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee; and

[(iii) At least one member of the audit committee must have accounting or related financial management expertise, as the Board of Directors interprets such qualification in its business judgment.

[(3) Independence Requirement of Audit Committee Members. In addition to the definition of Independent provided in 5.3(b)(2)(i), the following restrictions shall apply to every audit committee member:

[(i) Employees. A director who is an employee (including non-employee executive officers) of the company or any of its affiliates may not serve on the audit committee until three years following the termination of his or her employment. In the event the employment relationship is with a former parent or predecessor of the company, the director could serve on the audit committee after three years following the termination of the relationship between the company and the former parent or predecessor. ''Affiliate'' includes a subsidiary, sibling company, predecessor, parent company, or former parent company.

[(ii) Business Relationship. A director (a) who is a partner, controlling shareholder, or executive officer of an organization that has a business relationship with the company, or (b) who has a direct business relationship with the company (*e.g.*, a consultant) may serve on the audit committee only if the company's board of directors determines in its business judgment that the relationship does not interfere with the director's exercise of independent judgment. In making a determination regarding the independence of a director pursuant to this paragraph, the board of directors should consider, among other things, the materiality of the relationship to the company, to the director, and, if applicable, to the organization with which the director is affiliated.

[''Business relationships'' can include commercial, industrial, banking, consulting, legal, accounting and other relationships. A director can have this relationship directly with the company, or the director can be a partner, officer

[4] The Commission notes that the PCX will consider amendments to the proposed rule change once the Commission approves proposals on corporate governance matters filed by other exchanges. Telephone conversation between Steven B. Matlin, Senior Counsel, PCX, and Ira L. Brandriss, Special Counsel, Division of Market Regulation (''Division''), Commission, on October 23, 2003.

[5] The rule text as set forth herein includes several minor technical revisions that the Exchange has committed to correct by filing an amendment. Telephone conversation between Steven B. Matlin, Senior Counsel, PCX, and Ira L. Brandriss, Special Counsel, Division, Commission, on October 23, 2003.

[6] The Commission notes that the PCX listing rules provide standards for the listing of two different tiers of securities, to which the proposed rule change makes reference. As stated in PCX Rule 5.2(b): ''A listing under the Tier I designation generally signifies that the company has achieved maturity and high status in its industry in terms of assets, earnings, and shareholder interest, and acceptance. The Tier II designation is limited, except for specific circumstances as discussed [earlier in the provision], to the listing of common stock, preferred stock, bonds and debentures, and warrants. A listing under the Tier II designation generally signifies that the company has limited commercial operations, lower capitalization, and lacks a demonstrated earnings history.''

or employee of an organization that has such a relationship. The director may serve on the audit committee without the above-referenced board of directors' determination after three years following the termination of, as applicable, either (a) the relationship between the organization with which the director is affiliated and the company, (b) the relationship between the director and his or her partnership status, shareholder interest or executive officer position, or (c) the direct business relationship between the director and the company.

[(iii) Cross Compensation Committee Link. A director who is employed as an executive of another corporation where any of the company's executives serves on that corporation's compensation committee may not serve on the audit committee.

[(iv) Immediate Family. A director who is an Immediate Family member of an individual who is an executive officer of the company or any of its affiliates cannot serve on the audit committee until three years following the termination of such employment relationship. ''Immediate Family'' includes a person's spouse, parents, children, siblings, mothers-in-law and fathers-in-law, sons and daughters-in-law, and anyone (other than employees) who shares such person's home.

[(v) Notwithstanding the requirements of subparagraphs (3)(i) and (3)(iv), one director who is no longer an employee or who is an Immediate Family member of a former executive officer of the company or its affiliates, but is not considered independent pursuant to these provisions due to the three-year restriction period, may be appointed, under exceptional and limited circumstances, to the audit committee if the company's board of directors determines in its business judgment that membership on the committee by the individual is required by the best interests of the corporation and its shareholders, and the company discloses, in the next annual proxy statement subsequent to such determination, the nature of the relationship and the reasons for that determination.

[(4) Written Affirmation. As part of the initial listing process, and with respect to any subsequent changes to the composition of the audit committee, and otherwise approximately once each year, each company should provide the Exchange written confirmation regarding:

[(i) any determination that the company's board of directors has made regarding the independence of directors pursuant to any of the subparagraphs above;

[(ii) the financial literacy of the audit committee member;

[(iii) the determination that at least one of the audit committee members has accounting or related financial management expertise; and

[(iv) the annual review and reassessment of the adequacy of the audit committee charter.

[(5) ''Officer'' has the meaning specified in Rule 16a-1(f) under the Securities Exchange Act of 1934, or any successor rule.

[(6) Initial Public Offering. Companies listing in conjunction with their initial public offering (including spin-offs and carve outs) will be required to have two qualified audit committee members in place within three months of listing and a third qualified member in place within twelve months of listing.]

Rules 5.3(c)–(i)(4)—No change.

Rule 5.3(j) Corporate Governance Guidelines/Code of Conduct

(1) Corporate Governance Guidelines. Listed companies must adopt and disclose corporate governance guidelines. Each listed company's Web site must include its corporate governance guidelines, the charters of its most important committees (including at least the audit, compensation and nominating committees) and the company's code of business conduct and ethics. Each company's annual report must state that the foregoing information is available on its Web site, and that the information is available in print to any shareholder who requests it. The following subjects must be addressed in the corporate governance guidelines:

(A) Director qualification standards. These standards should, at minimum, reflect the independence requirements set forth in subsection (k) below. Companies may also address other substantive qualification requirements, including policies limiting the number of boards on which a director may sit, and director tenure, retirement and succession.

(B) Director responsibilities. These responsibilities should clearly articulate what is expected from a director, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials.

(C) Director access to management and, as necessary and appropriate, independent advisors.

(D) Director compensation. These guidelines should include general principles for determining the form and amount of director compensation (and for reviewing those principles, as appropriate).

(E) Director orientation and continuing education.

(F) Management succession. Succession planning should include policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO.

(G) Annual performance evaluation of the board. The board should conduct a self-evaluation at least annually to determine whether it and its committees are functioning effectively.

(2) Code of Business Conduct and Ethics. Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers. The code of business conduct and ethics must require that any waiver of the code for executive officers or directors may be made only by the board or a board committee and must be promptly disclosed to shareholders. The code of business conduct and ethics must also contain compliance standards and procedures that will facilitate the effective operation of the code. All codes should address the following topics:

(A) Conflicts of interest. A conflict of interest occurs when an individual's private interest interferes in any way, or even appears to interfere, with the interests of the corporation as a whole.

(B) Corporate opportunities. Employees, officers and directors should be prohibited from (1) taking for themselves opportunities that are discovered through the use of corporate property, information or position; (2) using corporate property, information, or position for personal gain; and (3) competing with the company.

(C) Confidentiality. Employees, officers and directors should maintain the confidentiality of information entrusted to them by the company or its customers, except when disclosure is authorized or legally mandated. Confidential information includes all non-public information that might be of use to competitors, or harmful to the company or its customers, if disclosed.

(D) Fair dealing. Each employee, officer and director should endeavor to deal fairly with the company's customers, suppliers, competitors and employees. None should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair dealing practices.

(E) Protection and proper use of company assets. All employees, officers and directors should protect the company's assets and ensure their efficient use.

(F) Compliance with laws, rules and regulations. The company should proactively promote compliance with laws, rules and regulations, including insider trading laws.

(G) Encouraging the reporting of any illegal or unethical behavior to appropriate personnel. The company should proactively promote ethical behavior. The company must ensure that employees know that the company will not allow retaliation for reports made in good faith.

Independent Directors/Board Committees

Rule 5.3(k) Independent Directors/Board Committees

The Corporation shall require that each listed domestic issuer have a majority of independent directors on its board of directors, except that a domestic issuer of which more than 50% of the voting power is held by an individual, a group or another company need not have a majority of independent directors on its board or have nominating/corporate governance and compensation committees composed of independent directors as set forth in Rule 5.3(k). However, all such controlled companies must have at least a minimum three person audit committee and otherwise comply with the audit committee requirements provided for in this Rule 5.3(k)(5).

(1) Independent Directors. For purposes of this Rule 5.3(k), no director qualifies as independent unless the board of directors affirmatively determines that the director has no material relationship with the listed company, either directly or as a partner, shareholder or officer of an organization that has a relationship with the company. Companies must disclose these determinations. The basis for a board determination that a relationship is not material must be disclosed in the company's annual proxy statement. A board may adopt and disclose categorical standards to assist it in making determinations of independence and may make a general disclosure if a director meets these standards. Any determination of independence for a director who does not meet these standards must be specifically explained. A company must disclose any standard it adopts. In the event that a director with a business or other relationship that does not fit within the disclosed standards is determined to be independent, a board must disclose the basis for its determination.

In addition, the following directors do not qualify as independent directors:

(A) A director who is a former employee of the listed company whose employment ended within the past five years.

(B) A director who is, or in the past three years has been, affiliated with or employed by a (present or former) auditor of the company (or of an affiliate). Such director cannot be independent until three years after the end of either the affiliation or the auditing relationship.

(C) A director who is, or in the past five years has been, part of an interlocking directorate in which an executive officer of the listed company serves on the compensation committee of another company that concurrently employs the director.

(D) A director with an immediate family member in any the foregoing categories. Immediate family includes a person's spouse, parents, children, siblings, mothers-in-law and fathers-in-law, sons and daughters-in-law, and anyone (other than employees) who shares such person's home.

(2) Regularly Scheduled Non-Management Directors Executive Sessions. The non-management directors of each company must meet at regularly scheduled executive sessions without management. Non-management directors are all those who are not company officers, and includes such directors who are not independent by virtue of a material relationship, former status or family membership, or for any other reason. There need not be a single presiding director at all executive sessions of the non-management directors. If one director is chosen to preside at these meetings, his or her name must be disclosed in the annual proxy statement. Alternatively, a company may disclose the procedure by which a presiding director is selected for each executive session. In order that interested parties may be able to make their concerns known to the non-management directors, a company must disclose a method for such parties to communicate directly with the presiding director or with the non-management directors as a group.

(3) Nominating/Corporate Governance Committee. Listed companies must have a Nominating Committee/Corporate Governance Committee composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee need not be an independent director. The committee must have a written charter that addresses:

(A) The committee's purpose, which at a minimum, must be to: identify individuals qualified to become board members, and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders; and develop and recommend to the board a set of corporate governance principles applicable to the company.

(B) The committee's goals and responsibilities, which must reflect, at a minimum, the board's criteria for selecting new directors, and oversight of the evaluation of the board and management.

(C) An annual performance evaluation of the committee.

(D) Committee member qualifications, committee member appointment and removal, committee structure and operations (including authority to delegate to subcommittees), and committee reporting to the board.

(E) The committee's authority to retain and terminate any search firm to be used to identify director candidates, including the sole authority to approve the search firm's fees and other retention terms.

If a company is required by contract or otherwise to provide third parties with the ability to nominate directors (for example, preferred stock rights to elect directors upon a dividend default, shareholder agreements, and management agreements), the selection and nomination of such directors need not be subject to the nominating committee process.

Boards may allocate the responsibilities of the nominating/corporate governance committee and the compensation committee to committees of their own denomination, provided that the committees are composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee need not be an independent director. Any such committee must have a published committee charter.

Controlled companies need not comply with the requirements of this provision.

(4) Compensation Committee. Listed companies must have a compensation committee composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee need not be an independent director. The committee must have a written charter that addresses:

(A) The committee's purpose which, at a minimum, must be to discharge the board's responsibilities relating to compensation of the company's executives, and to produce an annual report on executive compensation for inclusion in the company's proxy statement, in accordance with applicable rules and regulations.

(B) The committee's duties and responsibilities, which, at a minimum, must be to:

(i) Review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and set the CEO's compensation level based on this evaluation.

(ii) Make recommendations to the board with respect to incentive-compensation plans and equity-based plans.

(C) An annual performance evaluation of the compensation committee.

(D) Committee member qualifications, committee member appointment and removal, committee structure and operations (including authority to delegate to subcommittees), and committee reporting to the board.

(E) The committee's authority to retain and terminate a consultant to assist in the evaluation of a director, CEO or senior executive compensation. The Committee shall have the sole authority to approve the consultant's fees and other retention terms.

Controlled companies need not comply with the requirements of this provision.

(5) Audit Committee.

(A) General Provisions.

(i) Each listed company must have an audit committee as defined by Section 3(a)(58) of the Securities and Exchange Act of 1934. The audit committee must be composed entirely of independent directors. The audit committee must comply with all the rules and procedures set forth in Rule10A–3 of the Securities and Exchange Act of 1934. If a member of the audit committee ceases to be independent for reasons outside the member's reasonable control, that person, with notice by the issuer to the Corporation, may remain an audit committee member of the listed issuer until the earlier of the next annual meeting or special meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent. Should an individual who ceases to be independent for reasons outside the member's reasonable control remain a member of the audit committee after the time permitted by this Rule 5.3(k)(5)(A)(i), then the Corporation shall remove the issuer's securities from listing pursuant to the procedures set forth in Rule 5.5(m).

(ii) Listed issuers, other than foreign private issuers and small business issuers (as defined in Rule 12b–2 of the Securities and Exchange Act of 1934), must be in compliance with this Rule 5.3(k)(5) by the earlier of their first annual shareholders meeting after January 15, 2004, or October 31, 2004. Foreign private issuers and small business issuers must be in compliance with this Rule 5.3(k)(5) by July 31, 2005.

(iii) If an executive officer of a listed issuer becomes aware of any material noncompliance by the listed issuer with the requirements of this Rule 5.3(k)(5), the listed issuer must promptly notify the Corporation of such noncompliance.

(iv) To be eligible for continued listing, a listed issuer must comply with all of the requirements set forth in this Rule 5.3(k)(5). Except as provided for in Rule 5.3(k)(5)(A)(i), should a listed issuer fail to comply with any of the requirements set forth in this Rule 5.3(k)(5) for a period of six (6) consecutive months, then the Corporation shall remove the issuer's securities from listing pursuant to the procedures set forth in Rule 5.5(m). A listed issuer who is not in compliance with the requirements of Rule 5.3(k)(5) must provide the Corporation with plan of remediation within 15 days after notifying the Corporation of such noncompliance. The listed issuer must provide the Corporation with written monthly updates on the progress of the plan of remediation.

(B) Written Charter. The audit committee must have a written charter that addresses:

(i) The committee's purpose which, at a minimum, must be to:

(a) Assist board oversight of (1) the integrity of the company's financial statements, (2) the company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the company's internal audit function and independent auditors.

(b) Prepare the report that SEC rules require be included in the company's annual proxy statement.

(ii) The duties and responsibilities of the audit committee, which, at a minimum, must be to:

(a) Be directly responsible for the appointment, compensation, retention, and oversight of the work of any registered public accounting firm engaged (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed issuer, and each such registered public accounting firm must report directly to the audit committee.

(b) At least annually, obtain and review a report by the independent auditor describing the firm's internal quality control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the company.

(c) Discuss the annual audited financial statements and quarterly financial statements with management and the independent auditor, including the company's disclosure under ''Management Discussion and Analysis of Financial Condition and Results of Operations.''

(d) Discuss earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies.

(e) Engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(f) Discuss policies with respect to risk assessment and risk management.

(g) Meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors.

(h) Review with the independent auditor any audit problems or difficulties and management's response.

(i) Set clear policies for hiring employees or former employees of the independent auditors.

(j) Report regularly to the board of directors.

(k) Review major issues regarding accounting principles and financial statement presentations; including any significant changes in the company's selection or application of accounting principles, and major issues as to the adequacy of the company's internal controls and any special audit steps adopted in light of material control deficiencies.

(l) Review analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analyses

of the effects of alternative GAAP methods on the financial statements.

(m) Review the effect of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the company.

(n) Review earnings press releases (paying particular attention to any use of ''pro forma,'' or ''adjusted'' non-GAAP, information), as well as financial information and earnings guidance provided to analysts and rating agencies.

(o) Establish procedures for: (1) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters and (2) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting, internal accounting controls or auditing matters.

(iii) An annual performance evaluation of the audit committee.

(C) Composition/Expertise Requirement of Audit Committee Members.

(i) Each audit committee will consist of at least three independent directors, as defined in Rule 5.3(k)(1).

(ii) Each member of the audit committee must be financially literate, as such qualification is interpreted by the company's board of directors in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee.

(iii) At least one member of the audit committee must have accounting or related financial management expertise, as the board of directors interprets such qualification in its business judgment.

(D) Written Affirmation. As part of the initial listing process, and with respect to any subsequent changes to the composition of the audit committee, and otherwise approximately once each year, each company should provide the Exchange written confirmation regarding:

(i) Any determination that the company's board of directors has made regarding the independence of directors.

(ii) The financial literacy of the audit committee member.

(iii) The determination that at least one of the audit committee members has accounting or related financial management expertise.

(iv) The annual review and reassessment of the adequacy of the audit committee charter.

(6) Internal Audit Function. Each listed company must have an internal audit function. This does not necessarily mean that a company must establish a separate internal audit department or dedicate employees to the task on a full-time basis. It is sufficient for the company to have in place an appropriate control process for reviewing and approving its internal transactions and accounting. A company may outsource this function to a firm other than its independent auditors.

Rule 5.3(l). Reserved

CEO Certification

Rule 5.3(m). CEO Certification

Each listed company CEO must certify to the Corporation each year that he or she is not aware of any violation by the company of the Corporation's corporate governance listing standards. The certification filed with the Corporation, as well as the CEO/CFO certifications required to be filed with the SEC regarding the quality of the company's public disclosure, must be disclosed in the listed company's annual report to shareholders.

Listed Foreign Private Issuers

Rule 5.3(n). Listed Foreign Private Issuers

Listed foreign private issuers must disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under the Corporation's listing standards. Listed foreign private issuers must comply with the provisions of Rule 5.3(k)(5). Listed foreign private issuers may provide this disclosure either on their Web site (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States (again, in the English language). If the disclosure is only made available on the Web site, the annual report shall so state and provide the web address at which the information may be obtained.

Deadline for Compliance

Rule 5.3(o). Deadline for Compliance

Tier I listed issuers, other than Tier I foreign private issuers and Tier I small business issuers (as defined in Rule 12b–2 of the Securities and Exchange Act of 1934), must be in compliance with all applicable sections of Rule 5.3 by the earlier of (1) their first annual shareholders meeting after January 15, 2004, or (2) October 31, 2004. Tier I foreign private issuers and Tier I small business issuers must be in compliance with all applicable sections of Rule 5.3 by July 31, 2005.

Section 4. Suspension, *Public Reprimand* or Issuer Withdrawal from Listing

¶ 7957E Suspension/*Public Reprimand*

Rule 5.4(a). The *Corporation* [Board of Directors] may suspend dealings in or institute proceedings to remove any security from listed or unlisted trading privileges. *The Corporation may issue a public reprimand letter to any listed company that violates a Corporation listing standard. The Corporation shall remove any security from listed or unlisted trading privileges if the listed company violates any provisions of Rule 5.3(k)(5).*

Rule 5.4(b)—No change.

Section 5. Maintenance Requirements and Delisting Procedures

¶7957G Maintenance Requirements and Delisting Procedures

Rule 5.5(a). The Corporation does not rate or evaluate any security dealt in on the Corporation. In making a determination concerning listing and delisting it acts normally upon information furnished it by the issuer, and it does not verify this information from independent sources or gather independent information about the issuers whose securities are dealt in on the Corporation.

As a matter of policy, when a listed company fails to meet any of the listing maintenance requirements and has more than one class of securities listed, the Corporation will give consideration to delisting all such classes. However, the Corporation may continue the listing of one class of securities regardless of its decision to delist another class, *except for failure to comply with Rule 5.3(k)(5) in which case all such classes shall be delisted.* The securities of a company will be subject to suspension and/or withdrawal from listing and registration as a listed issue if the Corporation finds that a listed company fails to meet the maintenance requirements as set forth in this Rule 5.5, or fails to comply with the Corporation's listing policies or agreements.

Commentary:

.01 When the issuer fails to meet any provision of the applicable maintenance requirements of this Rule 5.5, the Exchange shall determine whether to suspend dealings in the security and/or request the issuer to take action to remedy any identified deficiency. Should the issuer fail to correct any deficiency, the Exchange shall take action to delist the security.

.02 Securities listed under the Tier I designation will not be granted waivers from the Corporation's maintenance

requirements. Any security that no longer meets the Tier I maintenance requirements, but meets the Tier II maintenance requirements, will be reclassified as a Tier II security. The Corporation, however, may grant a waiver for the continued listing of any security in cases where the security remains listed on either the NYSE, Amex, or Nasdaq National Market; provided, however, that the Corporation determines that there is a reasonable basis for a waiver. In such cases, the security will be included under the Tier II designation.

.03 Any security approved by the Board of Directors for listing prior to July 22, 1994 must meet one of the following:

(a) To qualify for inclusion under the Tier I designation, a security must meet the applicable initial listing requirements as set forth in Rule 5.2 (including any index product listed pursuant to Rule 8); however, a security listed on either the NYSE, Amex, or Nasdaq National Market may be designated as a Tier I security so long as it meets the applicable Tier I maintenance requirements in this Rule 5.5; or

(b) Any security not meeting the applicable maintenance requirements must do so within six months of July 22, 1994. Until such time, the former standards will be applied and the security will be designated as a Tier II security.

Rule 5.5(b)—(l)—No change.

¶7957T Delisting Procedures

Rule 5.5(m). Whenever the Corporation determines that it is appropriate to either suspend dealings in and/or remove securities from listing pursuant to *Rule 5.3 or* [this] Rule 5.5, except for other than routine reasons (*e.g.*, redemptions, maturities, etc.) *or violations of Rule 5.3(k)(5) in which case the Corporation shall initiate delisting a listed company's securities*, it will follow, insofar as practicable, the following procedures:

(1) The Corporation shall notify the issuer in writing describing the basis on which the Corporation is considering the delisting of the company's security. Such notice shall be sent by certified mail and shall include the time and place of a meeting to be held by the Corporation to hear any reasons why the issuer believes its security should not be delisted. Generally, the issuer will be notified at least three (3) weeks prior to the meeting and will be requested to submit a written response.

(2) If, after such meeting, the Corporation determines that the security should be delisted, the Corporation shall notify the issuer by telephone (if possible, the same day of the meeting) and in writing of the delisting decision and the basis thereof. The written notice will also inform the issuer that it may appeal the decision to the Board of Directors and request a hearing.

(3) Concurrent with the Corporation's decision to delist the issuer's security, the Corporation will prepare a press announcement, which will be disseminated to the Market Makers and the investing public no later than the opening of trading the business day following the Corporation's decision (the Securities Qualification Department will also distribute the information to the ETP Holders). Accordingly, the suspension of trading in the issuer's security will become effective at the opening of business on the day following the Corporation's decision.

(4) If the issuer requests an appeal hearing, it must file its request along with (i) a $2,500 delisting appeal fee and (ii) an answer to the causes specified by the Corporation with the Secretary of the Corporation no later than five (5) business days following service of notice of the proposed delisting. If the issuer does not request a hearing within the specified period of time, or it does not submit the $2,500 fee to the Corporation in the form and manner prescribed, the Corporation will submit an application to the Securities and Exchange Commission to strike the security from list of companies listed on the Corporation. The Corporation will furnish a copy of such application to the issuer in accordance with Section 12 of the Securities Exchange Act of 1934 and the Rules promulgated there under.

(5) If a request for a hearing is made and the requirements of Rule 5.5(m)(4) are met within the time specified, the issuer will be entitled to an appeal hearing and the Corporation will provide the issuer at least fifteen (15) business days notice of the time and place of the hearing.

(6) The hearing shall be held before the Board Appeals Committee appointed by the Board of Directors for such purpose. Only those members of the Board Appeals Committee who attend the hearing may vote with respect to any decisions the Committee may make.

(7) Any documents or other written material the issuer wishes to consider should be submitted to the appropriate office of the Corporation at least five (5) business days prior to the date of the hearing.

(8) At the hearing, the issuer must prove its case by presenting testimony, evidence, and argument to the Board Appeals Committee. The form and manner in which the actual hearing will be conducted will be established by the Board Appeals Committee so as to assure the orderly conduct of the proceeding. At the hearing, the Board Appeals Committee may require the issuer to furnish additional written information that has come to its attention.

(9) After the conclusion of the proceeding, the Board Appeals Committee shall make its decision. The decision of the Board Appeals Committee shall be in writing with one copy served upon the issuer and the second copy filed with the Secretary of the Corporation. Such decision shall be final and conclusive. If the decision is that the security of the issuer is to be removed from listing, an application shall be submitted by the Corporation to the Securities and Exchange Commission to strike the security from listing and registration, and a copy of such application shall be provided to the issuer in accordance with Section 12 of the Securities Exchange Act of 1934 and the Rules promulgated there under. If the decision is that the security should not be removed from listing, the issuer shall receive a notice to that effect from the Corporation.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In light of the recent failures of a number of significant companies due to the lack of diligence, ethics and controls, the PCXE chose to review its corporate governance and disclosure policies. In September 2002, the PCXE Board of Directors formed a subcommittee to review the PCXE's current corporate governance and disclosure standards. The goal of the subcommittee was to enhance the accountability, integrity, and

transparency of the Exchange's listed companies.

In addition to reviewing the PCXE's corporate governance and disclosure policies, the subcommittee also reviewed the changes mandated by the Sarbanes-Oxley Act of 2002. In a release effective April 25, 2003, the Commission directed all national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the audit committee requirements mandated by the Sarbanes-Oxley Act of 2002.[7] These requirements relate to the independence of audit committee members, the audit committee's responsibility to select and oversee the issuer's independent accountant, procedures for handling complaints regarding the issuer's accounting practices, the authority of the audit committee to engage advisors, and funding for the independent auditor and any outside advisors engaged by the audit committee.

The Exchange represents that the proposed new corporate governance and disclosure policies are designed to further the ability of honest and well-intentioned directors, officers, and employees to perform their functions effectively. The resulting proposal would also allow shareholders to more easily and efficiently monitor the performance of companies and directors in order to reduce the instances of lax and unethical behavior.

The proposals for new corporate governance and disclosure policies would be codified in PCXE Rule 5.3. The new standards in PCXE Rule 5.3 would apply to listed companies designated as Tier I issuers except for the new provisions on audit committees that are mandated by the Sarbanes-Oxley Act of 2002.[8] These provisions, which are contained in Rule 5.3(k)(5), would apply to all PCX listed securities.

Listed issuers, other than foreign private issuers and small business issuers, would have to be in compliance with Rule 5.3(k)(5) by the earlier of: (1) their first annual shareholders meeting after January 15, 2004, or (2) October 31, 2004. Foreign private issuers and small business issuers that are listed would have to be in compliance with the new listing rules by July 31, 2005.

Tier I listed issuers, other than Tier I foreign private issuers and Tier I small business issuers (as defined in Rule 12b–2 of the Act[9]), would have to be in compliance with all applicable sections of Rule 5.3 by the earlier of: (1) their first annual shareholders meeting after January 15, 2004, or (2) October 31, 2004. Tier I foreign private issuers and Tier I small business issuers would have to be in compliance with all applicable sections of Rule 5.3 by July 31, 2005.

The following are proposed requirements that would become incorporated in the PCXE's corporate governance and disclosure policies.

(1) Listed companies must adopt and disclose corporate governance guidelines.

Listed companies would be required to adopt and disclose corporate governance guidelines. Each listed company's Web site would be required to include its corporate governance guidelines, the charters of its most important committees (including at least the audit, compensation and nominating committees), and the company's code of business conduct and ethics. Each company's annual report would have to state that the foregoing information is available on its Web site, and that the information is available in print to any shareholder who requests it.

The following subjects would have to be addressed in the corporate governance guidelines:

• *Director qualification standards.* These standards should, at minimum, reflect the independence requirements set forth in proposed subsection 5.3(k). Companies may also address other substantive qualification requirements including policies limiting the number of boards on which a director may sit and director tenure, retirement, and succession.

• *Director responsibilities.* These responsibilities should clearly articulate what is expected from a director, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials.

• *Director access.* Directors must be given access to management and, as necessary and appropriate, independent advisors.

• *Director compensation.* These guidelines should include general principles for determining the form and amount of director compensation (and for reviewing those principles, as appropriate).

• *Director orientation.* The company must provide an orientation and continuing education for its directors.

• *Management succession.* Succession planning should include policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO.

• *Annual performance evaluation of the board.* The board should conduct a self-evaluation at least annually to determine whether it and its committees are functioning effectively.

(2) Code of Business Conduct.

Listed companies would have to adopt and disclose a code of business conduct and ethics for directors, officers, and employees, and promptly disclose any waivers of the code for directors or executive officers. The code of business conduct and ethics would have to require that any waiver of the code for executive officers or directors may be made only by the board or a board committee and would have to be promptly disclosed to shareholders. The code of business conduct and ethics would also have to contain compliance standards and procedures that would facilitate the effective operation of the code.

All codes should address the following topics:

• *Conflicts of interest.* A conflict of interest occurs when an individual's private interest interferes in any way, or even appears to interfere, with the interests of the corporation as a whole.

• *Corporate opportunities.* Employees, officers and directors should be prohibited from: (i) Taking for themselves opportunities that are discovered through the use of corporate property, information, or position; (ii) using corporate property, information, or position for personal gain; and (iii) competing with the company.

• *Confidentiality.* Employees, officers, and directors should maintain the confidentiality of information entrusted to them by the company or its customers, except when disclosure is authorized or legally mandated. Confidential information includes all non-public information that might be of use to competitors, or harmful to the company or its customers, if disclosed.

• *Fair dealing.* Each employee, officer, and director should endeavor to deal fairly with the company's customers, suppliers, competitors, and employees. None should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair dealing practices.

• *Protection and proper use of company assets.* All employees, officers, and directors should protect the company's assets and ensure their efficient use.

• *Compliance with laws, rules and regulations.* The company should proactively promote compliance with

[7] *See* Securities Act Release No. 8220, Securities Exchange Act Release No. 47654, and Investment Company Act Release No. 26001 (April 9, 2003), 68 FR 18788 (April 16, 2003).

[8] *See* PCXE Rule 5.3(k)(5).

laws, rules, and regulations, including insider trading laws.

• *Encouraging the reporting of any illegal or unethical behavior to appropriate personnel.* The company should proactively promote ethical behavior. The company must ensure that employees know that the company will not allow retaliation for reports made in good faith.

(3) Listed companies must have a majority of independent directors.

Each domestic issuer would be required to have a majority of independent directors on its board of directors, except that a domestic issuer of which more than 50% of the voting power is held by an individual, a group, or another company would not need to have a majority of independent directors on its board or have nominating/corporate governance and compensation committees composed of independent directors. However, all such controlled companies would be required to have at least a minimum three-person audit committee and otherwise comply with the audit committee requirements.

(4) In order to tighten the definition of ''independent director'' for purposes of these standards:

(a) No director would qualify as independent unless the board of directors affirmatively determines that the director has no material relationship with the listed company, either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company. Companies would have to disclose these determinations.

The basis for a board determination that a relationship is not material would have to be disclosed in the company's annual proxy statement. A board could adopt and disclose categorical standards to assist it in making determinations of independence, and could make a general disclosure if a director meets these standards. Any determination of independence for a director who does not meet these standards would have to be specifically explained. A company would be required to disclose any standard it adopts. In the event that a director with a business or other relationship that does not fit within the disclosed standards is determined to be independent, a board would be required to disclose the basis for its determination.

(b) In addition, the following directors would not qualify as independent directors:

(i) A director who is a former employee of the listed company whose employment ended within the past five years.

(ii) A director who is, or in the past three years has been, affiliated with or employed by a (present or former) auditor of the company (or of an affiliate). Such director could not be independent until three years after the end of either the affiliation or the auditing relationship.

(iii) A director who is, or in the past five years has been, part of an interlocking directorate in which an executive officer of the listed company serves on the compensation committee of another company that concurrently employs the director.

(iv) A director with an immediate family member in any of the foregoing categories. Immediate family includes a person's spouse, parents, children, siblings, mothers-in-law and fathers-in-law, sons and daughters-in-law, and anyone (other than employees) who shares such person's home.

(5) Regularly Scheduled Executive Sessions without Management.

In order to empower non-management directors to serve as a more effective check on management, non-management directors of each company would have to meet at regularly scheduled executive sessions without management. Non-management directors are all those who are not company officers, and include such directors who are not independent by virtue of a material relationship, former status or family membership, or for any other reason. There would not need to be a single presiding director at all executive sessions of the non-management directors. If one director is chosen to preside at these meetings, his or her name would have to be disclosed in the annual proxy statement. Alternatively, a company could disclose the procedure by which a presiding director is selected for each executive session. In order that interested parties may be able to make their concerns known to the non-management directors, a company would be required to disclose a method for such parties to communicate directly with the presiding director or with the non-management directors as a group.

(6) Nominating/Corporate Governance Committee.

Listed companies would be required to have a Nominating Committee/Corporate Governance Committee composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee would not need to be an independent director.

The committee would be required to have a written charter that addresses:

• The committee's purpose, which, at a minimum, would be required to be: to identify individuals qualified to become board members, and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders; and to develop and to recommend to the board a set of corporate governance principles applicable to the company.

• The committee's goals and responsibilities, which would be required to reflect, at a minimum, the board's criteria for selecting new directors, and oversight of the evaluation of the board and management.

• An annual performance evaluation of the committee.

• Committee member qualifications, committee member appointment and removal, committee structure and operations (including authority to delegate to subcommittees), and committee reporting to the board.

• The committee's authority to retain and terminate any search firm to be used to identify director candidates, including sole authority to approve the search firm's fees and other retention terms.

If a company is required by contract or otherwise to provide third parties with the ability to nominate directors (for example, preferred stock rights to elect directors upon a dividend default, shareholder agreements, and management agreements), the selection and nomination of such directors would not need to be subject to the nominating committee process.

Boards could allocate the responsibilities of the nominating/corporate governance committee and the compensation committee to committees of their own denomination, provided that the committees are composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee would not need to be an independent director. Any such committee would be required to have a published committee charter.

Controlled companies would not need to comply with the requirements of this provision.

(7) Compensation Committee.

Listed companies would be required to have a compensation committee composed entirely of independent directors, except that if such committee is made up of three or more individuals, then one member of the committee would not need to be an independent director.

The committee would be required to have a written charter that addresses:

• The committee's purpose which, at a minimum, would be required to be: to discharge the board's responsibilities relating to compensation of the

company's executives, and to produce an annual report on executive compensation for inclusion in the company's proxy statement, in accordance with applicable rules and regulations.

• The committee's duties and responsibilities, which, at a minimum, would be required to be to:

(i) Review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and set the CEO's compensation level based on this evaluation.

(ii) Make recommendations to the board with respect to incentive-compensation plans and equity-based plans.

• An annual performance evaluation of the compensation committee.

• Committee member qualifications, committee member appointment and removal, committee structure and operations (including authority to delegate to subcommittees), and committee reporting to the board.

• The committee's authority to retain and terminate a consultant to assist in the evaluation of a director, CEO or senior executive compensation. The Committee would need to have the sole authority to approve the consultant's fees and other retention terms.

Controlled companies would not need to comply with the requirements of this provision.

(8) Audit Committee.

Each listed company would be required to have an audit committee as defined by Section 3(a)(58) of the Act.[10] The audit committee would have to be composed entirely of independent directors. The audit committee would be required to comply with all the rules and procedures set forth in Rule 10A–3 of the Act.[11] If a member of the audit committee ceases to be independent for reasons outside the member's reasonable control, that person, with notice by the issuer to the Exchange, could remain an audit committee member of the listed issuer until the earlier of the next annual or special meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent. Should an individual who ceases to be independent for reasons outside the member's reasonable control remain a member of the audit committee after the time permitted, then the Exchange would be required to remove the issuer's securities from listing.

Listed issuers, other than foreign private issuers and small business issuers (as defined in Rule 12b–2 of the Act[12]), would have to be in compliance with Rule 5.3(k)(5) by the earlier of their first annual shareholders meeting after January 15, 2004, or October 31, 2004. Foreign private issuers and small business issuers would have to be in compliance with Rule 5.3(k)(5) by July 31, 2005.

If an executive officer of a listed issuer becomes aware of any material noncompliance by the listed issuer with the audit committee requirements, the listed issuer would be required to promptly notify the Exchange of such noncompliance.

To be eligible for continued listing, a listed issuer would have to comply with all of the audit committee requirements. Except for the situation where an audit committee member ceases to be independent for reasons outside the member's reasonable control, should a listed issuer fail to comply with any of the audit committee requirements for a period of 6 consecutive months, then the Exchange would be required to remove the issuer's securities from listing. A listed issuer who is not in compliance with the requirements of Rule 5.3(k)(5) would have to provide the Corporation with a plan of remediation within 15 days after notifying the Corporation of such noncompliance. The listed issuer would have to provide the Corporation with written monthly updates on the progress of the plan of remediation.

The audit committee would be required to have a written charter that addresses:

• The committee's purpose, which, at a minimum, would be required to be to:

(i) Assist board oversight of: (a) The integrity of the company's financial statements, (b) the company's compliance with legal and regulatory requirements, (c) the independent auditor's qualifications and independence, and (d) the performance of the company's internal audit function and independent auditors.

(ii) Prepare the report that SEC rules require be included in the company's annual proxy statement.

• The duties and responsibilities of the audit committee, which, at a minimum, would be required to be to:

(i) Be directly responsible for the appointment, compensation, retention, and oversight of the work of any registered public accounting firm engaged (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed issuer, and each such registered public accounting firm must report directly to the audit committee.

(ii) At least annually, obtain and review a report by the independent auditor describing the firm's internal quality control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the company.

(iii) Discuss the annual audited financial statements and quarterly financial statements with management and the independent auditor, including the company's disclosure under ''Management Discussion and Analysis of Financial Condition and Results of Operations.''

(iv) Discuss earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies.

(v) Engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(vi) Discuss policies with respect to risk assessment and risk management.

(vii) Meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function), and with independent auditors.

(viii) Review with the independent auditor any audit problems or difficulties and management's response.

(ix) Set clear policies for hiring employees or former employees of the independent auditors.

(x) Report regularly to the board of directors.

(xi) Review major issues regarding accounting principles and financial statement presentations, including any significant changes in the company's selection or application of accounting principles, and major issues as to the adequacy of the company's internal controls and any special audit steps adopted in light of material control deficiencies.

(xii) Review analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analyses

[10] 15 U.S.C. 78c(a)(58).

[11] 17 CFR 240.10A–3.

[12] 17 CFR 240.12b–2.

of the effects of alternative GAAP methods on the financial statements.

(xiii) Review the effect of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the company.

(xiv) Review earnings press releases (paying particular attention to any use of ''pro forma,'' or ''adjusted'' non-GAAP, information), as well as financial information and earnings guidance provided to analysts and rating agencies.

(xv) Establish procedures for: (a) The receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters, and (b) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting, internal accounting controls or auditing matters.

• An annual performance evaluation of the audit committee.

The composition of the Audit Committee would be required to be as follows:

(i) Each audit committee would be required to consist of at least three independent directors.

(ii) Each member of the audit committee would be required to be financially literate, as such qualification is interpreted by the company's board of directors in its business judgment, or become financially literate within a reasonable period of time after his or her appointment to the audit committee.

(iii) At least one member of the audit committee would be required to have accounting or related financial management expertise, as the board of directors interprets such qualification in its business judgment.

• As part of the initial listing process, and with respect to any subsequent changes to the composition of the audit committee, and otherwise approximately once each year, each company should provide the Exchange written confirmation regarding:

(i) Any determination that the company's board of directors has made regarding the independence of directors.

(ii) The financial literacy of the audit committee member.

(iii) The determination that at least one of the audit committee members has accounting or related financial management expertise.

(iv) The annual review and reassessment of the adequacy of the audit committee charter.

(9) Internal Audit Function.

Each listed company would be required to have an internal audit function. This does not necessarily mean that a company would be required to establish a separate internal audit department or dedicate employees to the task on a full-time basis. The Exchange states that it would be sufficient for the company to have in place an appropriate control process for reviewing and approving its internal transactions and accounting. A company could outsource this function to a firm other than its independent auditors.

(10) CEO Certification.

Each listed company CEO would have to certify to the Exchange each year that he or she is not aware of any violation by the company of the Exchange's corporate governance listing standards. The certification filed with the Exchange, as well as the CEO/CFO certifications required to be filed with the SEC regarding the quality of the company's public disclosure, would have to be disclosed in the listed company's annual report to shareholders.

(11) Listed Foreign Private Issuers.

Listed foreign private issuers would have to disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under the Exchange's listing standards. Listed foreign private issuers would be required to comply with the provisions of Rule 5.3(k)(5). Listed foreign private issuers could provide this disclosure either on their web site (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States (in the English language). If the disclosure is only made available on the web site, the annual report would be required to so state and provide the web address at which the information may be obtained.

(12) Deadline for Compliance.

Tier I listed issuers, other than Tier I foreign private issuers and Tier I small business issuers (as defined in Rule 12b–2 of the Act[13]), would have to be in compliance with all applicable sections of Rule 5.3 by the earlier of their first annual shareholders meeting after January 15, 2004 or October 31, 2004. Tier I foreign private issuers and Tier I small business issuers would have to be in compliance with all applicable sections of Rule 5.3 by July 31, 2005.

(13) Suspension/Public Reprimand.

Under the proposed rule change, the Exchange could suspend dealings in or institute proceedings to remove any security from listed or unlisted trading privileges. The Exchange could issue a public reprimand letter to any listed company that violates an Exchange listing standard. The Corporation would be required to remove any security from listed or unlisted trading privileges if the listed company violates any provisions of Rule 5.3(k)(5).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[14] in general, and furthers the objectives of Section 6(b)(5) of the Act[15] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all

[13] 17 CFR 240.12b–2.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

subsequent amendments, all written statements with respect to the proposed rule change, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to file number SR–PCX–2003–35 and should be submitted by November 21, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–27409 Filed 10–30–03; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3550]

Commonwealth of Pennsylvania (Amendment #1)

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency, effective October 23, 2003, the above numbered declaration is hereby amended to include Blair, Crawford, Lawrence, McKean, Mercer, Potter, Tioga, Venango, Warren, and Wayne Counties as disaster areas due to damages caused by severe storms, tornadoes, and flooding that occurred on July 21, 2003, and continuing through September 12, 2003.

In addition, applications for economic injury loans from small businesses located in the contiguous counties of Bradford, Beaver, Bedford, Butler, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Erie, Forest, Huntingdon, Lycoming, and Pike in Pennsylvania; Allegany, Broome, Cattaraugus, Chautauqua, Chemung, Delaware, Steuben, and Sullivan in New York; and Ashtabula, Columbiana, Mahoning, and Trumbull in Ohio may be filed until the specified date at the previously designated location. All other counties contiguous to the above named primary counties have been previously declared.

The economic injury number assigned to the State of New York is 9X4400 and for the State of Ohio is 9X4500.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is November 18, 2003, and for economic injury the deadline is June 21, 2004.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: October 24, 2003.

Cheri L. Cannon,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 03–27417 Filed 10–30–03; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Region 3—Washington Metropolitan Area District Office Advisory Council; Public Meeting

The Washington Metropolitan Area District Office Advisory Council of the U.S. Small Business Administration (SBA) will be conducting a meeting on Thursday, November 13, 2003, from 9 a.m. until 11:30 a.m. at the Washington Metropolitan Area District Office located at 1110 Vermont Avenue, NW., 9th Floor, Washington, DC 20005. The meeting is open to the public. Seating is limited and is available on a first come, first serve basis. The focus of the meeting includes a review of FY 2003 District Office accomplishments, FY 2004 District Office goals, update on new initiatives, and the operations and goals of the District Advisory Council in the coming year.

Anyone wishing further information concerning the meeting or who wishes to submit oral or written comments should contact, Joseph P. Loddo or Sheila D. Thomas, Designated Federal Officials for the SBA's Washington Metropolitan Area District Advisory Council, by phone at (202) 606–4000, ext. 200 or 276, respectively or via e-mail to: *joseph.loddo@sba.gov* or *sheila.thomas@sba.gov.* Requests for oral comments must be in writing to: Sheila D. Thomas 1110 Vermont Ave., NW., 9th Fl, Washington, DC 20005 and received no later than November 7, 2003.

Scott R. Morris,

Deputy Chief of Staff.

[FR Doc. 03–27419 Filed 10–30–03; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Region 1—Maine District Advisory Council; Public Meeting

The U.S. Small Business Administration Region 1 Advisory Council, located in the geographical area of Augusta, Maine will hold a public meeting at 1:30 p.m. November 18th, 2003 at the University of Southern Maine, 68 High Street, Room 118, Portland, Maine to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Mary McAleney, District Director, U.S. Small Business Administration, 68 Sewall Street, Room 512, Augusta, Maine 04330, (207)–622–8386 phone, (207)–622–8277 fax.

Scott R. Morris,

Deputy Chief of Staff.

[FR Doc. 03–27420 Filed 10–30–03; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Investment Companies; Increase in Maximum Leverage Ceiling

13 CFR 107.1150(a) sets forth the maximum amount of Leverage (as defined in 13 CFR 107.50) that a Small Business Investment Company may have outstanding at any time. The maximum Leverage amounts are adjusted annually based on the increase in the Consumer Price Index published by the Bureau of Labor Statistics. The cited regulation states that SBA will publish the indexed maximum Leverage amounts each year in a Notice in the **Federal Register**.

Accordingly, effective the date of publication of this Notice, and until further notice, the maximum Leverage amounts under 13 CFR 107.1150(a) are as stated in the following table:

If your leverageable capital is:	Then your maximum leverage is:
(1) Not over $19,300,000.	300 percent of Leverageable Capital
(2) Over $19,300,000 but not over $38,700,000.	$57,900,000 + [2 × (Leverageable Capital − $19,300,000)]
(3) Over $38,700,000 but not over $58,000,000.	$96,700,000 + (Leverageable Capital − $38,700,000)
(4) Over $58,000,000	$116,000,000

(Catalog of Federal Domestic Assistance Program No. 59.011, small business investment companies)

[16] 17 CFR 200.30–3(a)(12).

Dated: October 26, 2003.

Jeffrey D. Pierson,

Associate Administrator for Investment.

[FR Doc. 03–27418 Filed 10–30–03; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 4522]

Determination Pursuant to Section 1(b) of Executive Order 13224 Relating to the Communist Party of Nepal (Maoist)

Acting under the authority of section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13286 of July 2, 2002, and Executive Order 13284 of January 23, 2003, and in consultation with the Secretary of the Treasury, the Attorney General, and the Secretary of Homeland Security, I hereby determine that the Communist Party of Nepal (Maoist), also known as the United Revolutionary People's Council, also known as the People's iberation Army of Nepal, also known as CPN(M), has committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that ''prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously,'' I determine that no prior notice need be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: October 23, 2003.

Richard L. Armitage,

Deputy Secretary of State, Department of State.

[FR Doc. 03–27373 Filed 10–30–03; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 4490]

Advisory Committee on International Economic Policy; Notice of Open Meeting

The Advisory Committee on International Economic Policy (ACIEP) will meet from 9 a.m. to 12 noon on Monday, November 17, 2003 in Room 1107, U.S. Department of State, 2201 C Street NW., Washington, DC 20520. The meeting will be hosted by Assistant Secretary of State for Economic and Business Affairs E. Anthony Wayne and Committee Chairman R. Michael Gadbaw.

The ACIEP serves the U.S. Government in a solely advisory capacity concerning issues and problems in international economic policy. Proposed topics for the meeting are status of trade negotiations, economic strategic planning, and subcommittee updates.

The public may attend this meeting as seating capacity allows. The media are welcome but discussions are off the record. Admittance to the Department of State building is by means of a pre-arranged clearance list. In order to be placed on this list, please provide your name, title, company or other affiliation if appropriate, social security number, date of birth, and citizenship to the Advisory Committee Executive Secretariat by fax (202) 647–5936 (Attention: Gwendolyn Jackson); telephone (202) 647–0847; or email (*jacksongl@state.gov*) by Nov. 13, 2003.

For further information about the meeting, please contact Eliza Koch, ACIEP Secretariat, Office of Economic Policy and Public Diplomacy, Bureau of Economic and Business Affairs, U.S. Department of State, Room 3526, 2201 C Street NW., Washington, DC 20520, by email (*kochek@state.gov*) or telephone (202) 647–1310.

Dated: October 27, 2003.

Eliza Koch,

ACIEP Secretariat, Office of Economic Policy and, Public Diplomacy, Bureau of Economic and Business Affairs, U.S. Department of State.

[FR Doc. 03–27421 Filed 10–30–03; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF STATE

[Public Notice 4489]

Notice of Meeting; United States International Telecommunication Advisory Committee, Telecommunication Standardization Sector (ITAC–T)

The Department of State announces an electronic meeting of the U.S. International Telecommunication Advisory Committee (ITAC). The purpose of the Committee is to advise the Department on matters related to telecommunication and information policy matters in preparation for international meetings pertaining to telecommunication and information issues.

An electronic meeting of the U.S. Study Group B will be held from November 21–26, 2003 to comment on and approve normal contributions to the ITU–T Study Group 13 meeting, which will be held February 3–13, 2004. Contributors to this U.S. Study Group B (USSG B) electronic meeting should obtain USSG B numbers from Marcie Geissinger, the USSG B secretary at (303) 499–2145 or at *marciegeissinger@msn.com.* Any contributions to this electronic meeting should be forwarded to Ms. Geissinger at the above e-mail address no later than November 21. Comments to the contributions may be made through close of business, Monday, November 24; contributors must respond to the comments by 12 noon EST, Tuesday, November 25. If there are no comments or if the response comments are not challenged by 5 pm EST, Tuesday, November 25, then the USSG B Chair or the Secretary will close the meeting on November 26 and indicate to each contributor that the contributions may be forwarded to the ITU–T not later than December 3, 2003.

If you are not currently on the USSG B's Study Group 13 reflector, you will not be able to receive the contributions and comments. If you wish to be added to the reflector, please contact Ms. Geissinger at the e-mail address above. If you wish to confirm that you are on the USSG B's Study Group 13 reflector, please send a message to *listserv@almsntsa@state.gov* leaving the subject blank and showing ''review sgb-13'' as the body of the message. The response to your email will be a list of persons on the SG B reflector with interest in Study Group 13. If you are not on the ''sgb-13'' reflector, you will not be able to review the list of persons on the reflector.

Dated: October 24, 2003.

Anne D. Jillson,

International Telecommunications and Information Policy, Department of State.

[FR Doc. 03–27422 Filed 10–30–03; 8:45 am]

BILLING CODE 4710–07–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determinations Under the African Growth and Opportunity Act

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The United States Trade Representative (USTR), as of the date of publication of this notice in the **Federal Register**, designates the Democratic Republic of Congo (DROC) as a beneficiary sub-Saharan African country eligible to receive the trade benefits provided for in the African Growth and Opportunity Act for articles other than textiles and apparel.

EFFECTIVE DATE: October 31, 2003.

FOR FURTHER INFORMATION CONTACT: Constance Hamilton, Senior Director for African Affairs, Office of the United States Trade Representative, (202) 395–9514.

SUPPLEMENTARY INFORMATION: The African Growth and Opportunity Act (Title I of the Trade and Development Act of 2000, Pub. L. No. 106–200) (AGOA) provides trade benefits to the countries of sub-Saharan Africa to promote increased trade and investment between the United States and sub-Saharan Africa and economic development in the region.

In Proclamation 7657 (March 28, 2003), the President designated the Democratic Republic of Congo as an ''eligible sub-Saharan African country'' pursuant to section 104 of the AGOA (19 U.S.C. 3703), and authorized the USTR to exercise the authority provided to the President under section 506A(a)(1) of the Trade Act of 1974, as amended (the ''1974 Act'') (19 U.S.C. 2466a(a)(1)) to designate DROC as a ''beneficiary sub-Saharan African country'' eligible to receive the trade benefits of the AGOA for articles other than textiles and apparel. The President directed the USTR to announce any such exercise of authority in the **Federal Register**.

The President also proclaimed that, if it is designated as a beneficiary sub-Saharan African country, DROC would be a lesser developed beneficiary country for purposes of section 112(b)(3)(B) of the AGOA (19 U.S.C. 3721(b)(3)(B)). Lastly, the President decided to authorize the USTR, with respect to any designation of DROC as a beneficiary sub-Saharan African country, to exercise the authority provided to the President under section 604 of the 1974 Act (19 U.S.C. 2483) to embody modifications and technical or conforming changes in the Harmonized Tariff Schedule of the United States (HTS).

Based on progress DROC has made in stabilizing its political situation, I have determined that DROC meets the eligibility criteria set forth in section 506A(a)(1) of the 1974 Act and have decided, as of the date of publication of this notice in the **Federal Register**, to designate DROC as a beneficiary sub-Saharan African country for purposes of receiving the trade benefits of the AGOA for articles other than textiles and apparel. In order to reflect this designation in the HTS, general note 16(a) to the HTS is modified by inserting in alphabetical sequence in the list of beneficiary sub-Saharan African countries ''Democratic Republic of Congo.'' This modification to the HTS is effective with respect to respect to articles entered, or withdrawn from warehouse for consumption, on or after the date of publication of this notice in the **Federal Register**. DROC is also a lesser developed beneficiary sub-Saharan African country for purposes of section 112(b)(3) of the AGOA. DROC may now begin the process to become eligible for the trade benefits of the AGOA for textile and apparel articles.

Robert B. Zoellick,

United States Trade Representative.

[FR Doc. 03–27398 Filed 10–30–03; 8:45 am]

BILLING CODE 3190–W3–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Public Comment With Respect to the Annual National Trade Estimate Report on Foreign Trade Barriers

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Pursuant to section 303 of the Trade and Tariff Act of 1984, as amended, USTR is required to publish annually the National Trade Estimate Report on Foreign Trade Barriers (NTE). With this notice, the Trade Policy Staff Committee (TPSC) is requesting interested parties to assist it in identifying significant barriers to U.S. exports of goods, services and overseas direct investment for inclusion in the NTE. Particularly important are impediments materially affecting the actual and potential financial performance of an industry sector. The TPSC invites written comments that provide views relevant to the issues to be examined in preparing the NTE. In order to ensure the most timely processing of submissions, the Department of Commerce will receive comments in response to this Notice.

DATES: Public comments are due not later than Friday, December 12, 2003. This deadline is firm. No submissions will be accepted after December 12.

ADDRESSES: *Paper submissions:* NTE Comments, Office of Trade and Economic Analysis, Room H–2815, U.S. Department of Commerce, Washington, DC, 20230.

Submissions by electronic mail: ntecomments@ita.doc.gov.

FOR FURTHER INFORMATION CONTACT: Procedural questions about transmitting comments or viewing public submissions should be directed to Ms. Marva Thompson, (202) 482–2185, or Mr. Howard Schreier, (202) 482–4180, U.S. Department of Commerce. Questions regarding the report or its subject matter should be directed to Ms. Gloria Blue, Office of Policy Coordination, Office of the United States Trade Representative (202) 395–3475.

SUPPLEMENTARY INFORMATION: Last year's report may be found on USTR's Internet Home Page (*http://www.ustr.gov*) under the section on Reports. In order to ensure compliance with the statutory mandate for reporting foreign trade barriers that are significant, we will focus particularly on those restrictions where there has been active private sector interest.

The information submitted should relate to one or more of the following ten categories of foreign trade barriers:

(1) import policies (*e.g.*, tariffs and other import charges, quantitative restrictions, import licensing, and customs barriers);

(2) standards, testing, labeling, and certification (including unnecessarily restrictive application of phytosanitary standards, refusal to accept U.S. manufacturers' self-certification of conformance to foreign product standards, and environmental restrictions);

(3) government procurement (*e.g.*, ''buy national'' policies and closed bidding);

(4) export subsidies (*e.g.*, export financing on preferential terms and agricultural export subsidies that displace U.S. exports in third country markets);

(5) lack of intellectual property protection (*e.g.*, inadequate patent, copyright, and trademark regimes);

(6) services barriers (*e.g.*, limits on the range of financial services offered by foreign financial institutions, regulation of international data flows, restrictions on the use of data processing, quotas on imports of foreign films, and barriers to the provision of services by professionals (*e.g.*, lawyers, doctors, accountants, engineers, nurses, etc.);

(7) investment barriers (*e.g.*, limitations on foreign equity participation and on access to foreign government-funded R&D consortia, local content, technology transfer and export

performance requirements, and restrictions on repatriation of earnings, capital, fees and royalties);

(8) anticompetitive practices with trade effects tolerated by foreign governments (including anticompetitve activities of both state-owned and private firms that apply to services or to goods and that restrict the sale of U.S. products to any firm, not just to foreign firms that perpetuate the practices);

(9) trade restrictions affecting electronic commerce (*e.g.*, tariff and non-tariff measures, burdensome and discriminatory regulations and standards, and discriminatory taxation); and

(10) other barriers (*i.e.*, barriers that encompass more than one category, *e.g,* bribery and corruption, or that affect a single sector).

As in the case of last year's NTE, we are asking that particular emphasis be placed on any practices that may violate U.S. trade agreements. We are also interested in receiving any new or updated information pertinent to the barriers covered in last year's report as well as new information. Please note that the information not used in the NTE will be maintained for use in future negotiations.

It is most important that your submission contain estimates of the potential increase in exports that would result from the removal of the barrier, as well as a clear discussion of the method(s) by which the estimates were computed. Estimates should fall within the following value ranges: Less than $5 million; $5 to $25 million; $25 million to $50 million; $50 million to $100 million; $100 million to $500 million; or over $500 million. Such assessments enhance USTR's ability to conduct meaningful comparative analyses of a barrier's effect over a range of industries.

Please note that interested parties discussing barriers in more than one country should provide a separate submission (*i.e.*, one that is self-contained) for each country.

Written Comments: In order to ensure the most timely receipt and consideration of comments submitted in response to this notice, the following guidelines and special procedures have been established:

(1) All comments will be received at the U.S. Department of Commerce rather than the Office of the United States Trade Representative;

(2) The Department of Commerce has arranged to accept non-confidential, public submissions by electronic mail (e-mail). An automatic reply confirming receipt of e-mail submissions will be sent. E-mail submissions in Microsoft Word or Corel WordPerfect are preferred. If a word processing application other than those two is used, please advise us in your submission of the specific application used;

(3) In order to facilitate prompt processing of submissions, the Department of Commerce strongly urges and prefers e-mail submission of non-confidential, public comments;

(4) To ensure security, submissions containing business confidential information should not be sent by e-mail, but via the U.S. Postal Service or commercial express delivery (see paragraph 6 and 7 below for special requirements applying to such submissions). If a submission contains business confidential information, a non-confidential public version must also be submitted along with the business confidential version.

(5) Business-confidential submissions must be accompanied by a justification as to why the information contained in the submission should be treated confidentially. In addition, any submissions containing business confidential information must be clearly marked ''Confidential'' at the top and bottom of the cover page (or letter) and of each succeeding page of the submission. The version that does not contain confidential information should also be clearly marked, at the top and bottom of each page, ''public version'' or ''non-confidential'.

(6) When comments are submitted using the U.S. Postal Service or commercial couriers, it is strongly recommended that submitters notify the Department of Commerce by e-mail (*ntecomments@ita.doc.gov*) as to the date of transmittal and method of delivery (U.S. Postal Service or name of courier company).

(7) All submissions must be in English and should conform to the information requirements of 15 CFR 2003. If submissions are made via U.S. Postal Service or commercial express delivery, the submission should be accompanied by a computer disk containing a machine-readable version. The disk should have a label identifying the software used, the submitter and the title of the submission. In addition, business confidential and public or non-confidential submissions should be submitted on separate disks which are clearly marked ''business confidential'' or ''non-confidential'', as appropriate.

Submissions must be received at the Department of Commerce no later than Friday, December 12, 2003.

After the filing deadline, written comments submitted in connection with this request, except for information granted ''business confidential'' status pursuant to 15 CFR 2003.6, will be available for review on the web at: *http://web.ita.doc.gov/otea/ntecomments.nsf.* Arrangements can also be made to view these non-proprietary public comments in the Foreign Trade Reference Room (Room 2233) in the U.S. Department of Commerce. The Department of Commerce is located at 14th St. and Constitution Ave., NW in Washington, DC. Customary hours of operation for the Foreign Trade Reference Room are from 9 am to 4 pm, Monday through Friday. Call (202) 482–2185 to confirm. Questions regarding the operation of the Reference Room should be directed to Ms. Marva Thompson at (202) 482–2185.

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. 03–27496 Filed 10–30–03; 8:45 am]

BILLING CODE 3190–W3–P

Corrections

Federal Register

Vol. 68, No. 211

Friday, October 31, 2003

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF DEFENSE

Department of the Army

Intent to Grant an Exclusive License

Correction

In notice document 03–26432 appearing on page 60095 in the issue of Tuesday, October 21, 2003, make the following correction:

On page 60095, in the second column, under **SUPPLEMENTARY INFORMATION**, in item 1, in the second line, ''6,189,651'' should read ''6,189,651 B1.''

[FR Doc. C3–26432 Filed 10–30–03; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 303

Standards for Program Operations

Correction

In rule document 03–55530 beginning on page 61634 in the issue of Wednesday, October 29, 2003, make the following correction:

§303.109 [Corrected]

On page 61634, in the first column, in last line, the phrase ''Secretary of the U.S. Treasury'' is corrected to read ''fSecretary of the U.S. Treasuryt''.

[FR Doc. C3–55530 Filed 10–30–03; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48627A; File No. SR-NASD–2003–130]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. Relating to Amendments to its Recently Adopted Rules Regarding Shareholder Approval for Stock Option or Purchase Plans or Other Equity Compensation Arrangements

Correction

In notice document 03–27137 beginning on page 61532 in the issue of Tuesday, October 28, 2003, make the following corrections:

On page 61532, in the second column, in paragraph (iv), the sentence beginning eight lines from the bottom should read: ''*Promptly following an issuance of any employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.*''

On page 61532, in the second column, in the document file line, ''C3'' should read ''03''.

[FR Doc. C3–27137 Filed 10–30–03; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Friday,
October 31, 2003

Part II

Department of Agriculture

Food and Nutrition Service

7 CFR Part 247

Commodity Supplemental Food Program—Plain Language, Program Accountability, and Program Flexibility; Proposed Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 247

RIN 0584–AC84

Commodity Supplemental Food Program—Plain Language, Program Accountability, and Program Flexibility

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would rewrite the regulations for the Commodity Supplemental Food Program in ''plain language'' to help program operators and the general public better understand program requirements. It would also reduce the time and paperwork burden for State and local agencies, increase their flexibility in program operations, and strengthen program accountability. Other changes would be made to incorporate legislative provisions and improve program service and caseload management. The effect of this rule will be to make the Commodity Supplemental Food Program easier to understand and administer, and more effective and efficient in providing benefits to eligible persons.

DATES: Please send your comments to reach us on or before December 30, 2003. Comments received after the above date will not be considered in developing the final rule.

ADDRESSES: You can mail or hand-deliver comments to Lillie F. Ragan, Assistant Branch Chief, Household Programs Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Room 500, 3101 Park Center Drive, Alexandria, Virginia 22302–1594.

FOR FURTHER INFORMATION CONTACT: Lillie F. Ragan at the above address or telephone (703) 305–2662. A regulatory impact analysis has been prepared for this rule. You may request a copy of the analysis by contacting us at the above address.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures
II. Procedural Matters
III. Background and Discussion of the Proposed Rule

I. Public Comment Procedures

Your written comments on this proposed rule should be specific, confined to issues pertinent to the proposed rule, and should explain your reasons for any change recommended. Where possible, you should reference the specific section or paragraph of the proposal you are addressing. Comments received after the close of the comment period (see **DATES**) will not be considered or included in the Administrative Record for the final rule.

The comments, including names, street addresses, and other contact information of commenters, will be available for public review at the Food and Nutrition Service, Room 500, 3101 Park Center Drive, Alexandria, Virginia, during regular business hours (8:30 a.m. to 5 p.m.), Mondays through Fridays, except Federal holidays.

II. Procedural Matters

Clarity of the Regulations

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these regulations easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) make it more or less clear?

(4) Would the rule be easier to understand if it were divided into more (but shorter) sections?

(5) Is the description of the rule in the preamble section entitled ''Background and Discussion of the Proposed Rule'' helpful in understanding the rule? How could this description be more helpful?

Executive Order 12866

This proposed rule has been determined to be significant and was reviewed by the Office of Management and Budget under Executive Order 12866.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Prior to drafting this proposed rule, we received input from State and local agencies at various times. Since the Commodity Supplemental Food Program (CSFP) is a State-administered, federally funded program, our regional offices have informal and formal discussions with State and local officials on an ongoing basis regarding program implementation and performance. Additionally, Food and Nutrition Service (FNS) Headquarters and regional office staff receive input from State and local program staff at the annual national CSFP conference, and at various other meetings throughout the year. These contacts allow State and local agencies to provide feedback that forms the basis for proposals to amend program regulations. We will review all comments provided during the 60-day comment period following the publication of this rule and will develop the final rule after due consideration of the concerns expressed in the comments.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of $100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The program addressed in this action is listed in the Catalog of Federal Domestic Assistance under 10.565, and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials (7 CFR part 3015, Subpart V, and final rule-related notices published at 48 FR 29114, June 24, 1983, and 49 FR 22676, May 31, 1984).

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). The Under Secretary of Food, Nutrition, and Consumer Services, Eric M. Bost, has certified that this action will not have a significant impact on a substantial number of small

entities. While program participants and State agencies and Indian Tribal Organizations that administer the programs will be affected by this rulemaking, the economic effect will not be significant.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect. Prior to any judicial action challenging the application of CSFP rules, exhaustion of administrative remedies, as set out in 7 CFR 247.33, would be required.

Regulatory Impact Analysis

The regulatory amendments proposed in this rule will benefit State and local agencies by reducing the paperwork burden and increasing flexibility in program administration. Some of the changes will affect program eligibility, such as the establishment of income eligibility guidelines, the consideration of average income over the previous year, and counting the pregnant woman as two in considering income eligibility. However, these changes are not expected to result in appreciable changes in program participation or increase program costs.

Other changes will improve program accountability by increasing the penalties for program violations and requiring the initiation and pursuit of claims against participants who fraudulently obtain program benefits. These changes, too, are not expected to result in any appreciable changes in program participation or costs.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), this proposed rule will contain information collections that are subject to review and approval by the Office of Management and Budget (OMB); therefore, FNS is submitting for public comment the changes in the information collection burden that would result from adoption of the proposals in the rule.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

To be considered, comments must be postmarked on or before December 30, 2003. Please send comments to Lillie F. Ragan, Assistant Branch Chief, Household Programs Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Room 500, 3101 Park Center Drive, Alexandria, Virginia 22302–1594, and to Lauren Wittenberg, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503. All comments will be summarized and included in the request for OMB approval of the proposed changes in the information collection burden. All comments will become a matter of public record. For further information, or for copies of the information collections discussed below, please contact Ms. Ragan at the above address or telephone (703) 305–2662.

Title: Food Distribution Forms (This information collection burden consolidates the reporting and recordkeeping requirements for 7 CFR parts 240, 247, 250, 251, 252, 253, and 254).

OMB Number: 0584–0293.

Expiration Date: October 31, 2006.

Type of Request: Revision of a currently approved collection.

Abstract: This proposed rule would affect only reporting and recordkeeping requirements under 7 CFR part 247. The reporting burden for this part would be reduced from 350,812 hours to 262,983 hours. The recordkeeping burden for this part would increase from 84 hours to 124 hours. The total information collection burden for OMB Number 0584–0293 would be reduced from 1,154,152 hours to 1,066,363 hours. Below, we describe all proposed changes under the sections proposed in this rule.

Section 247.4, Agreements. Agreement requirements, currently under §§ 247.3 and 247.6, would be moved to the proposed §§ 247.4. We propose to make the Federal-State agreement permanent, instead of annual, with amendments submitted as needed. The information collection burden for Federal/State agreements for all food distribution and child nutrition programs is contained in a separate information collection—OMB Number 0584–0067. The proposal to make the Federal-State agreement for the CSFP permanent would require no change in the information collection burden, as this change was effected (erroneously, in the case of CSFP) when the agreement for other food distribution programs was made permanent in 1997. We propose to reduce the required elements for State agreements with local agencies, and for local agency agreements with other agencies. We estimate that these agreements would take 2 hours to complete, instead of the present 8 hours. We also propose to clarify that the duration of agreements between State and local agencies is determined by the State agency, and the duration of agreements between local agencies and other agencies is determined by the local agency. We estimate that 50 agreements between State and local agencies, and between local agencies and other agencies, would be completed each year. The total burden for completion of State and local agency agreements would be reduced from 480 to 100 hours.

Section 247.6, State Plan. State Plan requirements, currently under § 247.5, would be moved to the proposed § 247.6. We propose to make the State Plan permanent, with amendments submitted as needed, instead of annual. We also propose to remove several elements that are currently required to be included in the State Plan. We estimate that, on average, one State agency per year would submit a State Plan, which would require 50 hours to develop, instead of the current 100 hours. Thus, the total burden for State Plan submissions will be 50 hours. Since participating State agencies must submit amendments to request additional caseload for the following year, and to make any other changes in the Plan, we estimate that all 35 State agencies projected to be participating in fiscal year 2004 will submit an amendment to the Plan each year. We estimate that the submission of an amendment will require about 5 hours on average. Thus, the total burden for the submission of amendments to the State Plan would be 175 hours. The total information collection burden for development and submission of the State Plan and amendments would be reduced from 2,000 to 225 hours.

Section 247.8, Individuals applying to participate in CSFP, and § 247.16, Certification period. The application process for individuals applying to participate in CSFP, which is currently under § 247.7, would be moved to the

proposed § 247.8. The certification period requirements, which are also currently under § 247.7, would be moved to the proposed § 247.16. In this rule, we propose to allow State and local agencies to extend the certification of elderly participants for additional six-month periods without a formal review of eligibility. Local agencies would have to confirm the elderly participant's address and continued interest in receiving CSFP benefits. This change would reduce the time required for recertification, or contact with, elderly participants from 30 minutes to 15 minutes (0.25 hrs.). The burden for the twice-annual recertification of the approximately 381,000 elderly individuals projected to be participating in fiscal year 2004 would be 190,500 hours. The time required for recertification of women, infants, and children would remain the same (0.50 hrs.). The burden for the twice-annual recertification of the 66,000 women, infants, and children projected to be participating in fiscal year 2004 would be 66,000 hours. The total burden for applications and recertifications would be reduced from 342,000 hours to 256,500 hours. We propose to remove the current requirement that the local agency provide a verification of certification form to participants moving to another location. This would remove the information collection burden of 110 hours for this activity.

Section 247.23, State provision of administrative funds to local agencies. The requirement that State agencies request approval to retain administrative funds above a specific limit, which is currently under § 247.11, would be moved to the proposed § 247.23. We propose to allow all State agencies, regardless of whether they are involved in storage of commodities, to request approval to retain more funds. We do not believe, however, that this will result in an increase in the present information collection burden for this requirement.

Section 247.30, Claims. Under the proposed § 247.30, we propose to require that the State or local agency pursue a claim against a participant to recover the value of benefits improperly received or used if it determines that the participant, or the parent or caretaker of the participant, received or used the commodities through fraud. The State agency would have to maintain all records regarding claims actions taken against participants. Since 7 CFR part 247 and 7 CFR part 250 do not currently address specific criteria relative to the establishment and pursuit of claims against participants, there is currently no recordkeeping burden regarding such claims. We estimate that State and local agencies would initiate a total of 500 claims actions against participants each year. The recordkeeping burden would be 5 minutes (0.08 hrs.) for each claims action. The total recordkeeping burden for claims would be 40 hours.

Section 247.34, Management evaluation system. The requirement that State agencies perform management evaluations of local agencies, which is currently under § 247.21, would be moved to the proposed § 247.34. We propose to reduce the requirement for State agency on-site reviews of local agencies from annual to every two years. Thus, of the 103 local agencies currently participating, 52 would have to be reviewed each year. The total burden for management evaluations would be reduced from 480 hours to 416 hours.

Respondents: State, Local, or Tribal Government; program participants; business or other for profit; nonprofit institutions; Federal government.

Total Annual Responses: Current: 917,758; Proposed: 1,126,931.

Estimate of Burden: Current: 1,154,152; Proposed: 1,066,363.

The proposed changes in information collection burden for the reporting and recordkeeping requirements described above are included in the following table.

	Annual responses	Hours per response	Total hours
Reporting			
Section 247.4 State/local agreements:			
Present	60	8	480
Proposed	50	2	100
Section 247.6 State Plan/State Plan amendments:			
State Plan:			
Present	20	100	2,000
Proposed	1	50	50
State Plan amendments:			
Present	Included above under State Plan		
Proposed	35	5	175
Sections 247.8, 247.16 Applications/Recertifications:			
Present	684,000	0.50	342,000
Proposed	894,000	0.29	256,500
Verification of certification form:			
Present	1,325	0.08	110
Proposed	0	0	0
Section 247.34 Management reviews:			
Present	60	8	480
Proposed	52	8	416
Recordkeeping			
Section 247.30 Records of participant claims:			
Present	0	0	0
Proposed	500	0.08	40
Total			
Present	917,758	.....	.....
Proposed	1,126,931	.....	.....

III. Background and Discussion of the Proposed Rule

This rule proposes to rewrite 7 CFR part 247 in ''plain language.'' The proposed plain language format includes a question-and-answer structure under each section, and removal of the legalistic style that is currently reflected in the regulations. We have increased the number of sections to ensure that each section addresses only one specific program area. Nevertheless, some current sections have been consolidated or deleted. This rule also proposes to amend provisions of this part to accomplish several objectives, including:

(1) A reduction of the paperwork burden for State and local agencies, including making the Federal/State agreement and State Plan permanent, with amendments submitted as necessary;

(2) An increase in the flexibility of program operators in providing benefits to eligible population groups, including changes in the recertification of elderly participants;

(3) An increase in program accountability, including the requirement that State and local agencies initiate claims against program participants who improperly obtain benefits as a result of intentional misrepresentation;

(4) Improvements in program service by requiring that, for a pregnant woman, each embryo or fetus in utero be counted as a household member in determining if the household meets the income eligibility standards; and,

(5) Incorporation of current legislative provisions.

In the following paragraphs, we describe each section of the proposed new 7 CFR part 247, including an explanation of any changes in content or format.

Definitions, Section 247.1

In this proposed section, we propose to include definitions relevant to CSFP, which are currently included under § 247.2. We propose to remove the definitions of administrative costs, A–90, A–102, A–110, categorical ineligibility, FMC 74–4, homebound elderly persons, participants, participation, pregnant women, program, Secretary, SFPD, and supplemental foods. The meaning of homebound elderly persons, participants, participation, pregnant women, and program is obvious to any reader. SFPD is the FNS division that formerly administered CSFP. Instead of the term categorical ineligibility, we propose to refer instead to ineligible population groups. Wherever we refer to administrative costs, its meaning is clear. The numbered circulars are all obsolete, and have been replaced by other circulars or incorporated into Federal regulations, as cited in regulatory text. Wherever ''the Secretary'', or ''supplemental foods'', appears in current regulations we propose to refer instead to ''the Department'', and to ''commodities'', respectively.

The seven definitions that we propose to add include certification period, commodities, CSFP, 7 CFR part 250, 7 CFR part 3016, 7 CFR part 3019, and 7 CFR part 3052. A definition of certification period makes clear the time span of program eligibility before a review of eligibility is required. Definitions of commodities and CSFP simply ensure that readers are aware of the purpose of the foods distributed in the program and the program acronym. 7 CFR part 250 contains the regulations for donation of foods in USDA food distribution programs. 7 CFR parts 3016 and 3019 are the Departmental regulations for grants and cooperative agreements with State, local, and Indian tribal governments, and with nonprofit organizations, respectively. 7 CFR part 3052 is the Departmental regulation for audits of States, local governments, and nonprofit organizations. All of these regulations are referred to in this proposed part, and their inclusion in the definitions would help to ensure that readers understand their applicability to CSFP.

The definitions that we propose to revise include caseload, caseload cycle, certification, distributing agency, dual participation, elderly persons, fiscal year, local agency, nonprofit agency, postpartum women, State agency, and State agency plan of program operation and administration. Currently, the caseload cycle begins on December 1 or 30 days after enactment of appropriations legislation for the full fiscal year, and extends through November 30. We propose to establish January 1 through December 31 as the caseload cycle. This would ensure that the caseload cycle extends for a 12-month period even in the event of late passage of appropriations legislation. However, if enactment of a full year's appropriation has been delayed, it may be necessary to assign caseload on a tentative basis to reflect the amount of funds available to support the program under a Continuing Resolution(s). The revised definition of caseload establishes January 1 through December 31 as the caseload cycle, and includes reference to the caseload cycle rather than the present reference to service over a ''specified period of time''.

We propose to define nonprofit agencies as private agencies or organizations that have tax-exempt status under 26 U.S.C. 501 of the Internal Revenue Code (IRC), or that have applied for tax-exempt status with the Internal Revenue Service (IRS). A discussion of the eligibility of nonprofit agencies for participation in CSFP, including the needed tax-exempt status, is contained under the proposed § 247.7.

We propose to delete the definition of distributing agency and to refer instead to the subdistributing agency, so that definitions of distributing agency and subdistributing agency will be consistent with corresponding provisions in 7 CFR part 250. We propose to define subdistributing agency as an agency that has entered into an agreement with the State agency to perform functions that would otherwise be performed by the State, such as entering into agreements with eligible recipient agencies under which commodities are made available, ordering commodities and/or making arrangements for the storage and delivery of such commodities on behalf of eligible recipient agencies. As in 7 CFR part 250, the definition of subdistributing agency does not include an agency that is only responsible for providing warehousing space or making deliveries to specified agencies. We also propose to remove the requirement that a distributing agency (*i.e.*, subdistributing agency under this proposed rule) sign an agreement with the Department as well as with the State agency. This is described in more detail under *Agreements.* Under this proposal, we would also eliminate the description of duties of local agencies currently included in the definition of local agency, since this information is more appropriately included in the regulatory text, and include Indian tribal organizations under the definition. Finally, we propose to revise the definitions of certification, dual participation, elderly persons, fiscal year, postpartum women, State agency, and State Plan for clarification purposes.

The Purpose and Scope of CSFP, Section 247.2

In this proposed section, we propose to describe the purpose and scope of CSFP, which are currently described under § 247.1. In paragraph (a), we propose to ask and answer the question, *How does CSFP help participants?* We describe, as in current regulations, the purpose of CSFP as the distribution of nutritious foods, and provision of

nutrition education, to low-income pregnant, postpartum, and breastfeeding women, infants, children ages 1 through 5, and the elderly. We also propose to describe the monthly distribution of foods to participants based on guide rates established by FNS, and to list some of the foods characteristically included in the food packages. A description of the distribution of foods to participants is currently included under § 247.7(c).

Under paragraph (b), *How many persons may be served in CSFP?,* we propose to provide basic information on caseload, and the caseload cycle, to help the reader understand the scope of the program.

Administering Agencies, Section 247.3

Currently, § 247.3 describes the responsible CSFP administering agencies at the Federal, State, and local levels, and the requirements for the State agency to submit a State Plan and enter into agreements with the Department and other agencies. We propose to include, in this proposed § 247.3, the description of responsible administering agencies and the Federal requirements that apply to administration of CSFP. We propose to include required agreements in the proposed § 247.4 and State Plan requirements in the proposed § 247.6.

In paragraph (a) of this proposed § 247.3, we propose to include a description of the responsible administering agencies, and to clarify that the State agency may delegate to a subdistributing agency (*e.g.*, another State agency or a nonprofit organization) the responsibility for storage and distribution of commodities, and other program functions. We also propose to include in this paragraph the authority for local agencies and subdistributing agencies to delegate responsibility for specific program functions (*e.g.*, food distribution or storage) to another agency, with the State agency's approval. This authority is currently included under § 247.6(c).

While the State agency is provided a great deal of flexibility in administering the program, and in selecting other agencies to perform specific program functions, the State agency must itself perform a few functions. Thus, in paragraph (b) of this proposed section, we propose to make it clear that the State agency may not delegate the responsibility for establishing eligibility requirements for which it has options (such as income limits for women, infants, and children), or for conducting management reviews of local agencies. Through management reviews, the State agency determines if the program is being properly administered, and if corrective actions are needed.

In paragraph (c) of this proposed section, we propose to include the requirement that State, subdistributing, and local agencies administer the program in accordance with the provisions of this part, and with the provisions of 7 CFR part 250 of this chapter, except where they are inconsistent with this part. The current references to specific circulars in § 247.3 are deleted, since they are all obsolete.

Agreements, Section 247.4

Currently, the requirement that State agencies enter into an annual agreement with the Department to operate the program is included under § 247.3, as is the requirement that State agencies enter into agreements with distributing agencies. The requirement that State and local agencies enter into agreements, and the required contents of those agreements, are currently included under § 247.6. Also currently under § 247.6 is the requirement that local agencies and other agencies selected to perform specific program functions sign an agreement. We propose to include all agreement requirements in this proposed § 247.4.

In paragraph (a), we propose to include all of the current required agreements between administering agencies. However, we propose to remove the present requirement that, in addition to the agreement with the State agency, the subdistributing agency (currently referred to as the distributing agency) must also sign an agreement with FNS. Since the State agency is responsible for the administration of the program at the State level, an agreement between the subdistributing agency and FNS serves no real purpose. Also in this paragraph, we propose to clarify that the Federal-State agreement utilized is Form FNS–74.

Currently, a list of the required contents of agreements between State and local agencies is included under § 247.6(b). Additionally, under § 247.6(c), the agreement between the local agency and another agency must state the program responsibilities of the other agency. In paragraph (b) of this proposed section, we propose to include the required contents of all agreements, with the exception of the Federal-State agreement (which is a standard form). We propose to require that all agreements contain the following:

(1) An assurance that each agency will administer the program in accordance with the provisions of this part and with the provisions of 7 CFR part 250, unless they are inconsistent with the provisions of this part.

(2) An assurance that each agency will maintain accurate and complete records for a period of three years from the end of the fiscal year to which they pertain, or, if they are related to unresolved claims actions, audits, or investigations, until those activities have been resolved.

(3) A statement that each agency receiving commodities for distribution is responsible for any loss resulting from improper distribution, or improper storage, care, or handling of commodities.

(4) A statement that each agency receiving program funds is responsible for any misuse of these funds.

(5) A description of the specific functions that the State, subdistributing or local agency is delegating to another agency.

(6) A statement that the agreement may be terminated by either party upon 30 days written notice.

In paragraph (c) of this proposed § 247.4, we propose to list specific requirements for agreements between State and local agencies, which are in addition to the requirements of paragraph (b) of this section. We propose to require that the agreement between State and local agencies include:

(1) An assurance that the local agency will provide nutrition education as required under 7 CFR part 247.

(2) An assurance that the local agency will provide information to participants on the importance of health care and on other health, nutrition, and public assistance programs, and make referrals as appropriate, as required under 7 CFR part 247.

(3) An assurance that the local agency will distribute commodities in accordance with 7 CFR part 247, and with the approved food package guide rate.

(4) An assurance that the local agency will take steps to prevent and detect dual participation.

(5) The names and addresses of all certification, distribution, and storage sites under the jurisdiction of the local agency.

In paragraph (d), we propose to describe the duration of all required agreements. We propose to make the Federal-State agreement permanent, and amended at the initiation of State agencies or at the request of FNS, instead of annual. All amendments must be approved by FNS. We also propose to clarify that the duration of agreements between the State agency and local or subdistributing agencies is established by the State agency. Similarly, we propose to clarify that the State agency may establish, or permit

the local or subdistributing agency to establish, the duration of agreements between the local or subdistributing agency and other agencies. Current regulations do not address the duration of these agreements.

State and Local Agency Responsibilities, Section 247.5

Proposed § 247.5 includes an outline of the major responsibilities of State and local agencies in program administration. Since current regulations do not include such an outline, it is necessary to read through all of 7 CFR part 247 to determine the major responsibilities of the State or local agency in the program. This section is not, however, meant to be a comprehensive list of all State or local agency responsibilities. We propose to break out, in three separate paragraphs, the major responsibilities shared by the State and local agency, and specific responsibilities of the State agency and those of the local agency. We are not proposing to impose any new responsibilities on State or local agencies in this section. While some of the responsibilities listed are not specifically discussed in current regulations, they are inherent in the administration of the program (*e.g.*, ordering commodities and maintaining caseload limits).

State Plan, Section 247.6

Currently, under § 247.3(a), the State agency is required to submit a State Plan on an annual basis and, under § 247.5, must submit a State Plan to initiate or continue program operations and to request additional caseload to expand service to women, infants, children, and elderly persons. Other State Plan requirements are also included under the current § 247.5. We propose to include all State Plan requirements in this proposed § 247.6. In paragraph (a), we propose to describe the purpose, general format, and duration of the State Plan. We propose to make the State Plan permanent, rather than annual, with amendments submitted at the State agency's initiative, or at FNS request, and with all amendments subject to FNS approval. In conjunction with this proposal, we also propose to require that the State agency submit a State Plan to initiate the program, while removing the requirement for continuing program operations. While a State Plan to initiate the program must continue to describe the caseload needed to serve eligible women, infants, children, and the elderly, we propose to require that requests for additional caseload be made in amendments to the Plan, as described under paragraph (d) of this section.

We also propose to remove the language which states that FNS will assign caseload in approving the State Plan submission, and which describes the factors that determine the caseload assignment. We propose to include requirements and procedures for caseload assignment under the proposed § 247.21. We retain the State agency's option to submit the State Plan in the format provided in FNS guidance, in an alternate format, or in combination with other documents required by Federal regulations. However, we propose to remove the requirement that FNS receive advance notification of submission in an alternate format. We propose to encourage the State agency to collaborate with the State agency administering the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) in development of the State Plan (collaboration with the State WIC agency is required in developing a plan to prevent and detect dual participation). Likely areas of collaboration include plans for serving women, infants, and children, program outreach, and nutrition education. These recommendations for collaboration with the State WIC agency would incorporate policy guidance provided to State CSFP and WIC agencies on August 31, 2000. As at present, the State Plan must be signed by the State agency official responsible for program operations.

In paragraph (b) of this proposed section, entitled *When must the State Plan be submitted?,* we propose to retain the current requirement that the State agency submit the State Plan by August 15, to receive approval by the beginning of the fiscal year. We also include unchanged the requirement that FNS provide written approval or disapproval within 30 days of the receipt of the Plan or amendments, and must indicate the reason for disapproval. FNS must notify the State agency within 15 days if further information is required to make a decision on the Plan. We propose to add, in paragraph (b), that the approval of the State Plan or amendments is a prerequisite for the assignment of caseload and the allocation of administrative funds but does not ensure that caseload and funds will be provided. Program resources are dependent upon appropriations, which often become available later in the year. As at present, we propose to include the requirement that a copy of the State Plan be available for public inspection at the State agency.

In paragraph (c) of this proposed section, we propose to include the required contents of the State Plan. In the interest of reducing the paperwork burden for State agencies, we propose to remove several elements currently required to be included in the State Plan. We do not believe a description of these activities need be included in the State Plan, as Federal regulations sufficiently describe the requirements and the means by which the State agency must comply with them. We propose to remove the following elements:

(1) The names and addresses of all certification, food distribution, and storage sites under the jurisdiction of the local agency.

(2) A description of plans for requesting program expansion. Since the State Plan would be a one-time submission, expansion, or additional caseload requests, and plans for opening new sites, would be made in an amendment to the State Plan, as described previously.

(3) The requirement that the plan for nutrition education services provide for participant input and an evaluation component.

(4) A description of the manner in which the State agency plans to monitor local agencies.

(5) A description of plans to involve local agencies and other parties in the development of the Plan for the next fiscal year. Again, we are proposing that the Plan no longer be developed and submitted each year.

(6) A description of the financial management system that will be utilized.

(7) A description of the procedures for resolving commodity complaints.

(8) A description of the audit procedures.

(9) A description of procedures used to meet civil rights requirements.

(10) A description of the fair hearing procedures for participants. Since the procedures that the State agency must follow are detailed in the regulations, it is not necessary for the State agency to describe them in the Plan.

(11) A description of plans to initiate or expand service to elderly persons, including the means by which the homebound elderly will be served. We propose to retain only the requirement to address the means by which the homebound elderly will be served. Until 1986, the elderly could participate only under three pilot sites. Since general service to the elderly has long since become a standard part of the program, it is no longer necessary to specifically describe plans to serve them.

Currently, the State agency must describe in the State Plan the manner in which foods are distributed to local agencies and to participants. We propose to revise this to require that the

State agency describe the system of storage and distribution of commodities in the State Plan. Because of the importance of the proper storage of commodities and their safe and timely distribution to local agencies, we believe it is important for the State agency to describe the means by which it will meet these responsibilities. We also propose to require the State agency to include a description of the standards it will use in determining if the pursuit of a claim against a participant is cost-effective, in accordance with the proposed § 247.30(d).

In paragraph (d) of this proposed section, entitled *When must the State agency submit amendments to the State Plan?*, we propose to include the requirement that the State agency submit amendments to FNS for approval if it desires to amend the State Plan. As at present, the State agency may submit amendments at any time during the fiscal year. FNS may also require that the State Plan be amended to reflect changes in Federal law or policy. This change is necessary since the State Plan would be made permanent under this rule. We also propose to include the requirement that, if a State agency would like to receive additional caseload for the caseload cycle beginning the following January 1, it must submit an amendment to the Plan that conveys the request for additional caseload by November 5. The State agency must also describe any plans for serving women, infants, children, and the elderly at new sites in this submission. FNS currently allows State agencies until early November to submit additional caseload requests, as it allows the State agency sufficient time to review complete participation figures for the previous fiscal year, which are not available until October. The State agency cannot meaningfully request additional caseload until it knows what its base caseload will be, and its base caseload depends on its actual participation during the past fiscal year. FNS action on the State agency's request for additional caseload is part of the caseload assignment process, as described under the proposed § 247.21.

Selection of Local Agencies, Section 247.7

Currently, under section 247.6, a local agency must submit a written application to the State agency that includes sufficient information to allow the State agency to determine its eligibility. We propose to retain this requirement in paragraph (a) of this proposed § 247.7, entitled *How does a local agency apply to participate in CSFP?* We propose to clarify that the information submitted must describe how the local agency will operate the program. We also propose to require that, for nonprofit agencies, the application must include the tax-exempt status of the agency.

Under current regulations, a nonprofit agency must have tax-exempt status under 26 U.S.C. 501 of the IRC. However, under 26 U.S.C. 501(c)(3) of the IRC, as amended since the current regulatory requirement was established, organizations are automatically tax-exempt if they are organized or operated exclusively for religious purposes. Thus, we propose to clarify that such nonprofit agencies already have the tax-exempt status required for participation in CSFP. Additionally, under other USDA food distribution programs, nonprofit organizations that have applied for tax-exempt status with the IRS, and are moving toward compliance with the requirements for recognition of tax-exempt status, are eligible to participate. We propose to include nonprofit agencies with this provisional tax-exempt status as eligible local agencies in CSFP as well, and to also propose conditions used in other programs to determine the continued participation of these organizations in CSFP. These conditions are described below, under paragraph (c).

We propose to state, in paragraph (a) of this proposed section, that, to be eligible to participate in CSFP, a nonprofit agency must have tax-exempt status under 26 U.S.C. 501 of the IRC, or must have applied for tax-exempt status with the IRS, and be moving towards such status. We propose to indicate that organizations organized or operated exclusively for religious purposes are automatically tax-exempt under 26 U.S.C. 501(c)(3) of the IRC. We also propose to indicate that organizations required to obtain tax-exempt status must provide documentation from the IRS that they have obtained such status, or have applied for it.

In paragraph (b) of this proposed section, entitled *On what basis does the State agency make a decision on the local agency's application*?, we propose to include the basic guidelines that the State agency must consider in making a decision on approval or denial of the local agency's application to participate in CSFP. These guidelines do not constitute an additional requirement. Their inclusion in these regulations is simply meant to assist State agencies—particularly new State agencies—in choosing which local agencies to participate. The criteria are:

(1) The ability of the local agency to operate the program in accordance with Federal and State requirements.

(2) The need for the program in the projected service area of the local agency.

(3) The resources available (caseload and funds) for initiating a program in the local area.

(4) For nonprofit agencies, the tax-exempt status, with appropriate documentation.

In paragraph (c) of this proposed § 247.7, we propose to include the actions that the State agency must take if an agency that has been approved for CSFP participation is subsequently denied tax-exempt status by the IRS, or does not obtain this status within a certain period of time. We propose that, if a participating agency's application for tax-exempt status is subsequently denied by the IRS, the agency must immediately notify the State agency, which then must immediately terminate their participation in CSFP. If, after 180 days of the organization's approval for participation, the agency has not obtained, and submitted, documentation of its tax-exempt status, the State agency must terminate the agency's participation in CSFP until such time as recognition of tax-exempt status is obtained. However, the State agency may grant an extension of 90 days to an agency if the agency can demonstrate that its inability to obtain tax-exempt status within the 180-day period is due to circumstances beyond its control.

In paragraph (d) of this proposed section, we propose to indicate how much time the State agency has to act on the local agency's application to participate in CSFP. We propose to extend the period of time for deciding on approval or denial of the local agency's application from 30 days to 60 days. With a longer period of time for review, the State agency would be better able to make a determination of the local agency's eligibility to participate, and to consider other applicable criteria as described in paragraph (b) of this proposed section. We retain the requirement that a notification of denial of the application be in writing and that the State agency provide for an appeal of the denial, in accordance with the requirements of the proposed § 247.35.

We propose to remove current requirements that the State agency return the application to the local agency if a denial is based on lack of funds, and justify the need for approval of a local agency in an area already served by the WIC Program. We do not believe that the return of the application serves any useful purpose. Although both WIC and CSFP overlap somewhat

in the groups that they serve, the differences (especially in CSFP service to the elderly) are sufficient to justify the existence of both programs in the same area. However, under the proposed § 247.6, State agencies are encouraged to coordinate with the WIC State agency in formulating plans to serve women, infants, and children in common areas of service.

Individuals Applying To Participate in CSFP, Section 247.8

Currently, the process of applying for program benefits, determination of eligibility, and participant rights and responsibilities are included under § 247.7, entitled ''Certification''. We propose to split up these related topics into several sections for the sake of clarity. In this proposed § 247.8, we propose to include the specific information applicants must provide on the application to allow the local agency to make a determination of eligibility. This information is currently listed under § 247.7(d). Present regulations require that information be recorded on a ''certification form'', which we refer to as the application. The information must include, at a minimum, the applicant's name and address and other information necessary to make a determination of eligibility. Although ''other information'' must necessarily include data necessary to determine household income eligibility, and the applicant's age, or pregnancy, as applicable, we propose to specifically list the required information for the sake of clarity. We also propose to include in this section the requirement that each applicant present some form of identification, which is currently required under § 247.7(j)(4).

We propose to retain the requirement that the applicant, or adult parent or guardian of the applicant, sign the application form beneath a pre-printed statement attesting to the truthfulness of the information provided, and the applicant's liability to federal prosecution for deliberate misrepresentation. Presently, the statement must be read by, or to, the applicant (or adult parent or guardian) before signing. However, we propose to include in this statement the notification that information provided may be shared with other organizations to prevent dual participation. With the consent of the participant, this information may also be shared with other organizations to assist in outreach or in eligibility determination for other public assistance programs. This sharing of information would help to ensure that program applicants are aware of the benefits provided by other public assistance programs. These proposed changes have been included in § 247.36.

Eligibility Requirements, Section 247.9

Currently, the eligibility requirements for CSFP, including the eligible population categories in the program, are listed under § 247.7(a). We propose to include the eligibility requirements and eligible population groups in this proposed § 247.9. In paragraph (a), we propose to include the current eligible population groups, with changes only to improve clarity. For example, we propose to list each population group in a numbered format, and to describe each group fully, as in the definitions listed under the proposed § 247.1. This avoids the need for the reader to refer to the definitions to see that, under CSFP, children means persons who are at least one year of age, but have not reached their sixth birthday.

In paragraph (b), we propose to include the income eligibility requirements for women, infants, and children. Currently, in order to be eligible for CSFP, women, infants, and children must have income eligibility for local benefits under existing Federal, State, or local food, health, or welfare programs for low-income persons. Although current regulations contain no parameters with regard to women, infants, and children, State agencies have established 185 percent of the Federal Poverty Income Guidelines as the income eligibility standard for this group, as this conforms to the upper limit used in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). For the purpose of clarification, we propose to require, in paragraph (b)(1) of this proposed section, that the State agency establish household income guidelines for women, infants, and children that are at or below 185 percent of the Federal Poverty Income Guidelines, but not below 100 percent of these guidelines. However, in conformance with the WIC Program, we propose to require that the State agency accept as income-eligible, regardless of actual income, any applicant who is: (1) Certified as eligible to receive food stamps under the Food Stamp Act of 1977, Temporary Assistance for Needy Families (TANF) under Part A of Title IV of the Social Security Act, or Medical Assistance (*i.e.*, Medicaid) under Title XIX of the Social Security Act; or, (2) a member of a family that is certified eligible to receive assistance under TANF, or a member of a family in which a pregnant woman or an infant is certified eligible to receive assistance under Medicaid. We also propose, in paragraph (b)(2), to allow the State agency to consider women, infants, and children participating in another Federal, State, or local food, health, or welfare program as automatically eligible for CSFP if the income eligibility guidelines for the program are equal to or lower than the established CSFP guidelines.

We also propose, in paragraph (b)(3), to require that, for a pregnant woman, each embryo or fetus in utero be counted as a household member in determining if the household meets the income eligibility standards for the program. If, for example, a pregnant woman with a 3-year old child applied for CSFP benefits for herself and her child, the local agency would consider them a household of three members, and not two, in determining their eligibility. This provision is already included as part of eligibility criteria in the WIC Program, and CSFP State agencies have been authorized to implement it by policy memorandum.

Currently, elderly persons must have household income at or below 130 percent of the Federal Poverty Income Guidelines published annually by the Department of Health and Human Services. However, elderly persons certified before September 17, 1986, are subject to the eligibility criteria in effect at the time of their certification. On the date referenced, FNS published an interim rule in the **Federal Register** at 51 FR 32895 to implement legislation allowing low-income elderly persons at all CSFP sites to be served, if resources remained after providing benefits to all eligible women, infants, and children at the sites. The rule also established the current income eligibility guidelines to ensure that the neediest elderly persons received benefits. Before that date, elderly persons were served only at three pilot sites in New Orleans, Louisiana, Detroit, Michigan, and Des Moines, Iowa. Elderly participants in the pilots were subject to the same income eligibility criteria used for women, infants, and children. We propose to include the income eligibility requirements for elderly persons in paragraph (c) of this proposed section, without change from the current requirements.

Each year, usually in February, the Department of Health and Human Services publishes the adjusted Federal Poverty Income Guidelines in the **Federal Register**. Currently, FNS publishes notification in the **Federal Register** each year of the adjusted income guidelines by household size, including adjustments for 185 percent and 130 percent of the poverty level, as applicable for specific FNS programs. Although CSFP regulations do not make any reference to it, CSFP State and local

agencies are currently notified of the adjusted guidelines for elderly persons annually. Prior to 2002, this notification was provided through publication of a separate notice. However, in order to expedite the implementation of the guidelines, in 2002 we provided notification of the adjusted guidelines by memorandum. We propose to include, in paragraph (d) of this proposed section 247.9, reference to the notification, by memorandum, of the annual adjustment of the income guidelines by household size, and the effective date of the adjustments. The notification will provide the adjusted guidelines for 185 percent, 130 percent, and 100 percent, of the poverty guidelines. We propose to require that the adjusted guidelines be implemented for the elderly immediately upon receipt of the memorandum, in order to minimize the time gap between the adjustment of the guidelines and the cost-of-living adjustment in Social Security benefits, which is made in January. This requirement would help to ensure that elderly persons receiving Social Security benefits do not become temporarily ineligible for CSFP. We propose to require that the adjusted guidelines be implemented for women, infants, and children at the same time that the State WIC agency implements the adjusted guidelines for WIC eligibility. These implementation dates are current practice in CSFP, even though implementation of adjusted guidelines is not currently addressed in regulations.

In paragraph (e) of this proposed section 247.9, we propose to more clearly indicate how income is defined and considered in determining eligibility for CSFP. In making this clarification, we propose to include the following WIC regulatory provisions:

(1) Income means gross income before deductions for such items as income taxes, employees' social security taxes, insurance premiums, and bonds.

(2) The State agency may exclude from consideration the following sources of income listed under 7 CFR 246.7(d)(2)(iv):

(i) Any basic allowance for housing received by military services personnel residing off military installations.

(ii) The value of inkind housing and other inkind benefits.

(3) The State agency must exclude from consideration all income sources excluded by legislation, and which are listed in 7 CFR 246.7(d)(2)(iv)(C). FNS notifies State agencies of any new forms of income excluded by statute through program policy memoranda.

(4) The State agency may allow local agencies to consider the household's average income during the previous 12 months and current household income to determine which more accurately reflects the household's status. In instances in which the State makes the decision to permit local agencies to determine a household's income in this manner, all local agencies must comply with the State's decision and apply this method of income determination in situations in which it is warranted.

Currently, the CSFP regulations do not define income, or list income exclusions. Thus, it is up to the State or local agency to determine how they are to define and consider income in determining eligibility for CSFP. Based on a review of State Plans, we believe that gross income has generally been used in eligibility determination. We also believe that the WIC income exclusions listed have generally been used, as most of them are established by law. However, the lack of guidance in regulations or policy has resulted in some questions and uncertainty. We believe that adoption of these proposals would help to alleviate the confusion in how income should be considered in CSFP, and would not have a significant impact on participation.

Annual cost-of-living increases in Social Security benefits usually take effect in January. Since the Department of Health and Human Services does not usually adjust the Federal Poverty Income Guidelines until February, these increases make some elderly participants ineligible for benefits for a few months. Providing the option of looking at average income over the previous 12 months, as well as present income, would allow these elderly participants to remain on the program, instead of being discontinued for a few months each year. Similar options are already available for WIC, see 7 CFR 246.7(d)(2)(vii), and school lunch, see 7 CFR 245.2(a)(a–2) free and reduced price eligibility determinations.

Currently, under § 247.7(a), the State has the option to establish ''nutritional risk'' criteria for CSFP eligibility, and to require that individuals reside within the local CSFP service area at the time of application. Under paragraph (f) of this proposed section, entitled *What other options does the State agency have in establishing eligibility requirements for CSFP?,* we propose to include these options substantially unchanged but reworded in the interest of clarity. As at present, the State agency may not require that an individual reside in the area for any fixed period of time.

Distribution and Use of CSFP Commodities, Section 247.10

Currently, § 247.7(c) describes the monthly issuance of CSFP foods to participants, and allows local agencies the option of distributing a two-month supply of foods every other month. We propose to include this option under this proposed § 247.10. However, we propose to remove the current requirement that the local agency choosing to distribute foods every other month provide the participant the option of continuing to receive foods on a monthly basis. Although the local agency may provide this option, we believe that the requirement to do so may place an undue burden on the local agency. We propose to include in this section the requirement that the local agency require each participant, or participant's proxy, to present some form of identification before receiving CSFP commodities. This requirement is currently under § 247.7(j)(4). We also propose to include in this section current restrictions in the distribution and use of CSFP commodities that are presently contained in §§ 247.7(h) and 247.8(e). As at present, State and local agencies may not require, or request, that participants make any payments, or provide any materials or services in connection with the distribution of CSFP commodities, and may not use commodities to further the political interests of any person or party. Also, CSFP commodities may be used for nutrition education for CSFP participants, but may not be used for outreach, refreshments, or for any purpose other than distribution to CSFP participants.

Applicants Exceed Caseload Levels, Section 247.11

Currently, under § 247.7(b), if all caseload slots are filled, the local agency is required to maintain waiting lists of applicants and, when caseload slots open up, provide benefits to eligible persons on the waiting list in a specific order of priority. This order of priority does not apply, however, to the caseload assigned to the original elderly pilot projects. The current order of priority in service is:

(1) Pregnant women, breastfeeding women, and infants.

(2) Children ages 1 through 3.

(3) Children ages 4 and 5.

(4) Postpartum women.

(5) Elderly persons.

The local agency must include on the waiting list the date of application, the population group of the applicant, and information necessary to be able to contact the applicant if caseload space

becomes available. Applicants must be notified of their placement on a waiting list within 20 days of their request for benefits.

As described in the proposed § 247.15, we propose to require that applicants be notified of their placement on a waiting list, or their ineligibility or eligibility for benefits, within 10 days from the date of application. The shorter time period is more reasonable for applicants seeking food assistance. We also propose to remove the current provision that protects the original elderly pilot caseload from the designated priority structure. The continued participation of the original elderly pilot participants, who are now few in number, is no longer threatened by limited caseload, since the administering local agencies have a much larger caseload assignment than they did 15 years ago.

Rights and Responsibilities, Section 247.12

Currently, under § 247.7, the local agency must inform the applicant of certain rights and responsibilities in CSFP. We propose to include the most basic of these rights and responsibilities, listed below, in this proposed § 247.12. In paragraph (a), which includes applicant rights, we propose to expand the right to receive benefits without discrimination to include age, disability, and sex, as well as race, color, and national origin, in accordance with current laws. The rights listed include:

(1) Program standards will be applied without discrimination by race, color, national origin, age, disability, or sex.

(2) The local agency will provide notification of a decision to deny or terminate CSFP benefits, and of an individual's right to appeal this decision by requesting a fair hearing.

(3) The local agency will make nutrition education available to all adult participants, and to parents or guardians of infant and child participants, and will encourage them to participate.

(4) The local agency will provide information on other nutrition, health, or assistance programs, and make referrals as appropriate.

In paragraph (b), which includes applicant responsibilities, we propose to expand the information that must be provided to applicants to include the prohibition on dual participation, and the possibility of a claim against an individual who receives benefits improperly as a result of dual participation or other program violation, in accordance with provisions under the proposed § 247.30, which addresses claims. We also propose to add that the applicant must be informed that any changes in household income or composition must be reported within 10 days after the change becomes known to the household. We believe that this will aid in deterring dual participation and submission of fraudulent information. The information that must be provided includes:

(1) Dual participation is not permitted.

(2) Improper receipt of CSFP benefits as a result of dual participation or other program violations may lead to a claim against the individual to recover the value of the benefits, and disqualification from CSFP.

(3) Participants must report changes in income or household composition within 10 days after the change becomes known to the household.

We propose to include other applicant or participant rights currently listed under § 247.7 in separate sections under notification requirements, provisions for non-English speakers, and other public assistance programs. The breakout of these provisions into separate sections is done simply to increase clarity.

Provisions for Non-English or Limited English Speakers, Section 247.13

Currently, under §§ 247.7(e) and 247.19(b), if a significant proportion of the population in an area is composed of non-English or limited English speaking persons with a common language, State and local agencies are required to inform such persons of their rights in the program, and to ensure that other program information, except application forms, is provided, in an appropriate language. Additionally, the State agency must ensure that bilingual staff members or interpreters are available to serve these persons. We propose to consolidate these two related provisions of current regulations in this proposed § 247.13. We also propose to clarify that State and local agencies must inform such persons of their responsibilities, as well as their rights in the program, as listed in the proposed § 247.12, in an appropriate language.

Other Public Assistance Programs, Section 247.14

Currently, under § 247.7(f), the local agency is required to advise participants of the importance of receiving health care, the types of health services available, and their location. Additionally, section 1771(e) of the Food, Agriculture, Conservation, and Trade Act of 1990, Public Law 101–624, amended the Agriculture and Consumer Protection Act of 1973 (Pub. L. 93–86) to mandate that local agencies provide participating pregnant women, women with infants and children, and elderly persons with written information on specific programs that may affect their health, nutrition, or general welfare. This statutory provision has been implemented by policy memorandum but has not been included in the regulations. We propose to combine these regulatory and legislative requirements in this proposed § 247.14.

Under paragraph (a), we propose to include the specific programs contained in the law that apply to women, infants and children. For these applicants, the local agency must provide written information about Medicaid (42 U.S.C. 1396 *et seq.*), the Food Stamp Program (7 U.S.C. 2011 *et seq.*), the Temporary Assistance for Needy Families (TANF) program under part A of Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*)(SSA), and the child support enforcement program established under part D of Title IV of the SSA (42 U.S.C. 651 *et seq.*). As required by the law, the State agency must provide local agencies with materials showing the income standards utilized in the Medicaid Program (42 U.S.C. 1396 *et seq.*). In addition to these programs, we propose to require also that the local agency provide information on the WIC Program, to allow individuals eligible for both CSFP and WIC to choose the program in which they wish to participate. The local agency must also make clear that an individual may not participate in both CSFP and WIC simultaneously. Local agencies must also make referrals to these programs, as appropriate.

In paragraph (b), we propose to include the programs referred to in the law that apply to the elderly. For these applicants, the local agency must provide written information on the Food Stamp Program, and supplemental security income and medical benefits provided under Title XVI (42 U.S.C. 1381 *et seq.*) and Title XIX (42 U.S.C. 1396 *et seq.*) (including medical assistance provided to a qualified medicare beneficiary—as defined in section 1905(p) (42 U.S.C. 1396d(5)) of the SSA. Local agencies must also make referrals to these programs, as appropriate.

Currently, § 247.23(a) states that the value of CSFP benefits may not be considered as income or resources in other public assistance programs, or for any purpose under Federal, State or local laws. We propose to include this statement, substantially unchanged, in paragraph (c) of this proposed § 247.14.

Notification of an Applicant's Eligibility or Ineligibility, or Placement on a Waiting List, Section 247.15

Currently, under § 247.7(f), the State or local agency is required to notify an applicant in writing of a determination that the applicant is not eligible for CSFP benefits, and must document and maintain on file the reason that the applicant is not eligible. However, there is currently no requirement that the notification be made within a certain period of time, or that the applicant be notified of the reason for the denial of benefits. Currently, under § 247.7(b), the local agency is required to notify applicants of their placement on a waiting list, if no caseload slots are available, and provides a time limit of 20 days for this notification.

We propose to require, in this proposed § 247.15, that the local agency provide applicants with notification of their ineligibility or eligibility for CSFP, or their placement on a waiting list, within 10 days from the date of application. This is a reasonable period of time for a decision to be made on eligibility for food assistance, and to allow ineligible applicants to receive the information they need to seek other sources of assistance. We propose to retain the current requirement that notification of ineligibility be in writing, and include a statement of the individual's right to a fair hearing to appeal the decision. We propose to require that the written notification also include the reason that the applicant is ineligible. We propose to include the requirement to document and maintain on file the reasons for denying benefits to applicants under the proposed § 247.29, which addresses all reporting and recordkeeping requirements. We also propose to include in this section a requirement that the notification of approval of benefits be accompanied by information on the time, place and means of food distribution (*e.g.*, once a month, every two months), and the length of the certification period. The requirement that this information be provided is currently under section 247.7(f).

Certification Period, Section 247.16

Currently, under § 247.7(g), the State agency must establish a certification period, which is the period of time participants may receive CSFP benefits before their eligibility must be reviewed. The certification period established by the State agency generally may not exceed six months in length, with the following exceptions:

(1) Pregnant women must be certified for the duration of their pregnancy, and up to six weeks postpartum.

(2) Elderly persons certified before September 17, 1986, are subject to the terms and conditions in place at the time of their original certification.

(3) The certification period for other elderly persons may be extended for an additional six months without a review of eligibility criteria if the person's address and continued interest in program benefits are confirmed and if no women, infants, or children are waiting to be served.

We propose to include certification period requirements under this proposed § 247.16. In paragraph (a), we propose to include the length of the certification period for women, infants, and children without change. However, to reduce the burden on local agencies, we propose to allow State agencies to authorize local agencies to extend the certification period of elderly persons without a review of eligibility criteria for additional six-month periods (and not just for one six-month period), if, at each six-month interval, the conditions listed above are met. However, we propose to state explicitly that local agencies must have sufficient reason to believe that the elderly participant continues to meet the income eligibility standards (*e.g.*, the elderly person has a fixed income). In conjunction with this proposed extension of the certification period for the elderly, we propose to remove the current provision that provides separate certification period criteria for elderly persons certified before September 17, 1986.

In paragraph (b) of this proposed section, we propose to require that the certification period always extends to the final day of the month in which eligibility expires (*e.g.*, the last day of the month in which a child reaches his or her sixth birthday). Under current regulations, the certification period may extend to this date. We believe that this certification period requirement should be uniform throughout the program.

Currently, under § 247.7(i), in the event that a CSFP or WIC participant moves to another area during the certification period, he or she may receive benefits under the local CSFP agency in the new area for the duration of the certification period. We propose to include this right of transfer of certification under paragraph (c) of this proposed section. We propose to add that, in the case of a WIC participant, the local agency must first determine that the participant is also eligible for CSFP, as eligibility requirements in both programs may not be the same. We also propose to remove the requirement that the State (or local) agency issue a verification of certification form to the participant to effect this transfer. We believe that, in most cases, such a form would be unnecessary, as the participant will have received notification of the certification period when eligibility was determined. Alternatively, the local agency in the participant's new area may simply make a telephone call to the other local agency to verify the certification period. We propose to state, however, that the local agency must provide verification of the certification period to the participant upon request.

Under paragraph (d), we propose to include the current requirement that the local agency notify the participant at least 15 days before the expiration of the certification period that eligibility for the program is about to expire. Currently, this requirement is under § 247.7(f)(4).

Notification of Discontinuance, Section 247.17

Currently, under § 247.7(f)(3), the local agency must provide a participant who is found, during the certification period, to be no longer eligible for CSFP benefits with a notification of discontinuance at least 15 days prior to the effective date of termination from the program. The notification must include a reason for the participant's ineligibility, and a statement that the participant may appeal the discontinuance through the fair hearing process. We propose to include these notification requirements under this proposed § 247.17, and to require also that the notification include the effective date of program termination.

Nutrition Education, Section 247.18

Currently, under § 247.8, two broad goals of nutrition education are included, and State and local agency responsibilities for providing nutrition education are described.

The two broad goals address the relationship of proper nutrition to overall health, and achieving a positive change in food habits through use of CSFP foods. We propose to include nutrition education requirements in this proposed § 247.18.

In paragraph (a), we propose to outline the State agency's responsibilities in providing nutrition education. We propose to include here the current requirements that the State agency establish an overall nutrition education plan (which is part of the State Plan), and ensure that local agencies provide nutrition education in accordance with the plan. We also include the current requirement that the

State agency establish an evaluation procedure to ensure that the nutrition education provided is effective. The evaluation procedure must include participant input and must be directed by a nutritionist or other qualified professional. The evaluation may be performed by the State or local agency or, by another agency under agreement with the State or local agency.

In paragraph (b), entitled *What type of nutrition education must the local agency provide?,* we propose to clarify nutrition education requirements by consolidating the two broad goals currently included in regulations and the current information that the local agency must provide. We propose to reword the informational requirements to put more emphasis on the relationship of the program to overall diet and good health. We also propose to include in this paragraph the current requirement that the local agency provide nutrition education that is easily understood, that is related to participants' nutritional needs and household situations, and that accounts for ethnic and cultural characteristics whenever possible. We propose that the local agency provide the participant with information on:

(1) The nutritional value of the foods provided in the program, and their relationship to the overall dietary needs of the population groups served.

(2) Nutritious ways to use the foods.

(3) Special nutritional needs of participants and how these needs may be met.

(4) For pregnant and postpartum women, the benefits of breastfeeding.

(5) The importance of health care, and the role nutrition plays in maintaining good health.

(6) The importance of the use of the foods by the participant to whom they are distributed, and not by another person.

We propose to remove the current language that the local agency direct program funds to nutrition education for participants and program staff. Local agencies may choose to meet nutrition education requirements through use of other available resources, such as those provided by the Expanded Food, Nutrition and Education Program (EFNEP) or the Indian Health Service.

Under paragraph (c), entitled *To whom must local agencies provide nutrition education?,* we propose to include the present requirement that local agencies make nutrition education available to all adult participants, and to parents or guardians of infants and child participants. We also propose to include the present encouragement to make nutrition education available to children, where appropriate.

Under paragraph (d), entitled *May CSFP foods be used in cooking demonstrations?,* we include the current provision that the State or local agency, or an agency with which it has signed an agreement, may use CSFP foods in conducting cooking demonstrations as part of the nutrition education provided to program participants, but not for other purposes.

Dual Participation, Section 247.19

Currently, under § 247.7(j), State and local agencies are responsible for the detection and prevention of dual participation. Dual participation may entail simultaneous participation in WIC and CSFP, or simultaneous participation at more than one CSFP site. The State CSFP agency must agree on a plan with the State WIC agency to detect and prevent dual participation. The agreement must be in writing and must be included in the State Plan. To aid in preventing dual participation, the local agency must check the identification of each participant. We propose to include the requirements for the prevention and detection of dual participation without substantial change in paragraph (a) of this proposed § 247.19.

Currently, when a participant is determined to be committing dual participation, the participant must be terminated from one of the programs, and must be notified of termination from the other program, if, in accordance with § 247.7(k), the local agency exercises the option to disqualify the participant. In paragraph (b) of this proposed section, we propose to include the actions that the local agency must take against an individual determined to be committing dual participation. We propose to clarify that the local agency may, in some instances, be required to disqualify a participant determined to be committing dual participation, in accordance with requirements relative to program violations in the proposed § 247.20. We also propose to include that the local agency must initiate a claim against the participant to recover the value of benefits improperly received, in accordance with the proposed § 247.30(c).

Program Violations, Section 247.20

Currently, under § 247.7(k), the State agency may disqualify applicants and participants from CSFP if the applicant, participant, parent, or caretaker is found to have fraudulently applied for, or obtained, program benefits. The State agency may establish a period of disqualification of up to 3 months. Fraud is defined in the current regulations as the commission of specific actions (which are listed) taken knowingly, willingly, and deceitfully. In this proposed § 247.20, we propose to list, in paragraph (a), actions which are subject to disqualification as program violations. Of the current list, we propose to remove the alteration of program documents to receive increased benefits or to transfer benefits; this action is included under intentionally making false or misleading statements, orally or in writing, which is retained from the current list. We propose to add as a program violation the physical abuse, or threat of physical abuse, of program staff. This problem has been related by some State and local agencies and has already been included as a program violation in regulations for the WIC Program. Other changes made to the current list are simply for the purpose of clarification.

In paragraph (b), we propose to describe the disqualification penalties for committing program violations. We propose to allow the State agency to establish a disqualification period of up to one year, instead of up to three months. Additionally, we propose to require that the State agency require local agencies to disqualify participants from CSFP for a period of up to one year for program violations that involve fraud, unless the local agency determines that disqualification would result in a serious health risk. We also propose to require that State agencies require local agencies to permanently disqualify participants who commit three program violations that involve fraud. For purposes of this program, we propose to clarify that fraud includes the following actions:

(1) Intentionally making false or misleading statements to obtain CSFP commodities.

(2) Intentionally withholding information to obtain CSFP commodities.

(3) Selling CSFP commodities, or exchanging them for non-food items.

Individuals who commit dual participation may have committed a fraudulent act and be subject to the required disqualification. CSFP program operators, as well as those for the WIC Program, have expressed the need for stronger sanctions against persons committing dual participation and other program violations. Similar proposals regarding the strengthening of penalties for program violations were adopted by the WIC Program in a final rule published in the **Federal Register** at 65 FR 83248 on December 29, 2000 (effective February 27, 2001). Thus, these proposals for CSFP would bring

the program into closer conformance with WIC in the important area of program integrity. They would also help to assure that CSFP benefits are available to those that really need the assistance.

In paragraph (c), we propose to include the requirement that the State or local agency provide an individual with written notification of disqualification from CSFP at least 15 days before the effective date of the disqualification. The notification must include the effective date and period of disqualification, the reason for the disqualification, and must indicate that the individual may appeal the disqualification through the fair hearing process. This is in accordance with the right of the individual to a fair hearing to appeal other adverse actions, including denial or discontinuance of benefits.

Caseload Assignment, Section 247.21

Currently, the processes of caseload assignment and allocation of administrative funds are described under § 247.10. We propose to include caseload assignment in this proposed § 247.21 and to describe the allocation of administrative funds in the proposed § 247.22. Currently, the order of caseload assignment is:

(1) The three original elderly feeding projects.

(2) Base caseload for each participating State agency, determined by participation in the previous year.

(3) Expansion caseload requested by participating State agencies.

(4) Caseload for States newly approved to participate in CSFP.

We propose to remove the assignment of caseload to the three original elderly feeding projects as the first step in the process of assigning caseload to State agencies. The original intent of this provision, which was included in the interim rule published in the **Federal Register** at 51 FR 32895 on September 17, 1986, was to ensure adequate caseloads to accommodate the original elderly pilot projects. Since that time, assigned caseloads have increased dramatically, far beyond the amount necessary to ensure continued participation of the elderly pilot participants.

We propose to change the terminology from ''expansion'' caseload to ''additional'' caseload. The term additional caseload is more appropriate, since it represents the caseload assigned to currently participating States in addition to the base caseload. The term expansion implies that the State is planning to expand to new areas of the State. However, more often caseload is requested to allow service to additional participants at existing sites, or to return to the base caseload from the previous year.

Under § 247.10, State agencies are currently eligible to receive additional caseload if their monthly average participation during the preceding July through September or the prior fiscal year, or their participation during the month of September, equaled at least 90 percent of their assigned caseload level for the preceding caseload cycle. In addition to using participation in the month of September to meet the 90 percent caseload utilization requirement for the purpose of obtaining additional caseload, the month of September is also included in the determination of base caseload. In some instances, State agencies that cannot sustain an average participation rate of 90 percent over a prolonged period of time will significantly increase participation in the month of September in order to obtain additional caseload and administrative funds for the following caseload cycle.

As discussed in detail below, the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171, 116 Stat. 134 (May 13, 2002)), requires that the Department provide State agencies with a grant per assigned caseload slot, adjusted annually to reflect inflation, to pay administrative costs. This change significantly increased the amount of funds available to support the program in 2003, and will continue to provide an enhanced, stable, and predictable administrative grant per assigned caseload slot. As a result, States are expected to more fully utilize assigned caseload. However, the establishment of an administrative grant per caseload slot also provides a greater incentive for States to request caseload in excess of what they can utilize. To ensure that additional caseload slots are allocated to States that are most likely to use them, we propose to implement more realistic, rigorous performance measures. The revised performance measures include (1) an increase in the caseload utilization requirement from 90 percent to 95 percent, and (2) the removal of participation during the month of September from the computation that determines base caseload and a State's eligibility for additional caseload.

In developing these proposals, we analyzed the performance of State agencies over the last three fiscal years. Based on this analysis, and the availability of a specific enhanced level of administrative funds, it has been determined that State agencies can reasonably be expected to meet these more rigorous measures. While these measures may negatively impact a small number of States in any given year, they will have a positive impact on the program as whole by facilitating assignment of caseload slots to State agencies most likely to utilize them based on past performance. The allocation of caseload slots to such State agencies will ensure that the nutritional needs of low-income women, infants, children, and elderly persons are more fully met. We are specifically requesting comments on the removal of the month of September.

Currently, under § 247.10, State agencies are assigned the lesser of an equal share of caseload available for expansion (up to each State's expansion request), or the amount that FNS determines State agencies need and can effectively manage. The criteria for making this determination are currently described in general terms under § 247.5(a), as ''demographic data'' and ''past performance of the State agency''. We propose to include, in this proposed section, the more specific factors that FNS considers in assigning additional caseload to State agencies. The specific factors proposed here are those that we have used over the last few years, and that were described in policy guidance provided to State agencies in April 1999. The factors, in descending order of importance, include:

(1) Program participation of women, infants, and children, and the elderly in the State in the previous fiscal year.

(2) The percentage of caseload utilized by the State in the previous caseload cycle.

(3) Program participation trends in the State in previous fiscal years.

(4) Other information provided by the State agency in support of the request.

We propose to remove the current option to simply assign an equal amount of additional caseload to all States making requests. Since program needs and performances of States differ widely, it would not be a wise use of program resources to assign an equal amount of caseload to all.

We also propose to include the specific factors that FNS considers in determining how much caseload to assign to States approved to begin participation in the program. The factors include:

(1) Justification provided by the State agency which includes names and locations of local agencies, the areas within the State that will be served, the amount of caseload necessary to support service to these areas; and

(2) The total amount of caseload for new States that program funds will support.

We do not propose to change other important aspects of the caseload assignment process, including:

(1) Base caseload may not exceed the total caseload assigned in the previous year.

(2) Priority in assignment of additional caseload, or caseload for newly approved States, is given to requests to serve women, infants, and children over requests to serve the elderly.

(3) Priority in assignment of caseload is given to currently participating States over requests from non-participating States.

Under paragraph (b), we propose to respond to the question, *When does FNS assign caseload to State agencies?* We propose to revise the date by which FNS must assign caseload to December 31, or within 30 days after enactment of appropriations legislation for the full fiscal year. Currently, FNS must assign caseload by December 1, or 30 days after enactment of appropriations legislation. However, because of late appropriations in several years, caseload has often been assigned later than December 1. Hence, this proposed change reflects what has come to be current practice. We are also proposing to change the caseload cycle to conform to the proposed change in the timing of caseload assignment, as described under the proposed section 247.1.

Under paragraph (c), we propose to describe the means by which State agencies may request additional caseload for the next caseload cycle. As proposed under section 247.6(d), the State agency would be required to submit a request for additional caseload by November 5, as an amendment to the State Plan. The submission must also describe plans to serve women, infants, and children, and elderly, at new sites.

Allocation and Disbursement of Administrative Funds to State Agencies, Section 247.22

Currently, the allocation and disbursement of administrative funds to State and local agencies are addressed under §§ 247.9 and 247.10. We propose to address FNS's allocation and disbursement of administrative funds to State agencies in this proposed § 247.22, and to address the provision of funds by State agencies to local agencies in the proposed § 247.23.

In paragraph (a), we propose to include the current requirement that, in order to receive administrative funds, the State agency must have signed an agreement with FNS, in accordance with the proposed § 247.4(a)(1), and must have an approved State Plan, in accordance with the proposed § 247.6(a).

The total amount of appropriated funds available each year for the administrative support of State and local agencies is established by law. In 1990, section 1771(d)(2) of Public Law 101–624 amended section 5(a)(2) of Public Law 93–86 to increase the maximum level of administrative funding available for State and local agencies from 15 percent of the program appropriation to 20 percent. Additionally, in 1996, section 402(b)(3) of the Federal Agriculture Improvement and Reform Act of 1996, Public Law 104–127, amended section 5 of Public Law 93–86 to mandate that the Department provide up to 20 percent of food funds carried over from the previous year for administrative support of State and local agencies.

Section 4201(b) of the Farm Security and Rural Investment Act of 2002 amended section 5 of Public Law 93–86 to mandate that the Department provide State agencies with a grant per assigned caseload slot, adjusted annually to reflect inflation, to pay administrative costs. It also deleted the limitation of total administrative funding for the program of 20 percent of the program appropriation and of food funds carried over from the previous year. Section 4201(b)(2) stipulates the per-caseload slot amounts State agencies are to receive in fiscal year 2003, and for subsequent fiscal years. For fiscal year 2003, the grant per assigned caseload slot is $51.49, an amount equal to the per-caseload slot amount provided in fiscal year 2001 ($50.89), adjusted by the percentage change between: (1) The value of the State and local government price index, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30, 2001; and (2) the value of that index for the 12-month period ending June 30, 2002. For subsequent fiscal years, the amount of the grant per assigned caseload slot is equal to the amount of the grant per assigned caseload slot for the preceding fiscal year, adjusted by the percentage change between: (1) The value of the State and local government price index, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30 of the second preceding fiscal year; and (2) the value of that index for the 12-month period ending June 30 of the preceding fiscal year. In paragraph (b) of this proposed section, we propose to include the current legislative mandates for allocating administrative funds to State agencies. Although the statutory changes described above are already in effect, we are amending the regulations at this time to incorporate these changes.

We propose to remove current language under § 247.10(b) that describes the formula once used for the separate allocation of administrative funds to support the distribution of surplus commodities provided to CSFP for distribution to households. This separate allocation of funds was eliminated by section 1771(d)(2) of Public Law 101–624.

In paragraph (c), we propose to include a description of the means by which State agencies access administrative funds. As currently described under § 247.9(g), FNS provides funds to State agencies on a quarterly basis, through a Letter of Credit, unless other funding arrangements have been made with FNS. The State agency obtains the funds by electronically accessing its Letter of Credit account.

State Provision of Administrative Funds to Local Agencies, Section 247.23

Currently, section 247.10(b) addresses the amount of federal administrative funds that State agencies may retain to meet State-level costs each fiscal year, and the provision of the remaining funds to local agencies for their use in meeting program costs. The amount of funds that State agencies may retain is determined by a specific formula, and may not exceed $30,000. We propose to include these provisions substantially unchanged in paragraph (a) of this proposed § 247.23. We do not propose to change the formula, or the maximum amount of funds that State agencies may retain.

Under current regulations, the State agency may request approval from FNS to retain more than the maximum amount provided by the formula in any fiscal year. In paragraph (b), we propose to retain the State's option to request to retain more funds than allowed by formula. However, we propose to remove the limitation of this option to State agencies that provide warehouse services. Although food storage costs may make up a large part of a State agency's administrative costs, other administrative functions may also put a strain on State funds, and require the State agency to request to retain a larger share. As at present, however, State agencies must justify to FNS the need for the larger amount of funds, and must ensure that local agencies will not be unduly burdened by a reduction in their administrative funding.

Currently, under § 247.10(b)(6), the State agency must apportion funds among local agencies according to their

respective needs. We propose to include this provision in paragraph (c) of this proposed § 247.23, and also to include the statement that the State agency must apportion funds in a manner that ensures that the funds will be used to achieve program objectives.

Recovery and Redistribution of Caseload and Administrative Funds, Section 247.24

Currently, under § 247.10(c), FNS may recover, and reassign, caseload slots that are not being utilized, and may recover, and reallocate, administrative funds that are not being utilized. In redistributing these resources, FNS must use the same procedures used in the initial assignment of the resources. We propose to include in § 247.24 FNS's authority to recover and redistribute caseload and administrative funds. The redistribution of resources will be accomplished using the same procedures described in the proposed §§ 247.21(a) and 247.22(b). FNS will reassign caseload using the most up-to-date data on participation and caseload utilization, as well as other information provided by State agencies. We propose to make clear that whether a State agency voluntary gives up caseload slots or FNS takes action to recover caseload slots, the State must use 95 percent of its original caseload allocation to be eligible for expansion caseload.

We are requesting that State and local agencies provide specific comments regarding procedures FNS should use in recovering caseload and administrative funds (*e.g.*, is there a specific time during the caseload cycle that should be used to determine if there is a need to recover caseload and administrative funds?).

The current limitation, found at § 247.10(b)(4), which allows FNS to recover no more than 25 percent of a State agency's administrative funds allocation during any fiscal year is included in this proposed rule. However, we are considering increasing or eliminating the 25 percent limitation. Therefore, we are requesting specific comments regarding what, if any, limitation should be imposed, and the potential impact on program administration at the State and local level should the current limitation be increased or eliminated. We also propose to clarify that in instances in which the State agency requests that FNS recover any portion of its assigned caseload, no limitation, should one be retained, will apply.

Allowable Uses of Administrative Funds and Other Funds, Section 247.25

Currently, under § 247.11, State and local agencies may use administrative funds only for costs identified by Federal regulations or circulars as allowable, and determined by the State agency to be necessary to carry out the program. Some examples of allowable costs in CSFP are included, as well as a list of costs allowable only with prior approval of FNS. Current regulations describe unallowable costs as those costs ''not applicable to program objectives'' and include some examples.

Currently, under § 247.14, State and local agencies may use the procurement and property management requirements established by their State and local regulations in procuring equipment or services with program funds, and utilizing and disposing of the equipment, provided that they do not conflict with the requirements of applicable Federal regulations.

Currently, § 247.12 contains the requirements for the use of program income, which is income directly generated from program activities. Program income does not include income from the sale of property. The State agency is currently required to use program income to further program objectives.

We propose to include regulatory guidance on allowable uses of administrative funds, program income, and funds recovered as a result of claims actions, in this proposed § 247.25. In paragraph (a), we propose to state that administrative funds may be used for costs that are necessary to ensure the efficient and effective administration of the program, in accordance with 7 CFR part 3016 and 7 CFR part 3019. 7 CFR part 3016 contains the rules for management of Federal grants to State, local, and Indian tribal governments, and incorporates the provisions of OMB Circular A–87 (Cost Principles for State and Local Governments) relating to allowable costs. 7 CFR part 3019 contains the grants management rules for nonprofit organizations and incorporates the provisions of OMB Circular A–122 relating to allowable costs. Since a discussion of the principles that determine whether specific costs are allowable is contained in the OMB circulars, we propose to include reference to the circulars as well as the Federal regulations. Reference to FMC 74–4 is removed, as this document has been superseded by the regulations and the OMB circulars. We also propose to include, in proposed § 247.25(a), some examples of allowable costs, including: Storing, transporting, and distributing foods, eligibility determination, program outreach, nutrition education, audits and fair hearings, monitoring and review of program operations, and transportation of participants to and from the local agency, as necessary. This list is meant only to be representative of allowable costs in the program and is not meant to exclude other costs. If there is a question as to whether a particular cost is allowable, State and local agencies should refer to the above documents, or contact FNS.

In paragraph (b), we propose to include the examples of unallowable costs currently included in the regulations and make clear that the applicable Federal regulations must be referenced to determine if other costs are allowable or not.

Currently, under § 247.11(c), specific costs that require FNS approval are listed. These include automatic data processing equipment and system purchases, capital expenditures over $2,500, rental or lease of facilities or equipment, and management studies performed by agencies or organizations other than the State or local agencies. However, the OMB Circulars referenced above, and parts 3016 and 3019 of this title, which incorporated their provisions, do not currently include rental or lease costs or management studies as costs requiring prior FNS approval. The regulations also currently define equipment as items with a cost of $5,000 or more per unit. Accordingly, we propose to amend 7 CFR part 247 to conform with these revisions.

We propose to remove the current prior approval requirements for rental or lease costs and the cost of management studies. In paragraph (c) of this proposed § 247.25, we propose to require prior approval for capital expenditures, but to clarify that capital expenditures include the acquisition of facilities or equipment, or enhancements to such capital assets, with a cost per unit of at least $5,000. We also propose to clarify that equipment includes automated information systems, automated data processing equipment, and other computer hardware and software, which are currently listed separately from capital expenditures. Equipment costs per unit under $5,000 are considered supplies, and not capital expenditures, and may be made without prior FNS approval.

We propose to include the requirements for procuring property and services with program funds, and utilizing and disposing of property, in paragraph (d) of this proposed section, rather than in a separate section, as at

present. The use of administrative funds to procure property or services is an allowable cost (sometimes requiring FNS approval) and thus is appropriate to include in this section. We propose to include again the reference to 7 CFR parts 3016 and 3019, as these are the current Federal regulations that apply to procurement of property and services with program funds. As at present, State or local agencies may follow procurement procedures established by State or local regulations as long as these procedures do not conflict with Federal regulations. Also, as at present, Federal regulations do not relieve State or local agencies from responsibilities established in contracts relating to procurement of property, equipment, or services.

In paragraph (e), we propose to include the current requirements for the use of program income, rather than in a separate section. As at present, State and local agencies must use program income—income directly generated from program activities—for allowable program costs, in accordance with 7 CFR part 3016. We propose to provide two examples of program income: The sale of packing containers or pallets, and the salvage of commodities. We also state, as in current regulations, that program income does not include interest earned from administrative funds.

In paragraph (f), we propose to address the use of funds recovered as a result of claims against subdistributing and local agencies, and against participants. Currently, the State agency must use funds recovered through claims actions against subdistributing and local agencies in accordance with the provisions of 7 CFR 250.15 and FNS Instruction 410–1. We propose to incorporate this requirement in this paragraph for the sake of clarity. We also propose to require that the State agency use funds recovered as a result of claims against participants for allowable program costs. We propose to allow the State agency to authorize local agencies to utilize such funds for allowable program costs incurred at the local level, rather than returning them to the State. This authority is being proposed for State agencies since, in some instances, these funds can be used more efficiently and effectively at the local level.

Return of Administrative Funds, Section 247.26

Section 247.18 of the current regulations addresses closeout procedures. Under current procedures, if a State agency does not use all of the funds allocated to it for the fiscal year, FNS recovers the unused funds at the end of the fiscal year. If, in the following fiscal year, OMB reapportions the recovered funds, FNS reallocates them to all State agencies. FNS reallocates to each State agency a share of the total reapportioned funds that is proportionate to its share of the total assigned caseload for the year in which the reallocation takes place.

As discussed in detail above, the Farm Security and Rural Investment Act of 2002 requires that the Department provide State agencies with a grant per assigned caseload slot to pay administrative costs. The law limits the amount of administrative funds provided State agencies to the amount provided under the formula described in proposed § 247.22. Therefore, administrative funds recovered at the end of the year and reapportioned by OMB will be used to support the program by generating caseload and the administrative funding that must accompany it. Such funds will not be reallocated to State agencies in the form of administrative funds in addition to the mandated grant per slot. We propose to include a description of this process in this proposed section 247.26.

Financial Management, Section 247.27

Currently, under § 247.9, State and local agencies must establish a financial management system that provides an accurate, current, and complete disclosure of the financial status of the program. Among the various aspects of the program's financial status, the State agency's system must include:

(1) An accounting of all property and other assets procured with program funds.

(2) An accounting of all program funds received and expended each fiscal year.

(3) The accurate completion of required reports, and the maintenance of records identifying the source and use of administrative funds and program income (currently required under § 247.12).

(4) Prompt resolution of audits and claims.

(5) Prompt disbursement of funds for program costs.

(6) Assurance that local agencies will develop and implement a financial management system that allows them to meet Federal requirements.

We propose to include financial management requirements for State and local agencies in this proposed § 247.27. In paragraph (a), we propose to state that State and local public agencies must establish a financial management system in accordance with the provisions of 7 CFR part 3016, and that nonprofit organizations must follow financial management requirements contained under 7 CFR part 3019. We also propose to include the current statement that the State agency's financial management system must provide accurate, current, and complete disclosure of the financial status of the program, including an accounting of all program funds received and expended each fiscal year. We also propose to include the current requirement that the State agency must ensure that local agencies develop and implement a financial management system that allows them to meet Federal requirements.

In paragraph (b), we propose to include some of the important components of the State agency's financial management system, which are treated in more detail in 7 CFR part 3016. These include:

(1) Prompt and accurate payment of allowable costs.

(2) Timely disbursement of funds to local agencies.

(3) Timely and appropriate resolution of claims and audit findings.

(4) Maintenance of records identifying the receipt and use of administrative funds, funds recovered as a result of claims actions, property and other assets procured with program funds, and the generation and use of program income (as defined under the proposed § 247.25(e)).

Storage and Inventory of Commodities, Section 247.28

Currently, under § 247.4, the State agency is required to protect commodities from theft, spoilage, damage or destruction, or other loss. Other requirements relating to the storage of commodities are contained in 7 CFR 250.14, and pertain also to CSFP. Currently, under § 247.13(c), a physical inventory of all foods at each storage and distribution site is required on an annual basis. We propose to include, in this proposed § 247.28, the current requirements for storage and inventory of commodities, with only minor changes.

Under paragraph (a), we propose to include the current requirement that State and local agencies must provide for storage of commodities to ensure their protection from theft, spoilage, damage or destruction, or other loss. We propose to state specifically that State and local agencies may contract with commercial facilities to store and distribute commodities, which is presently contained under § 250.14 of this chapter. We also propose to indicate that the required standards for warehousing and distribution systems,

and for contracts with storage facilities, are contained under § 250.14 of this chapter.

Under paragraph (b) of this proposed section, we propose to include the current requirement that a physical inventory of all USDA commodities be conducted annually at each State and local agency storage and distribution site where these commodities are stored. We also propose to include the current requirement under 7 CFR 250.14 that results of the physical inventory be reconciled with inventory records and maintained on file by the State or local agency.

Reports and Recordkeeping, Section 247.29

Currently, under §§ 247.9 and 247.13, State and local agencies are required to maintain records to demonstrate that the receipt, disposal, and inventory of commodities, and the use of administrative funds, are in accordance with program regulations. Records must also indicate the results of any claims brought by the State agency. Also, under current §§ 247.7 and 247.20, State and local agencies are required to maintain records relating to applicant eligibility and fair hearings. Additionally, under 7 CFR 250.16(a)(5), State and local agencies must maintain records related to the determination of participant eligibility for receipt of foods.

Currently, under §§ 247.13 and 247.18, the State agency must report financial data on Form SF–269, on a quarterly basis, and must submit a closeout report, using this form, within 90 days of the end of the fiscal year. The State agency must submit data on the receipt, disposal, and inventory of commodities on a monthly basis, utilizing Form FNS–153, Monthly Report of the Commodity Supplemental Food Program. Each local agency must submit data on racial/ethnic participation on an annual basis, utilizing Form FNS–191, Racial/Ethnic Group Participation.

We propose to include the reporting and recordkeeping requirements in this proposed § 247.29. In paragraph (a), we propose to consolidate recordkeeping requirements from this part and from 7 CFR part 250 without substantial change. However, in the interest of clarity, we propose to be more specific in referring to some of the areas for which records must be maintained. We propose to require State and local agencies to maintain accurate and complete records relating to the receipt, disposal, and inventory of commodities, the receipt and disbursement of administrative funds and other funds, eligibility determinations, fair hearings, and other program activities. We propose to retain the present language that State and local agencies must also maintain records pertaining to liability for any improper distribution, use of, loss of, or damage to commodities, and the results obtained from the pursuit of claims arising in favor of the State or local agency. At present, all records must be retained for a period of three years from the end of the fiscal year to which they pertain, or, if they are related to unresolved claims actions, audits, or investigations, until those activities have been resolved. Also, all records must be available during normal business hours for use in management reviews, audits, or investigations, except medical case records of participants (unless they are the only source of certification data). We propose to remove current language under § 247.13 that all reports must be traceable to their source documentation. While it is true that the data in reports must coincide with source data, we do not believe that it is necessary to state this in the regulations. We also propose to remove the language indicating that FNS will use reports in evaluating the program performance of State and local agencies, which need not be stated in the regulations.

In paragraph (b) of this proposed section, we propose to include the reporting requirements. Currently, under 7 CFR 250.17(a), the FNS–153 is required to be submitted monthly, but FNS may require less frequent submission, or submission in another format, if this is determined to be sufficient to meet program needs. This allows FNS to reduce the reporting requirement in the future without regulatory action. For the sake of clarity, we propose to incorporate this language into this section. We also propose to include the major data elements that are reported on the FNS–153: The number of program participants in each population category; the distribution and receipt of commodities; beginning and ending inventories; and quarterly use of administrative funds. A number of years ago, a policy change moved the quarterly reporting of administrative funds use to the FNS–153 from the previous quarterly submission of the SF–269.

Although the CSFP regulations currently reference the SF–269, Financial Status Report, that reference is imprecise because the underlying Departmental regulations at 7 CFR part 3016 recognize two variations of this form: The SF–269 (Long Form) and the SF–269A (Short Form). OMB Circular A–102 and 7 CFR part 3016 require Federal grant-making agencies to require one or the other of these forms for use by their grantees in reporting the status of funds for non-construction programs. We have required the SF–269A for this purpose because this form is more appropriate for programs that do not have matching requirements or other complicating transactions. Therefore, we propose to clarify in this regulation the existing requirement for State agencies to use the SF–269A in reporting end-of-year financial data. Since use of administrative funds is reported quarterly on the FNS–153, we propose, in this new section, to formally require the SF–269A to be submitted only at the end of the fiscal year, as the closeout report. For the same reason, we propose to remove the current requirement, under § 247.18(a), that the State agency submit a preliminary financial report within 30 days of the end of the fiscal year. We also propose to remove the current language that refers to submittal of Form FNS–155. This form, which also reports data on commodity inventories, is not required for CSFP, and was included in this part in error.

Currently, under § 247.23(b), FNS may require that State and local agencies provide data collected in the program to aid in the evaluation of the effect of program benefits on the low-income populations served. Such data requests must not include information on particular individuals. We propose to include this requirement, without change, in paragraph (c) of this proposed § 247.29.

Claims, Section 247.30

Currently, under § 247.17, FNS must pursue a claim against the State agency if it determines that the State or local agency has misused program funds through negligence, fraud, theft, embezzlement, or other causes. The State agency must repay to FNS the full value of the misused funds. Currently, the requirements for pursuit of claims for the loss, or improper distribution, of commodities are contained under 7 CFR 250.15(c). FNS may initiate and pursue a claim against the State agency for commodities improperly distributed, or lost, stolen, spoiled or damaged as a result of improper care, storage, or handling. The State agency has the option of replacing the misused commodities with like foods. The State agency is responsible for initiating and pursuing claims against local agencies, subdistributing agencies, or other agencies or organizations for such losses.

We propose to include the basic requirements for the initiation and pursuit of claims for the misuse of

program funds and commodities in this proposed § 247.30, without substantial change from current requirements. We propose to address actions in response to misuse of funds in paragraph (a), and to address actions in response to the loss of commodities in paragraph (b). We propose to include in the regulations reference to 7 CFR 250.15(c) for procedural requirements relative to claims.

Under 7 CFR 250.15, State agencies are required to pursue claims for improper distribution or loss of commodities. However, specific criteria relative to the establishment and pursuit of claims against CSFP participants are not currently addressed in 7 CFR parts 247 or 250. We propose to establish such criteria in paragraph (c) of this proposed section. The WIC Program, under 7 CFR 246.23(c), requires that a State agency initiate a claim to recover the value of benefits improperly obtained or disposed of as the result of a participant violation. We propose to include a similar requirement, but to tie the initiation and pursuit of claims to those cases involving fraud, as defined in these regulations. As under the proposed § 247.20, we propose to consider the selling of CSFP commodities, or their exchange for non-food items, as fraud, in addition to intentional false or misleading statements or the withholding of information by the participant, or the parent or caretaker. The State or local agency must also disqualify the participant from CSFP, unless the local agency determines that disqualification would result in a serious health risk, in accordance with the requirements of proposed § 247.20(b). The State or local agency must advise the participant of the opportunity to appeal the claim through the fair hearing process, in accordance with proposed § 247.33(a).

In paragraph (d) of this proposed section, we propose to address the procedures that State and local agencies must follow in pursuing claims against participants. We propose to include the following requirements, which correspond to similar requirements in the WIC regulations:

(1) The State agency must establish standards, based on a cost-benefit review, for determining when the pursuit of a claim is cost-effective, and must ensure that local agencies use these standards in determining if a claim is to be pursued.

(2) The local agency must issue a letter demanding repayment for the value of the commodities improperly received or used.

(3) If repayment is not made in a timely manner, the local agency must take additional collection actions that are cost-effective, in accordance with the standards established by the State agency.

(4) The local agency must maintain all records regarding claims actions taken against participants, in accordance with proposed § 247.29.

We believe that inclusion of these criteria would prove an effective deterrent, and would help to ensure that more program resources will be available to those who really need the assistance. These benefits would outweigh the small extra burden placed on State and local agencies in initiating and pursuing claims. State and local agencies would be able to exercise their judgment in determining if the actions necessary to recover the value of improperly obtained benefits are cost-effective, in accordance with the State-established standards.

Audits and Investigations, Section 247.31

Currently, requirements for Federal and State-sponsored audits are contained under § 247.15. Under § 247.16, the Department is authorized to conduct investigations of any allegation that the State or local agency has not complied with Federal regulations. We propose to address audit requirements and the Department's authority to conduct investigations in this proposed § 247.31. Legislation, and subsequent regulatory action by the Department, have modified requirements for State-sponsored audits somewhat, and this proposed section contains the amended requirements. All changes to current provisions described here merely reflect current audit requirements contained in 7 CFR part 3052, which contains the audit requirements for State and local governments and for nonprofit organizations.

The Single Audit Act of 1984 (31 U.S.C. 7501 *et seq.*), and the Single Audit Act Amendments of 1996 (Pub. L. 104–156), amended Federal requirements for State-sponsored audits of agencies operating Federal programs. The OMB implemented the laws by publishing OMB Circular A–133, on June 30, 1997, and the Department implemented the provisions of the law and circular by publishing regulations under 7 CFR part 3052 on August 29, 1997. OMB Circular A–128 was repealed, while OMB Circular A–102 now addresses only Federal agency audits.

The audit requirements were amended to increase the dollar threshold that determines when an audit is required from $25,000 to $300,000. Thus, Federal regulations do not require State and local governments or nonprofit organizations which expend less than $300,000 in Federal awards in any fiscal year to have an audit for that year. This allows limited resources for audits to be used more efficiently. However, the new audit requirements require State and local agencies to have an audit conducted for each fiscal year in which they expend at least $300,000 in Federal awards, as detailed in 7 CFR part 3052. Thus, fewer agencies are now required to conduct audits; however, for those agencies that are required to conduct them, the requirement is now annual, instead of the two-year audit cycles previously required. As before, not all of the programs administered by an agency must be included in the audit, if the agency chooses to conduct a single, and not a program-specific, audit. The new audit requirements also modified the way in which auditors select which of the agency's programs are to be included in a single audit.

In paragraph (a) of this proposed § 247.31, we propose to describe the purpose of an audit, as currently described under § 247.15(d). In paragraph (b), we propose to clarify that the Department may conduct an audit of the program at the State or local agency level at its discretion, and may conduct an investigation of an allegation that the State or local agency has not complied with program requirements.

In paragraph (c), we propose to include the following current responsibilities of the State agency in responding to a Departmental audit:

(1) The State agency must provide access to records or documents compiled by State or local agencies or contractors.

(2) The State agency must submit a corrective action plan, with time frames for implementation and completion of corrective actions, and must take additional actions, if determined necessary by the Department.

In paragraph (d), we propose to include the current requirements under 7 CFR part 3052, as described above, that determine when a State and local agency audit is required. We propose to clarify that the value of CSFP commodities distributed by the agency or organization must be considered as part of the Federal award, in determining if an audit is required.

In paragraph (e) of this proposed § 247.31, we propose to note that State and local agency audits must be conducted in accordance with the requirements of 7 CFR part 3052. We also propose to include current requirements that State and local

agencies are responsible for follow-up and corrective actions in response to audit findings. Lastly, we propose to include that the State agency must ensure that local agencies meet audit requirements, and must ensure that all State or local agency audit reports are available for FNS review.

Termination of Agency Participation, Section 247.32

Currently, under § 247.18, FNS may terminate a State agency's participation in CSFP, in whole or in part, if the State agency does not comply with program requirements. The State agency must terminate a local agency's program, in whole or in part, if the State agency or FNS determines that the local agency has not complied with program requirements. Termination of a program must be effected by written notification, including the reasons and effective date. The State agency must provide the local agency with an opportunity to appeal the action. The State or local agency may also terminate its program, in whole or in part, by written notification to the administering agency (FNS or the State agency, as applicable), stating the reasons and effective date. Finally, program participation may also be terminated, in whole or in part, upon the agreement of both parties. The specific actions and procedures in program termination are more fully described in 7 CFR part 3016.

In paragraph (a) of this proposed § 247.32, we propose to describe when a State agency's program participation may be terminated, in whole or in part, without change to current requirements. However, for clarification, we propose to include the reference that 7 CFR part 3016 contains the specific actions and procedures relative to program termination. We propose to remove the description of specific procedures relating to the return and recovery of funds currently included under § 247.18, as these procedures are included in 7 CFR part 3016. We also propose to include a reference to the requirement, in the proposed § 247.4(b), that either party to the program agreement provide 30 days' written notice of termination of the agreement.

In paragraph (b), we propose to describe when a local agency's program participation may be terminated, in whole or in part. In accordance with the language contained in 7 CFR part 3016, we propose to state that the State agency may terminate a local agency's participation, or may be required to terminate the local agency's participation, in whole or in part, if the local agency does not comply with program requirements. This would allow the State agency to take less drastic actions than termination, whether complete or partial, in response to less serious violations. It also preserves the right of FNS, as the awarding agency, to require termination if the State agency does not take the action. We also propose to clarify in this paragraph that termination requires 30 days' written notification, in accordance with the agreements signed to operate the program.

Fair Hearing Procedures, Section 247.33

Currently, under § 247.20, the State agency must establish a fair hearing process to allow individuals to appeal the denial or discontinuance of CSFP benefits, or disqualification from CSFP. The specific procedures that the State agency is required to include in this process are also described in this section. We propose to include the fair hearing requirements in this proposed § 247.33, with a clearer explanation of the nature and purpose of a fair hearing, and the procedures that State and local agencies must follow in providing individuals with an opportunity to request a hearing, and in conducting the hearing. Additionally, in paragraph (a) of this proposed section, we propose to include the appeal of a claim brought against a participant as one of the adverse actions for which a fair hearing may be requested.

In paragraph (f) of this proposed section, we include the current provision that a participant who appeals the discontinuance of benefits within the 15-day advance notification period required under §§n 247.17 and 247.20 must be permitted to continue to receive benefits until a decision on the appeal is made (unless the certification period ends before the decision is made). However, we propose to include that, if the hearing decision finds that a participant received program benefits fraudulently, the local agency must include the value of benefits received for the period of time that the hearing was pending, as well as for any previous period, in its initiation and pursuit of a claim against the participant.

Management Reviews, Section 247.34

Currently, under § 247.21, FNS and the State agency must establish a management evaluation system to assess the accomplishment of program objectives and compliance with program regulations. Specific responsibilities of FNS and the State agency are outlined. Currently, as part of its management review, the State agency must conduct annual reviews of local agencies that include a review of all aspects of program administration. More frequent reviews may be conducted if the State agency determines that this is necessary. The evaluation must include on-site reviews, including reviews of storage facilities. The State agency must then identify problem areas and follow up to ensure that all problems are corrected.

We propose to include the management review requirements for State agencies in this proposed § 247.34, but to remove the FNS requirements. While FNS will continue its role in program oversight, these regulations should address only requirements for State and local agencies in monitoring the program. In paragraph (a), we propose to clarify that State agencies must establish a management review system to ensure that local agencies, subdistributing agencies, and other agencies conducting program activities meet program requirements and objectives. As part of the system, the State agency must perform on-site reviews of local agencies that include an evaluation of all aspects of program administration, and must also review program reports, including financial and inventory reports, food orders, and audits, on an ongoing basis. As at present, on-site reviews must include a review of all storage facilities. However, to reduce the burden on State agencies in conducting reviews, we propose to require that the State agency perform on-site reviews of local agencies and storage facilities at least once every two years, instead of annually. We believe that, in most cases, effective communication and review of reports, in conjunction with the less frequent on-site reviews, will be sufficient to ensure the effective and efficient operation of the program at the local level.

In paragraph (b), we propose to clearly state what the State agency must do if it finds that a local agency or subdistributing agency is deficient in any aspect of program administration. As at present, the State agency must record all deficiencies identified during the review, and ensure that the deficiencies are corrected within a reasonable period of time. Currently, the State agency must also require local agencies to establish review procedures for their programs irrespective of their program success or efficiency. We propose to state instead that, to ensure improved efficiency in program operations for the future, the State agency may require that local agencies adopt specific review procedures for their programs.

Local Agency Appeals of State Agency Actions, Section 247.35

Currently, under § 247.22, the State agency must establish a hearing procedure to allow local agencies to appeal any State agency decision that adversely affects a local agency's program participation. Such adverse action may include a denial or termination of participation, or a claim against the local agency. We propose to include this requirement in this proposed § 247.35 without substantial change. As at present, the State agency must include specific procedures to allow the local agency to make an adequate presentation of its case at the hearing. The hearing decision must be made by an impartial person, and must be based solely on the evidence presented at the hearing and on program legislation and regulations. We propose only to revise the format to include three separate paragraphs in this new section, and to reduce the detail in current regulatory language to improve clarity.

Confidentiality of Applicants or Participants, Section 247.36

Currently, under § 247.23(c), State and local agencies must restrict the use or disclosure of information provided by program applicants or participants to only those persons directly connected with the administration or enforcement of the program. We propose to include the requirements for protection of confidentiality of program applicants or participants in this proposed § 247.36. In paragraph (a), we propose to clarify that the disclosure of information to persons connected to the enforcement of the program includes those persons investigating or prosecuting program violations. This includes State or local agency WIC administrators investigating dual participation in CSFP and WIC. We also propose to allow the State or local agency to exchange information related to the determination of an individual's eligibility for other health or welfare programs, or for program outreach, with the participant's consent. Before doing this, however, the State agency must sign an agreement with the administering agencies for those programs to ensure that the information will be used only for the specified purposes, and that agencies receiving the information will not further share it. This exchange of information is currently allowed in the WIC program, and allows WIC agencies to provide information necessary for CSFP and other agencies to effectively outreach to, and enroll, eligible individuals. It is important that CSFP regulations also allow this sharing of information to ensure that CSFP agencies may similarly assist WIC agencies.

Currently, under § 247.16(b), the State agency must protect the confidentiality, and other rights in the program, of any person making allegations or complaints against any participant or program official, except as necessary to conduct an investigation, hearing, or judicial proceeding. We propose to include this requirement in paragraph (b) of this proposed section, as it relates to the protection of the confidentiality of program applicants or participants.

Civil Rights Requirements, Section 247.37

Currently, under § 247.19, the State agency must comply with the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), FNS Civil Rights Instruction 113–2, and the Department's regulations (7 CFR Part 15) regarding nondiscrimination. We propose to include civil rights requirements under this proposed § 247.37, and to add references to the more recent legislation relating to nondiscrimination, including Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq.*), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), and Titles II and III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*). In accordance with the legislation, we also propose to amend the current regulatory language to state that no person shall, on the grounds of race, color, national origin, age, sex, or disability, be subjected to discrimination under the program. We also propose to include in this proposed section the current instructions under § 247.19 for the filing of a complaint of discrimination.

We propose to delete the current § 247.23(d), which indicates how interested persons may acquire program information and includes a list of the addresses of all FNS Regional Offices. We believe that program materials provided by State and local agencies and information on the FNS Web site at *http://www.fns.usda.gov/fns* are readily accessible sources of program contacts and information, and may also be more easily revised in the event any changes are made regarding this information.

List of Subjects in 7 CFR Part 247

Agricultural commodities, Food assistance programs, Infants and children, Maternal and child health, Public assistance programs, nutrition, women, aged.

Accordingly, 7 CFR part 247 is proposed to be revised to read as follows:

PART 247—COMMODITY SUPPLEMENTAL FOOD PROGRAM

Sec.

247.1 Definitions.
247.2 The purpose and scope of CSFP.
247.3 Administering agencies.
247.4 Agreements.
247.5 State and local agency responsibilities.
247.6 State Plan.
247.7 Selection of local agencies.
247.8 Individuals applying to participate in CSFP.
247.9 Eligibility requirements.
247.10 Distribution and use of CSFP commodities.
247.11 Applicants exceed caseload levels.
247.12 Rights and responsibilities.
247.13 Provisions for non-English or limited English speakers.
247.14 Other public assistance programs.
247.15 Notification of eligibility or ineligibility of applicant.
247.16 Certification period.
247.17 Notification of discontinuance of participant.
247.18 Nutrition education.
247.19 Dual participation.
247.20 Program violations.
247.21 Caseload assignment.
247.22 Allocation and disbursement of administrative funds to State agencies.
247.23 State provision of administrative funds to local agencies.
247.24 Recovery and redistribution of caseload and administrative funds.
247.25 Allowable uses of administrative funds and other funds.
247.26 Return of administrative funds.
247.27 Financial management.
247.28 Storage and inventory of commodities.
247.29 Reports and recordkeeping.
247.30 Claims.
247.31 Audits and investigations.
247.32 Termination of agency participation.
247.33 Fair hearings.
247.34 Management reviews.
247.35 Local agency appeals of State agency actions.
247.36 Confidentiality of applicants or participants.
247.37 Civil rights requirements.

Authority: Sec. 5, Pub. L. 93–86, 87 Stat. 249, as added by Sec. 1304(b)(2), Pub. L. 95–113, 91 Stat. 980 (7 U.S.C. 612c note); sec. 1335, Pub. L. 97–98, 95 Stat. 1293 (7 U.S.C. 612c note); sec. 209, Pub. L. 98–8, 97 Stat. 35 (7 U.S.C. 612c note); sec. 2(8), Pub. L. 98–92, 97 Stat. 611 (7 U.S.C. 612c note); sec. 1562, Pub. L. 99–198, 99 Stat. 1590 (7 U.S.C. 612c note); sec. 101(k), Pub. L. 100–202; sec. 1771(a), Pub. L 101–624, 101 Stat. 3806 (7 U.S.C. 612c note); sec. 402(a), Pub. L. 104–127, 110 Stat. 1028 (7 U.S.C. 612c note).

§ 247.1 Definitions.

Following is a list of definitions that apply to the Commodity Supplemental Food Program (CSFP).

Breastfeeding women means women up to one year postpartum who are breastfeeding their infants.

Caseload means the number of persons the State agency may serve on an average monthly basis over the course of the caseload cycle.

Caseload cycle means the period from January 1 through the following December 31.

Certification means the use of procedures to determine an applicant's eligibility for the program.

Certification period means the period of time that a participant may continue to receive program benefits without a review of his or her eligibility.

Children means persons who are at least one year of age but have not reached their sixth birthday.

Commodities means nutritious foods purchased by USDA to supplement the diets of CSFP participants.

CSFP means the Commodity Supplemental Food Program.

Department means the U.S. Department of Agriculture.

Dual participation means simultaneous participation by an individual in CSFP and the WIC Program, or in CSFP at more than one distribution site.

Elderly persons means persons at least 60 years of age.

Fiscal year means the period from October 1 through the following September 30.

FNS means the Food and Nutrition Service.

Infants means persons under one year of age.

Local agency means a public or private nonprofit agency, including an Indian tribal organization, which enters into an agreement with the State agency to administer CSFP at the local level.

Nonprofit agency means a private agency or organization with tax-exempt status under the Internal Revenue Code, or that has applied for tax-exempt status with the Internal Revenue Service.

Postpartum women means women up to one year after termination of pregnancy.

7 CFR part 250 means the Department's regulations pertaining to the donation of foods for use in USDA food distribution programs.

7 CFR part 3016 means the Department's regulations pertaining to administrative requirements for grants and cooperative agreements with State, local, and Indian tribal governments.

7 CFR part 3019 means the Department's regulations pertaining to administrative requirements for grants and cooperative agreements with nonprofit organizations.

7 CFR part 3052 means the Department's regulations pertaining to audits of States, local governments, and nonprofit organizations.

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

State agency means the agency designated by the State to administer CSFP at the State level; an Indian tribe or tribal organization recognized by the Department of the Interior that administers the program for a specified tribe or tribes; or, the appropriate area office of the Indian Health Service of the Department of Health and Human Services.

State Plan means the document that describes the manner in which the State agency intends to administer the program in the State.

Subdistributing agency means an agency or organization that has entered into an agreement with the State agency to perform functions normally performed by the State, such as entering into agreements with eligible recipient agencies under which commodities are made available, ordering commodities and/or making arrangements for the storage and delivery of such commodities on behalf of eligible recipient agencies.

WIC Program means the Special Supplemental Nutrition Program for Women, Infants, and Children.

§ 247.2 The purpose and scope of CSFP.

(a) *How does CSFP help participants?* Through CSFP, the Department provides nutritious commodities to help State and local agencies meet the nutritional needs of low-income pregnant, postpartum, and breastfeeding women, infants, children ages 1 through 5, and elderly persons. Through local agencies, each participant receives a monthly package of commodities, based on food package guide rates developed by FNS, with input from State and local agencies. Food packages include such nutritious foods as infant formula and cereal, juices, canned fruits and vegetables, canned meat or poultry and other protein items, and grain products such as pasta, as well as other foods. Participants also receive nutrition education.

(b) *How many persons may be served in CSFP?* State agencies may serve eligible persons up to the caseload limit assigned to them by FNS. Caseload is the number of persons that may be served on an average monthly basis over the course of the caseload cycle, which extends from January 1 through the following December 31.

§ 247.3 Administering agencies.

(a) *What agencies are responsible for administering CSFP?* CSFP is administered at the Federal level by the Department's Food and Nutrition Service (FNS), which provides commodities, assigns caseload, and allocates administrative funds to State agencies. State agencies are responsible for administering the program at the State level. The State agency may select local agencies to administer the program in local areas of the State. The State agency must provide guidance to local agencies on all aspects of program operations. The State agency may also select subdistributing agencies (*e.g.*, another State agency, a local governmental agency, or a nonprofit organization) to distribute or store commodities, or to perform other program functions on behalf of the State agency. Local or subdistributing agencies may also select other agencies to perform specific program functions (*e.g.*, food distribution or storage), with the State agency's approval. Although the State agency may select other organizations to perform specific activities, the State agency is ultimately responsible for all aspects of program administration.

(b) *Are there specific functions that the State agency cannot delegate to another agency?*

Yes. The State agency may not delegate the performance of the following functions to another agency:

(1) Establishing eligibility requirements, in accordance with the options provided to the State agency under § 247.9.

(2) Establishing a management review system and conducting reviews of local agencies, in accordance with § 247.34.

(c) *What Federal requirements must State, subdistributing, and local agencies follow in administering CSFP?* State, subdistributing, and local agencies must administer the program in accordance with the provisions of this part, and with the provisions contained in part 250 of this chapter, unless they are inconsistent with the provisions of this part.

§ 247.4 Agreements.

(a) *What agreements are necessary for agencies to administer CSFP?* The following agreements are necessary for agencies to administer CSFP:

(1) *Agreements between FNS and State agencies.* Each State agency must enter into an agreement with FNS (Form FNS–74, the Federal-State Agreement) prior to receiving commodities or administrative funds.

(2) *Agreements between State agencies and local or subdistributing*

agencies. The State agency must enter into written agreements with local or subdistributing agencies prior to making commodities or administrative funds available to them. The agreements must contain the information specified in paragraph (b) of this section. Agreements between State and local agencies must also contain the information specified in paragraph (c) of this section. Copies of all agreements must be kept on file by the parties to the agreements.

(3) *Agreements between local and subdistributing agencies and other agencies.* The State agency must ensure that local and subdistributing agencies enter into written agreements with other agencies prior to making commodities or administrative funds available to these other agencies. The agreements must contain the information specified in paragraph (b) of this section. Copies of all agreements must be kept on file by the parties to the agreements.

(b) *What are the required contents of agreements?* All agreements described under paragraphs (a)(2) and (a)(3) of this section must contain the following:

(1) An assurance that each agency will administer the program in accordance with the provisions of this part and with the provisions of part 250 of this chapter, unless they are inconsistent with the provisions of this part.

(2) An assurance that each agency will maintain accurate and complete records for a period of three years from the close of the fiscal year to which they pertain, or longer if the records are related to unresolved claims actions, audits, or investigations.

(3) A statement that each agency receiving commodities for distribution is responsible for any loss resulting from improper distribution, or improper storage, care, or handling of commodities.

(4) A statement that each agency receiving program funds is responsible for any misuse of program funds.

(5) A description of the specific functions that the State, subdistributing, or local agency is delegating to another agency.

(6) A statement that the agreement may be terminated by either party upon 30 days' written notice.

(c) *What other assurances or information must be included in agreements between State and local agencies?* In addition to the requirements under paragraph (b) of this section, agreements between State and local agencies must contain the following:

(1) An assurance that the local agency will provide, or cause to be provided, nutrition education to participants, as required in § 247.18.

(2) An assurance that the local agency will provide information to participants on other health, nutrition, and public assistance programs, and make referrals as appropriate, as required in § 247.14.

(3) An assurance that the local agency will distribute commodities in accordance with the approved food package guide rate.

(4) An assurance that the local agency will take steps to prevent and detect dual participation, as required in § 247.19.

(5) The names and addresses of all certification, distribution, and storage sites under the jurisdiction of the local agency.

(d) *What is the duration of required agreements?* All agreements between FNS and State agencies are considered permanent, but may be amended at the initiation of State agencies or at the request of FNS. All amendments must be approved by FNS. The State agency establishes the duration of agreements it signs with local agencies or subdistributing agencies. The State agency may establish, or permit the local or subdistributing agency to establish, the duration of agreements between local or subdistributing agencies and other agencies.

§ 247.5 State and local agency responsibilities.

State and local agencies are responsible for administering the program in accordance with the provisions of this part, and with the provisions of part 250 of this chapter, as applicable. Although the State agency may delegate specific responsibilities to another agency, the State agency is ultimately responsible for all aspects of program administration. Following is an outline of the major responsibilities of State and local agencies; it is not intended to be all-inclusive.

(a) *What are the major responsibilities shared by State and local agencies?* The major responsibilities shared by State and local agencies include:

(1) Entering into required agreements.

(2) Ordering commodities for distribution.

(3) Storing and distributing commodities.

(4) Establishing procedures for resolving complaints about commodities.

(5) Complying with civil rights requirements.

(6) Maintaining accurate and complete records.

(7) Conducting program outreach.

(b) *What are the major State agency responsibilities?* The major responsibilities of State agencies include:

(1) Completing and submitting the State Plan.

(2) Selecting local agencies to administer the program in local areas of the State.

(3) Determining caseload needs, and submitting caseload requests to FNS.

(4) Assigning caseload, and allocating administrative funds, to local agencies.

(5) Establishing eligibility requirements, in accordance with the options provided to the State agency under § 247.9. (This function may not be delegated to another agency.)

(6) Establishing nutritional risk criteria and a residency requirement for participants, if such criteria are to be used.

(7) Establishing a financial management system that effectively accounts for funds received for program administration.

(8) Developing a plan for the detection and prevention of dual participation, in coordination with CSFP local agencies and with the State WIC agency.

(9) Developing a plan for providing nutrition education to participants.

(10) Establishing appeals and fair hearing procedures for local agencies and program participants.

(11) Developing a management review system and conducting reviews of local agencies. (This function may not be delegated to another agency.)

(12) Determining and pursuing claims, and establishing standards for pursuit of claims against participants.

(13) Ensuring compliance with Federal audit requirements.

(14) Providing guidance to local agencies, as needed.

(c) *What are the major local agency responsibilities?* The major local agency responsibilities include:

(1) Determining eligibility of applicants in accordance with eligibility criteria established by the State agency.

(2) Complying with fiscal and operational requirements established by the State agency.

(3) Ensuring that participation does not exceed the caseload assigned by the State agency.

(4) Issuing foods to participants in accordance with the established food package guide rates.

(5) Providing nutrition education and information on the availability of other nutrition and health assistance programs to participants.

(6) Informing applicants of their rights and responsibilities in the program.

(7) Meeting the special needs of the homebound elderly, to the extent possible.

(8) Pursuing claims against participants.

§ 247.6 State Plan.

(a) *What is the State Plan?* The State Plan is a document that describes how the State agency will operate CSFP and the caseload needed to serve eligible applicants. The State agency must submit the State Plan to FNS for approval. Once submitted and approved, the State Plan is considered permanent, with amendments submitted at the State agency's initiative, or at FNS request. All amendments are subject to FNS approval. The State Plan may be submitted in the format provided in FNS guidance, in an alternate format, or in combination with other documents required by Federal regulations. The State agency is encouraged to collaborate with the State WIC agency in developing the State Plan, for example, in developing plans for serving women, infants, and children, program outreach, and nutrition education. (Collaboration with the State WIC agency is required in preventing and detecting dual participation.) The State Plan must be signed by the State agency official responsible for program administration. A copy of the State Plan must be kept on file at the State agency for public inspection.

(b) *When must the State Plan be submitted?* The State Plan must be submitted by August 15 to take effect for the fiscal year beginning in the following October. FNS will provide notification of the approval or disapproval of the State Plan within 30 days of receipt, and will notify the State agency within 15 days of receipt if additional information is needed. Disapproval of the Plan will include a reason for the disapproval. Approval of the Plan is a prerequisite to the assignment of caseload and allocation of administrative funds, but does not ensure that caseload and funds will be provided.

(c) *What must be included in the State Plan?* The State Plan must include:

(1) The names and addresses of all local agencies and subdistributing agencies with which the State agency has entered into agreement.

(2) The income eligibility standards to be used for women, infants, and children, and the options to be used relating to income or other eligibility requirements, as provided under § 247.9.

(3) The nutritional risk criteria to be used, if the State chooses to establish such criteria.

(4) A description of plans for serving women, infants, children, and elderly participants and the caseload needed to serve them.

(5) A description of plans for conducting outreach to women, infants, children, and the elderly.

(6) A description of the system for storing and distributing commodities.

(7) A description of plans for providing nutrition education to participants.

(8) A description of the means by which the State agency will detect and prevent dual participation, including collaboration with the State WIC agency, and a copy of the agreement signed with the State WIC agency to accomplish this.

(9) A description of the standards the State agency will use in determining if the pursuit of a claim against a participant is cost-effective.

(10) A description of the means by which the State will meet the needs of the homebound elderly.

(11) Copies of all agreements entered into by the State agency.

(d) *When must the State agency submit amendments to the State Plan?* The State agency must submit amendments to FNS to reflect any changes in program operations or administration described in the State Plan, and to request additional caseload for the following caseload cycle. FNS may also require that the State Plan be amended to reflect changes in Federal law or policy. The State agency may submit amendments to the State Plan at any time during the fiscal year, for FNS approval. The amendments will take effect immediately upon approval, unless otherwise specified by FNS. If a State agency would like to receive additional caseload for the caseload cycle beginning the following January 1, it must submit an amendment to the Plan which conveys the request for additional caseload by November 5. The State agency must also describe in this submission any plans for serving women, infants, children, and the elderly at new sites. FNS action on the State agency's request for additional caseload is part of the caseload assignment process, as described under § 247.21.

§ 247.7 Selection of local agencies.

(a) *How does a local agency apply to participate in CSFP?* Local agencies wishing to participate in CSFP must submit a written application to the State agency. The application must describe how the local agency will operate the program and, for nonprofit agencies, must include the agency's tax-exempt status. To be eligible to participate in CSFP, a nonprofit agency must have tax-exempt status under the Internal Revenue Code (IRC), or have applied for tax-exempt status with the Internal Revenue Service (IRS), and be moving towards such status. Nonprofit agencies organized or operated exclusively for religious purposes are automatically tax-exempt under the IRC. Nonprofit agencies required to obtain tax-exempt status must provide documentation from the IRS that they have obtained such status, or have applied for it.

(b) *On what basis does the State agency make a decision on the local agency's application?* The State agency must approve or disapprove the local agency's application based on the following criteria:

(1) The ability of the local agency to operate the program in accordance with Federal and State requirements.

(2) The need for the program in the projected service area of the local agency.

(3) The resources available (caseload and funds) for initiating a program in the local area.

(4) For nonprofit agencies, the tax-exempt status, with appropriate documentation.

(c) *What must the State agency do if a nonprofit agency approved for CSFP is subsequently denied tax-exempt status by the IRS, or does not obtain this status within a certain period of time?* In accordance with paragraph (a) of this section, the State agency may approve a nonprofit agency that has applied to the IRS for tax-exempt status, and is moving toward compliance with the requirements for recognition of tax-exempt status. However, if the IRS subsequently denies a participating agency's application for recognition of tax-exempt status, the agency must immediately notify the State agency of the denial. The State agency must terminate the agency's agreement and participation immediately upon notification. If documentation of recognition of tax-exempt status is not received within 180 days of the effective date of the agency's approval to participate in CSFP, the State agency must terminate the agency's participation until such time as recognition of tax-exempt status is obtained. However, the State agency may grant an extension of 90 days if the agency demonstrates that its inability to obtain tax-exempt status in the 180-day period is due to circumstances beyond its control.

(d) *How much time does the State agency have to make a decision on the local agency's application?* The State agency must inform the local agency of approval or denial of the application within 60 days of its receipt. If the application is denied, the State agency must provide a written explanation for the denial, along with notification of the

local agency's right to appeal the decision, in accordance with § 247.35. If the application is approved, the State and local agency must enter into an agreement in accordance with the requirements of § 247.4.

§ 247.8 Individuals applying to participate in CSFP.

(a) *What information must individuals applying to participate in CSFP provide?* To apply for CSFP benefits, the applicant, or the adult parent or guardian of the applicant, must provide the following information on the application:

(1) Name and address, including some form of identification for each applicant.

(2) Household income.

(3) Other information related to eligibility, such as age or pregnancy, as applicable.

(b) *What else is required on the application form?* After informing the applicant (or adult parent or guardian) of his or her rights and responsibilities, in accordance with § 247.12, the local agency must ensure that the applicant, or the adult parent or guardian of the applicant, signs the application form beneath the following pre-printed statement. The statement must be read by, or to, the applicant (or adult parent or guardian) before signing.

This application is being completed in connection with the receipt of Federal assistance. Program officials may verify information on this form. I am aware that deliberate misrepresentation may subject me to prosecution under applicable State and Federal statutes. I am also aware that the information provided may be shared with other organizations to detect and prevent dual participation. I have been advised of my rights and obligations under the program. I certify that the information I have provided for my eligibility determination is correct to the best of my knowledge.

I authorize the release of information provided on this application form to other organizations administering assistance programs for use in determining my eligibility for participation in other public assistance programs and for program outreach purposes. (Please indicate decision by placing a checkmark in the appropriate box.)

YES □
NO □

§ 247.9 Eligibility requirements.

(a) *Who is eligible for CSFP?* To be eligible for CSFP, individuals must fall into one of the following population groups:

(1) Infants, *i.e.*, persons under one year of age.

(2) Children, *i.e.*, persons who are at least one year of age but have not reached their sixth birthday.

(3) Pregnant women.

(4) Breastfeeding women, up to one year after giving birth (post-partum).

(5) Post-partum women, up to one year after termination of pregnancy.

(6) Elderly persons, *i.e.*, persons at least 60 years of age.

(b) *What are the income eligibility requirements for women, infants, and children?* (1) The State agency must establish household income limits that are at or below 185 percent of the Federal Poverty Income Guidelines published annually by the Department of Health and Human Services, but not below 100 percent of these guidelines. However, the State agency must accept as income-eligible, regardless of actual income, any applicant who is:

(i) Certified as eligible to receive food stamps under the Food Stamp Act of 1977 (7 U.S.C. 2011 *et seq.*), Temporary Assistance for Needy Families (TANF) under Part A of Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), or Medical Assistance (*i.e.*, Medicaid) under Title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*).

(ii) A member of a family that is certified eligible to receive assistance under TANF, or a member of a family in which a pregnant woman or an infant is certified eligible to receive assistance under Medicaid.

(2) The State agency may consider women, infants, and children participating in another Federal, State, or local food, health, or welfare program as automatically eligible for CSFP if the income eligibility limits for the program are equal to or lower than the established CSFP limits.

(3) For a pregnant woman, the State agency must count each embryo or fetus in utero as a household member in determining if the household meets the income eligibility standards.

(c) *What are the income eligibility requirements for elderly persons?* The State agency must use a household income limit at or below 130 percent of the Federal Poverty Income Guidelines. Elderly persons in households with income at or below this level must be considered eligible for CSFP benefits (assuming they meet other requirements). However, elderly persons certified before September 17, 1986 (*i.e.*, under the three elderly pilot projects) must remain subject to the eligibility criteria in effect at the time of their certification.

(d) *When must the State agency revise the CSFP income guidelines to reflect the annual adjustments of the Federal Poverty Income Guidelines?* Each year, FNS will notify State agencies, by memorandum, of adjusted income guidelines by household size at 185 percent, 130 percent, and 100 percent of the Federal Poverty Income Guidelines. The memorandum will reflect the annual adjustments to the Federal Poverty Income Guidelines issued by the Department of Health and Human Services. The State agency must implement the adjusted guidelines for elderly applicants immediately upon receipt of the memorandum. However, for women, infants, and children applicants, the State agency must implement the adjusted guidelines at the same time that the State WIC agency implements the adjusted guidelines in WIC.

(e) *How is income defined and considered as it relates to CSFP eligibility?* (1) Income means gross income before deductions for such items as income taxes, employees' social security taxes, insurance premiums, and bonds.

(2) The State agency may exclude from consideration the following sources of income listed under the WIC regulations at § 246.7(d)(2)(iv) of this chapter:

(i) Any basic allowance for housing received by military services personnel residing off military installations.

(ii) The value of inkind housing and other inkind benefits.

(3) The State agency must exclude from consideration all income sources excluded by legislation, which are listed in § 246.7(d)(2)(iv)(C) of this chapter. FNS will notify State agencies of any new forms of income excluded by statute through program policy memoranda.

(4) The State agency may authorize local agencies to consider the household's average income during the previous 12 months and current household income to determine which more accurately reflects the household's status. In instances in which the State makes the decision to authorize local agencies to determine a household's income in this manner, all local agencies must comply with the State's decision and apply this method of income determination in situations in which it is warranted.

(f) *What other options does the State agency have in establishing eligibility requirements for CSFP?* (1) The State agency may require that an individual be at nutritional risk, as determined by a physician or by local agency staff.

(2) The State agency may require that an individual reside within the service area of the local agency at the time of application for CSFP benefits. However, the State agency may not require that an individual reside within the area for any fixed period of time.

§ 247.10 Distribution and use of CSFP commodities.

(a) *What are the requirements for distributing CSFP commodities to participants?* The local agency must distribute a package of commodities to participants each month, or a two-month supply of commodities to participants every other month, in accordance with the food package guide rates established by FNS.

(b) *What must the local agency do to ensure that commodities are distributed only to CSFP participants?* The local agency must require each participant, or participant's proxy, to present some form of identification before distributing commodities to that person.

(c) *What restrictions apply to State and local agencies in the distribution of CSFP commodities?* State and local agencies must not require, or request, that participants make any payments, or provide any materials or services, in connection with the receipt of CSFP commodities. State and local agencies must not use the distribution of CSFP commodities as a means of furthering the political interests of any person or party.

(d) *What are the restrictions for the use of CSFP commodities?* CSFP commodities may not be used for outreach, refreshments, or for any purposes other than distribution to, and nutrition education for, CSFP participants.

§ 247.11 Applicants exceed caseload levels.

(a) *What must the local agency do if the number of applicants exceeds the local agency's caseload level?* If all caseload has been filled, the local agency must maintain a waiting list of individuals who apply for the program. In establishing the waiting list, the local agency must include the date of application, the population group of the applicant, and information necessary to allow the local agency to contact the applicant when caseload space becomes available. Unless they have been determined ineligible, applicants must be notified of their placement on a waiting list within 10 days of their request for benefits.

(b) *What are the requirements for serving individuals on the waiting list once caseload slots become available?* When caseload slots open up, the local agency must provide benefits to eligible individuals on the waiting list in the following order of priority:

(1) Pregnant women, breastfeeding women, and infants.

(2) Children ages 1 through 3.

(3) Children ages 4 and 5.

(4) Postpartum women.

(5) Elderly persons.

§ 247.12 Rights and responsibilities.

(a) *What information regarding an individual's rights in CSFP must the local agency provide to the applicant?* The local agency is responsible for informing the applicant, orally or in writing, of the following:

(1) Program standards are applied without discrimination by race, color, national origin, age, disability, or sex.

(2) The local agency will provide notification of a decision to deny or terminate CSFP benefits, and of an individual's right to appeal this decision by requesting a fair hearing, in accordance with § 247.33(a).

(3) The local agency will make nutrition education available to all adult participants, and to parents or guardians of infant and child participants, and will encourage them to participate.

(4) The local agency will provide information on other nutrition, health, or assistance programs, and make referrals as appropriate.

(b) *What information regarding an individual's responsibilities in CSFP must the local agency provide to the applicant?* In addition to the written statement required by § 247.8(b), the local agency is responsible for informing the applicant, orally or in writing, of the following:

(1) Individuals may not receive both CSFP and WIC benefits simultaneously, and may not receive CSFP benefits at more than one CSFP site simultaneously.

(2) Improper receipt of CSFP benefits as a result of dual participation or other program violations may lead to a claim against the individual to recover the value of the benefits, and may lead to disqualification from CSFP.

(3) Participants must report changes in household income or composition within 10 days after the change becomes known to the household.

§ 247.13 Provisions for non-English or limited English speakers.

(a) *What must State and local agencies do to ensure that non-English or limited English speaking persons are aware of their rights and responsibilities in the program?* If a significant proportion of the population in an area is comprised of non-English or limited English speaking persons with a common language, the State agency must ensure that local agencies inform such persons of their rights and responsibilities in the program, as listed under § 247.12, in an appropriate language. State and local agencies must ensure that bilingual staff members or interpreters are available to serve these persons.

(b) *What must State and local agencies do to ensure that non-English or limited English speaking persons are aware of other program information?* If a significant proportion of the population in an area is comprised of non-English or limited English speaking persons with a common language, the State agency must ensure that local agencies provide other program information, except application forms, to such persons in an appropriate language.

§ 247.14 Other public assistance programs.

(a) *What information on other public assistance programs must the local agency provide to women, infants, and children applicants?* The local agency must provide CSFP applicants eligible for both CSFP and WIC with written information on the WIC Program, to assist them in choosing the program in which they wish to participate. Additionally, the local agency must provide women, infants, and children applicants with written information on the following nutrition, health, or public assistance programs, and make referrals to these programs as appropriate:

(1) The Medicaid Program, which is the medical assistance program established under Title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*), and other health insurance programs for low-income households in the State. The State agency must provide local agencies with materials showing the income standards utilized in the Medicaid Program.

(2) The Temporary Assistance for Needy Families (TANF) program under part A of Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*).

(3) The Child Support Enforcement Program under part D of Title IV of the Social Security Act (42 U.S.C. 651 *et seq.*).

(4) The Food Stamp Program (7 U.S.C. 2011 *et seq.*).

(b) *What information on other public assistance programs must the local agency provide to elderly applicants?* The local agency must provide elderly applicants with written information on the following programs, and make referrals, as appropriate:

(1) Supplemental security income benefits provided under title XVI of the Social Security Act (42 U.S.C. 1381 *et seq.*).

(2) Medical assistance provided under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*), including medical assistance provided to a qualified Medicare beneficiary (42 U.S.C. 1395(p) and 1396d(5)).

(3) The Food Stamp Program (7 U.S.C. 2011 *et seq.*).

(c) *Is the value of CSFP benefits counted as income or resources for any other public assistance programs?* No. The value of benefits received in CSFP may not be considered as income or resources of participants or their families for any purpose under Federal, State, or local laws, including laws relating to taxation and public assistance programs.

§ 247.15 Notification of eligibility or ineligibility of applicant.

(a) *What is the timeframe for notifying an applicant of eligibility or ineligibility for CSFP benefits?* Local agencies must notify applicants of their eligibility or ineligibility for CSFP benefits, or their placement on a waiting list, within 10 days from the date of application.

(b) *What must be included in the notification of eligibility or ineligibility?* The notification of eligibility must include information on the time, location, and means of food distribution, and the length of the certification period. Notification of ineligibility must be in writing, and must include the reason the applicant is not eligible, and a statement of the individual's right to a fair hearing to appeal the decision.

§ 247.16 Certification period.

(a) *How long is the certification period?* (1) *Women, infants, and children.* For women, infants, and children, the State agency must establish certification periods that may not exceed 6 months in length. However, pregnant women must be certified to participate for the duration of their pregnancy and for up to six weeks post-partum.

(2) *Elderly persons.* For elderly persons, the State agency must establish certification periods that may not exceed 6 months in length. However, the State agency may authorize local agencies to extend the certification period without a formal review of eligibility for additional 6-month periods, as long as the following conditions are met:

(i) The person's address and continued interest in receiving program benefits are verified.

(ii) The local agency has sufficient reason to believe that the person still meets the income eligibility standards (*e.g.*, the elderly person has a fixed income).

(iii) No eligible women, infants, or children are waiting to be served.

(b) *On what day of the final month does the certification period end?* The certification period extends to the final day of the month in which eligibility expires (*e.g.*, the last day of the month in which a child reaches his or her sixth birthday).

(c) *Does the certification period end when a participant moves from the local area in which he or she was receiving benefits?* No. The State agency must ensure that local agencies serve a CSFP participant, or WIC participant (if also eligible for CSFP), who moves from another area to an area served by CSFP, and whose certification period has not expired. The participant must be given the opportunity to continue to receive CSFP benefits for the duration of the certification period. If the local agency has a waiting list, the participant must be placed on its waiting list ahead of all other waiting applicants. The local agency that determined the participant's eligibility must provide verification of the extent of the certification period to the participant upon request.

(d) *What must the local agency do to ensure that participants are aware of the expiration of the certification period?* The local agency must notify program participants in writing at least 15 days before the expiration date that eligibility for the program is about to expire.

§ 247.17 Notification of discontinuance of participant.

(a) *What must a local agency do if it has evidence that a participant is no longer eligible for CSFP benefits during the certification period?* If a local agency has evidence that a participant is no longer eligible for CSFP benefits during the certification period, it must provide the participant with a written notification of discontinuance at least 15 days before the effective date of discontinuance.

(b) *What must be included in the notification of discontinuance?* The notification of discontinuance must include the effective date of discontinuance, the reason for the participant's ineligibility, and a statement of the individual's right to appeal the discontinuance through the fair hearing process, in accordance with § 247.33(a).

§ 247.18 Nutrition education.

(a) *What are the State agency's responsibilities in ensuring that nutrition education is provided?* The State agency must establish an overall nutrition education plan and must ensure that local agencies provide nutrition education to participants in accordance with the plan. The State agency must also establish an evaluation procedure to ensure that the nutrition education provided is effective. The evaluation procedure must include participant input and must be directed by a nutritionist or other qualified professional. The evaluation may be conducted by the State or local agency, or by another agency under agreement with the State or local agency.

(b) *What type of nutrition education must the local agency provide?* The local agency must provide nutrition education that can be easily understood by participants and is related to their nutritional needs and household situations. The local agency must provide nutrition education that includes the following information, which should account for specific ethnic and cultural characteristics whenever possible:

(1) The nutritional value of CSFP foods, and their relationship to the overall dietary needs of the population groups served.

(2) Nutritious ways to use CSFP foods.

(3) Special nutritional needs of participants and how these needs may be met.

(4) For pregnant and postpartum women, the benefits of breastfeeding.

(5) The importance of health care, and the role nutrition plays in maintaining good health.

(6) The importance of the use of the foods by the participant to whom they are distributed, and not by another person.

(c) *To whom must local agencies provide nutrition education?* The local agency must make nutrition education available to all adult participants and to parents or guardians of infants and child participants. Local agencies are encouraged to make nutrition education available to children, where appropriate.

(d) *May CSFP foods be used in cooking demonstrations?* Yes. The State or local agency, or another agency with which it has signed an agreement, may use CSFP foods to conduct cooking demonstrations as part of the nutrition education provided to program participants, but not for other purposes.

§ 247.19 Dual participation.

(a) *What must State and local agencies do to prevent and detect dual participation?* The State agency must work with the State WIC agency to develop a plan to prevent and detect dual participation, in accordance with an agreement signed by both agencies. The State agency must also work with local agencies to prevent and detect dual participation. In accordance with § 247.12(b)(1), the local agency must inform applicants that dual participation is not allowed and must check the identification of all

participants when they are certified or recertified.

(b) *What must the local agency do if a CSFP participant is found to be committing dual participation?* A participant found to be committing dual participation must be discontinued from one of the programs (WIC or CSFP), or from participation at more than one CSFP site. Whenever an individual's participation in CSFP is discontinued, the local agency must notify the individual of the discontinuance, in accordance with § 247.17. The individual may appeal the discontinuance through the fair hearing process, in accordance with § 247.33(a). In accordance with § 247.20(b), if the dual participation resulted from the participant, or the parent or caretaker of the participant, making false or misleading statements, or intentionally withholding information, the local agency must disqualify the participant from CSFP, unless the local agency determines that disqualification would result in a serious health risk. The local agency must also initiate a claim against the participant to recover the value of CSFP benefits improperly received, in accordance with § 247.30(c).

§ 247.20 Program violations.

(a) *What are program violations in CSFP?* Program violations are actions taken by CSFP applicants or participants, or the parents or caretakers of applicants or participants, to obtain or use CSFP benefits improperly. Program violations include the following actions:

(1) Intentionally making false or misleading statements, orally or in writing.

(2) Intentionally withholding information pertaining to eligibility in CSFP.

(3) Selling commodities obtained in the program, or exchanging them for non-food items.

(4) Physical abuse, or threat of physical abuse, of program staff.

(5) Committing dual participation.

(b) *What are the penalties for committing program violations?* If applicants or participants, or the parents or caretakers of applicants or participants, commit program violations, the State agency may require local agencies to disqualify the applicants or participants for a period of up to one year. However, if the local agency determines that disqualification would result in a serious health risk, the disqualification may be waived. For program violations that involve fraud, the State agency must require local agencies to disqualify the participant from CSFP for a period of up to one year, unless the local agency determines that disqualification would result in a serious health risk. The State agency must require local agencies to permanently disqualify a participant who commits three program violations that involve fraud. For purposes of this program, fraud includes:

(1) Intentionally making false or misleading statements to obtain CSFP commodities.

(2) Intentionally withholding information to obtain CSFP commodities.

(3) Selling CSFP commodities, or exchanging them for non-food items.

(c) *What must the local agency do to notify the individual of disqualification from CSFP?* The local agency must provide the individual with written notification of disqualification from CSFP at least 15 days before the effective date of disqualification. The notification must include the effective date and period of disqualification, the reason for the disqualification, and a statement that the individual may appeal the disqualification through the fair hearing process, in accordance with § 247.33(a).

§ 247.21 Caseload assignment.

(a) *How does FNS assign caseload to State agencies?* Each year, FNS assigns a caseload to each State agency to allow persons meeting the eligibility criteria listed under § 247.9 to participate in the program, up to the caseload limit. To the extent that resources are available, FNS assigns caseload to State agencies in the following order:

(1) *Base caseload.* (i) Each State agency entering its second year of program participation receives caseload equal to the amount assigned it in its first year of participation.

(ii) Each State agency that has participated in two or more caseload cycles receives caseload in an amount equal to its highest average monthly participation in one of the two periods of the previous fiscal year listed below. However, the State agency may not receive a base caseload in excess of its total caseload assignment for the previous cycle. The two periods are:

(A) The full fiscal year; or

(B) The final quarter of the fiscal year.

(2) *Additional caseload.* Each participating State agency may request, and receive, additional caseload to increase service to women, infants, and children, and the elderly. Requests by State agencies to increase service to women, infants, and children receive priority over requests to increase service to the elderly. State agencies which did not utilize at least 95 percent of their assigned caseload in one of the periods of the previous fiscal year listed under paragraph (a)(1)(ii) of this section are not eligible for additional caseload. Of the State agency's request for additional caseload, FNS assigns an amount that it determines the State needs and can efficiently utilize. In making this determination, FNS considers the factors listed below, in descending order of importance. If all reasonable requests for additional caseload cannot be met, FNS assigns it to those States that are most likely to utilize it. The factors are:

(i) Program participation of women, infants, and children, and the elderly in the State, in the previous fiscal year;

(ii) The percentage of caseload utilized by the State in the previous caseload cycle;

(iii) Program participation trends in the State in previous fiscal years; and

(iv) Other information provided by the State agency in support of the request.

(3) *New caseload.* Each State agency requesting to begin participation in the program, and with an approved State Plan, may receive caseload to serve women, infants, and children, and the elderly, as requested in the State Plan. State agency requests to initiate service to women, infants, and children receive priority over requests to initiate service to the elderly. Of the State agency's caseload request, FNS assigns caseload in an amount that it determines the State needs and can efficiently utilize. This determination is made based on information contained in the State Plan and on other relevant information. However, if all caseload requests cannot be met, FNS will assign caseload to those States that are most likely to utilize it.

(b) *When does FNS assign caseload to State agencies?* FNS must assign caseload to State agencies by December 31 of each year, or within 30 days after enactment of appropriations legislation covering the full fiscal year, whichever comes later. Caseload assignments for the previous caseload cycle will remain in effect, subject to the availability of sufficient funding, until caseload assignments are made for the current caseload cycle.

(c) *How do State agencies request additional caseload for the next caseload cycle?* In accordance with § 247.6(d), a State agency that would like additional caseload for the next caseload cycle (beginning the following January 1) must submit a request for additional caseload by November 5, as an amendment to the State Plan. The State agency must also describe plans for serving women, infants, and children, and the elderly, at new sites in this submission.

§ 247.22 Allocation and disbursement of administrative funds to State agencies.

(a) *What must State agencies do to be eligible to receive administrative funds?* In order to receive administrative funds, the State agency must have signed an agreement with FNS to operate the program, in accordance with § 247.4(a)(1), and must have an approved State Plan.

(b) *How does FNS allocate administrative funds to State agencies?* (1) As required by law, each fiscal year FNS allocates to each State agency an administrative grant per assigned caseload slot, adjusted each year for inflation.

(2) For fiscal year 2003, the amount of the grant per assigned caseload slot is equal to the per-caseload slot amount provided in fiscal year 2001, adjusted by the percentage change between:

(i) The value of the State and local government price index, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30, 2001; and

(ii) The value of that index for the 12-month period ending June 30, 2002.

(3) For subsequent fiscal years, the amount of the grant per assigned caseload slot is equal to the amount of the grant per assigned caseload slot for the preceding fiscal year, adjusted by the percentage change between:

(i) The value of the State and local government price index, as published by the Bureau of Economic Analysis of the Department of Commerce, for the 12-month period ending June 30 of the second preceding fiscal year; and

(ii) The value of that index for the 12-month period ending June 30 of the preceding fiscal year.

(c) *How do State agencies access administrative funds?* FNS provides administrative funds to State agencies on a quarterly basis, by means of a Letter of Credit, unless other funding arrangements have been made with FNS. The State agency obtains the funds by electronically accessing its Letter of Credit account.

§ 247.23 State provision of administrative funds to local agencies.

(a) *How much of the administrative funds must State agencies provide to local agencies for their use?* The State agency must provide to local agencies for their use all administrative funds it receives, except that the State agency may retain for its own use the amount determined by the following formula:

(1) 15 percent of the first $50,000 received.

(2) 10 percent of the next $100,000 received.

(3) 5 percent of the next $250,000 received.

(4) A maximum of $30,000, if the administrative grant exceeds $400,000.

(b) *May a State agency request to retain more than the amount determined by the above formula in the event of special needs?* Yes, the State agency may request approval from FNS to retain a larger amount than is allowed under the formula prescribed in paragraph (a) of this section. However, in making its request, the State agency must provide justification of the need for the larger amount at the State level, and must ensure that local agencies will not suffer undue hardship as a result of a reduction in administrative funds.

(c) *How must the State agency distribute funds among local agencies?* The State agency must distribute funds among local agencies on the basis of their respective needs, and in a manner that ensures the funds will be used to achieve program objectives.

§ 247.24 Recovery and redistribution of caseload and administrative funds.

(a) *May FNS recover and redistribute caseload and administrative funds assigned to a State agency?* Yes. FNS may recover and redistribute caseload and administrative funds assigned to a State agency during the fiscal year. FNS will redistribute these resources to other State agencies in accordance with the provisions of 247.21(a) and 247.22(b). In reassigning caseload, FNS will use the most up-to-date data on participation and the extent to which caseload is being utilized, as well as other information provided by State agencies. In instances in which FNS recovers caseload slots, the State agency must use 95 percent of its original caseload allocation to be eligible for expansion caseload.

(b) *Is there a limit on the amount of caseload slots or administrative funds that FNS may recover?* Yes. Caseload will be recovered and reassigned only to the extent permitted by recovered administrative funding. FNS will not involuntarily recover caseload that would result in the recovery of more than 25 percent of the State's administrative funds. However, in instances in which the State agency requests that FNS recover any portion of its assigned caseload, the 25 percent limitation will not apply.

§ 247.25 Allowable uses of administrative funds and other funds.

(a) *What are allowable uses of administrative funds provided to State and local agencies?*

Administrative funds may be used for costs that are necessary to ensure the efficient and effective administration of the program, in accordance with parts 3016 and 3019 of this title. Part 3016 of this title contains the rules for management of Federal grants to State, local, and Indian tribal governments, and part 3019 of this title contains the grants management rules for nonprofit organizations. These departmental regulations incorporate by reference OMB Circulars A–87 (Cost Principles for State and Local Governments) and A–122 (Cost Principles for Non-Profit Organizations), which set out the principles for determining whether specific costs are allowable. Some examples of allowable costs in CSFP include:

(1) Storing, transporting, and distributing foods.

(2) Determining the eligibility of program applicants.

(3) Program outreach.

(4) Nutrition education.

(5) Audits and fair hearings.

(6) Monitoring and review of program operations.

(7) Transportation of participants to and from the local agency, if necessary.

(b) *What are unallowable uses of administrative funds?* In addition to those costs determined to be unallowable by the principles contained in the OMB circulars referenced in paragraph (a) of this section, specific examples of unallowable uses of administrative funds in CSFP include:

(1) The cost of alteration of facilities not required specifically for the program.

(2) Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or by other means).

(c) *What costs are allowable only with prior approval of FNS?* Capital expenditures, which include the acquisition of facilities or equipment, or enhancements to such capital assets, with a cost per unit of at least $5,000, are allowable only with prior approval of FNS. Examples of equipment include automated information systems, automated data processing equipment, and other computer hardware and software.

(d) *What procedures must State and local agencies use in procuring property, equipment, or services with program funds, and disposing of such property or equipment?* The procedures that State and local agencies must follow in procuring property, equipment, or services with program funds, or disposing of such property or equipment, are contained in parts 3016 and 3019 of this title. State, local, and Indian tribal governments must comply with part 3016 of this title, while

nonprofit subgrantees must comply with part 3019 of this title. State and local agencies may use procurement procedures established by State and local regulations as long as these procedures do not conflict with Federal regulations. Federal regulations do not relieve State or local agencies from responsibilities established in contracts relating to procurement of property, equipment, or services. The State agency is the responsible authority regarding the settlement of all contractual and administrative issues arising out of procurements for the program.

(e) *What is program income and how must State and local agencies use it?* Program income is income directly generated from program activities. It includes, for example, income from the sale of packing containers or pallets, and the salvage of commodities. Program income does not include interest earned from administrative funds. State and local agencies must use program income for allowable program costs, in accordance with part 3016 of this title.

(f) *How must State and local agencies use funds recovered as a result of claims actions?*

The State agency must use funds recovered as a result of claims actions against subdistributing or local agencies in accordance with the provisions of § 250.15 of this chapter. The State agency must use funds recovered as a result of claims actions against participants for allowable program costs. The State agency may authorize local agencies to use such funds for allowable program costs incurred at the local level.

§ 247.26 Return of administrative funds.

(a) *Must State agencies return administrative funds that they do not use at the end of the fiscal year?* Yes. If, by the end of the fiscal year, a State agency has not obligated all of its allocated administrative funds, the unobligated funds must be returned to FNS.

(b) *What happens to administrative funds that are returned by State agencies at the end of the fiscal year?* If, in the following fiscal year, OMB reapportions the returned administrative funds, the funds are used to support the program. Such funds are not returned to State agencies in the form of administrative funds in addition to the legislatively mandated grant per assigned caseload slot.

§ 247.27 Financial management.

(a) *What are the Federal requirements for State and local agencies with regard to financial management?* State and local public agencies must maintain a financial management system that complies with the Federal regulations contained in part 3016 of this title, while nonprofit organizations must comply with the Federal regulations contained in part 3019 of this title. The State agency's financial management system must provide accurate, current, and complete disclosure of the financial status of the program, including an accounting of all program funds received and expended each fiscal year. The State agency must ensure that local agencies develop and implement a financial management system that allows them to meet Federal requirements.

(b) *What are some of the major components of the State agency's financial management system?* In addition to other requirements, the State agency's financial management system must provide for:

(1) Prompt and accurate payment of allowable costs.

(2) Timely disbursement of funds to local agencies.

(3) Timely and appropriate resolution of claims and audit findings.

(4) Maintenance of records identifying the receipt and use of administrative funds, funds recovered as a result of claims actions, program income (as defined under § 247.25(e)), and property and other assets procured with program funds.

§ 247.28 Storage and inventory of commodities.

(a) *What are the requirements for storage of commodities?* State and local agencies must provide for storage of commodities that protects them from theft, spoilage, damage or destruction, or other loss. State and local agencies may contract with commercial facilities to store and distribute commodities. The required standards for warehousing and distribution systems, and for contracts with storage facilities, are included under § 250.14 of this chapter.

(b) *What are the requirements for the inventory of commodities?* A physical inventory of all USDA commodities must be conducted annually at each storage and distribution site where these commodities are stored. Results of the physical inventory must be reconciled with inventory records and maintained on file by the State or local agency.

§ 247.29 Reports and recordkeeping.

(a) *What recordkeeping requirements must State and local agencies meet?* State and local agencies must maintain accurate and complete records relating to the receipt, disposal, and inventory of commodities, the receipt and disbursement of administrative funds and other funds, eligibility determinations, fair hearings, and other program activities. State and local agencies must also maintain records pertaining to liability for any improper distribution, use of, loss of, or damage to commodities, and the results obtained from the pursuit of claims arising in favor of the State or local agency. All records must be retained for a period of three years from the end of the fiscal year to which they pertain, or, if they are related to unresolved claims actions, audits, or investigations, until those activities have been resolved. All records must be available during normal business hours for use in management reviews, audits, investigations, or reports of the General Accounting Office, except medical case records of participants (unless they are the only source of certification data).

(b) *What reports must State and local agencies submit to FNS?* State agencies must submit the following reports to FNS:

(1) *SF–269A, Financial Status Report.* The State agency must submit the SF–269A, Financial Status Report, to report the financial status of the program at the close of the fiscal year. This report must be submitted within 90 days after the end of the fiscal year. Obligations must be reported for the fiscal year in which they occur. Revised reports may be submitted at a later date, but FNS will not be responsible for reimbursing unpaid obligations later than one year after the end of the fiscal year in which they were incurred.

(2) *FNS–153, Monthly Report of the Commodity Supplemental Food Program and Quarterly Administrative Financial Status Report.* The State agency must submit the FNS–153 on a monthly basis. FNS may permit the data contained in the report to be submitted less frequently, or in another format. The report must be submitted within 30 days after the end of the reporting period. On the FNS–153, the State agency reports: (i) The number of program participants in each population category (*e.g.*, infants, children, and elderly).

(ii) The receipt and distribution of commodities, and beginning and ending inventories, as well as other commodity data.

(iii) On a quarterly basis, the cumulative amount of administrative funds expended and obligated, and the amount remaining unobligated.

(3) *FNS–191, Racial/Ethnic Group Participation.* Local agencies must submit a report of racial/ethnic

participation each year, using the FNS–191.

(c) *Is there any other information that State and local agencies must provide to FNS?* FNS may require State and local agencies to provide data collected in the program to aid in the evaluation of the effect of program benefits on the low-income populations served. Any such requests for data will not include identification of particular individuals.

§ 247.30 Claims.

(a) *What happens if a State or local agency misuses program funds?* If FNS determines that a State or local agency has misused program funds through negligence, fraud, theft, embezzlement, or other causes, FNS must initiate and pursue a claim against the State agency to repay the amount of the misused funds. The State agency will be given the opportunity to contest the claim. The State agency is responsible for initiating and pursuing claims against subdistributing and local agencies if they misuse program funds.

(b) *What happens if a State or local agency misuses program commodities?* If a State or local agency misuses program commodities, FNS may initiate a claim against the State agency to recover the value of the misused commodities. The procedures for pursuing claims resulting from misuse of commodities are detailed in § 250.15(c) of this chapter. Misused commodities include commodities improperly distributed or lost, spoiled, stolen, or damaged as a result of improper storage, care, or handling. The State agency is responsible for initiating and pursuing claims against subdistributing agencies, local agencies, or other agencies or organizations if they misuse program commodities. The State agency must use funds recovered as a result of claims for commodity losses in accordance with § 250.15 of this chapter.

(c) *What happens if a participant improperly receives or uses CSFP benefits through fraud?* The State agency must ensure that a local agency initiates a claim against a participant to recover the value of CSFP commodities improperly received or used if the local agency determines that the participant, or the parent or caretaker of the participant, fraudulently received or used the commodities. For purposes of this program, fraud includes intentionally making false or misleading statements, or intentionally withholding information, to obtain CSFP commodities, or the selling or exchange of CSFP commodities for non-food items. The local agency must advise the participant of the opportunity to appeal the claim through the fair hearing process, in accordance with § 247.33(a). The local agency must also disqualify the participant from CSFP for a period of up to one year, unless the local agency determines that disqualification would result in a serious health risk, in accordance with the requirements of § 247.20(b).

(d) *What procedures must be used in pursuing claims against participants?* The State agency must establish standards, based on a cost-benefit review, for determining when the pursuit of a claim is cost-effective, and must ensure that local agencies use these standards in determining if a claim is to be pursued. In pursuing a claim against a participant, the local agency must:

(1) Issue a letter demanding repayment for the value of the commodities improperly received or used.

(2) If repayment is not made in a timely manner, take additional collection actions that are cost-effective, in accordance with the standards established by the State agency.

(3) Maintain all records regarding claims actions taken against participants, in accordance with § 247.29.

§ 247.31 Audits and investigations.

(a) *What is the purpose of an audit?* The purpose of an audit is to ensure that:

(1) Financial operations are properly conducted.

(2) Financial reports are fairly presented.

(3) Proper inventory controls are maintained.

(4) Applicable laws, regulations, and administrative requirements are followed.

(b) *When may the Department conduct an audit or investigation of the program?* The Department may conduct an audit of the program at the State or local agency level at its discretion, or may investigate an allegation that the State or local agency has not complied with Federal requirements. An investigation may include a review of any State or local agency policies or practices related to the specific area of concern.

(c) *What are the responsibilities of the State agency in responding to an audit by the Department?* In responding to an audit by the Department, the State agency must:

(1) Provide access to any records or documents compiled by the State or local agencies, or contractors.

(2) Submit a response or statement to FNS describing the actions planned or taken in response to audit findings or recommendations. The corrective action plan must include time frames for implementation and completion of actions. FNS will determine if actions or planned actions adequately respond to the program deficiencies identified in the audit. If additional actions are needed, FNS will schedule a follow-up review and allow sufficient time for further corrective actions. The State agency may also take exception to particular audit findings or recommendations.

(d) *When is a State or local agency audit required?* In accordance with part 3052 of this title, which contains the Department's regulations pertaining to audits of States, local governments, and nonprofit organizations, a State or local government agency, or a nonprofit organization, that expends $300,000 or more in Federal awards in a fiscal year must have a single, or a program-specific, audit conducted for that year. The value of CSFP commodities distributed by the agency or organization must be considered part of the Federal award. Federal regulations do not require agencies and organizations that expend less than this amount in Federal awards in a fiscal year to have an audit for that year.

(e) *What are the requirements for State or local agency audits?* State and local agency audits must be conducted in accordance with the requirements of part 3052 of this title. State and local agencies are responsible for follow-up and corrective actions in response to audit findings. The State agency must ensure that local agencies meet audit requirements. The State agency must ensure that all State or local agency audit reports are available for FNS review.

§ 247.32 Termination of agency participation.

(a) *When may a State agency's participation in CSFP be terminated?* While the following paragraphs describe the circumstances and basic procedures in termination of local agency programs, specific actions and procedures relating to program termination are more fully described in part 3016 of this title.

(1) *Termination by FNS.* FNS may terminate a State agency's participation in CSFP, in whole or in part, if the State agency does not comply with the requirements of this part. FNS must provide written notification to the State agency of termination, including the reasons for the action, and the effective date.

(2) *Termination by State agency.* The State agency may terminate the program, in whole or in part, upon

written notification to FNS, stating the reasons and effective date of the action. In accordance with § 247.4(b)(6), which relates to the termination of agreements, either party must provide 30 days' written notice.

(3) *Termination by mutual agreement.* The State agency's program may also be terminated, in whole or in part, if both parties agree the action would be in the best interest of the program. The two parties must agree upon the conditions of the termination, including the effective date.

(b) *When may a local agency's participation in CSFP be terminated?* While the following paragraphs describe the circumstances and basic procedures in termination of local agency programs, specific actions and procedures relating to program termination are more fully described in part 3016 of this title.

(1) *Termination by State agency.* The State agency may terminate a local agency's participation in CSFP, or may be required to terminate a local agency's participation, in whole or in part, if the local agency does not comply with the requirements of this part. The State agency must notify the local agency in writing of the termination, the reasons for the action, and the effective date, and must provide the local agency with an opportunity to appeal, in accordance with § 247.35.

(2) *Termination by local agency.* The local agency may terminate the program, in whole or in part, upon written notification to the State agency, stating the reasons and effective date of the action. In accordance with § 247.4(b)(6), which relates to the termination of agreements, either party must provide 30 days' written notice.

(3) *Termination by mutual agreement.* The local agency's program may also be terminated, in whole or in part, if both the State and local agency agree that the action would be in the best interest of the program. The two parties must agree upon the conditions of the termination, including the effective date.

§ 247.33 Fair hearings.

(a) *What is a fair hearing?* A fair hearing is a process that allows a CSFP applicant or participant to appeal an adverse action, which may include the denial or discontinuance of program benefits, disqualification from the program, or a claim to repay the value of commodities received as a result of fraud. State and local agencies must ensure that CSFP applicants and participants understand their right to appeal an adverse action through the fair hearing process, which includes providing written notification of the individual's right to a fair hearing along with notification of the adverse action. Such notification is not required at the expiration of a certification period.

(b) *What are the basic requirements the State agency must follow in establishing procedures to be used in fair hearings?* The State agency must establish simple, clear, uniform rules of procedure to be used in fair hearings, including, at a minimum, the procedures outlined in this section. The State agency may use alternate procedures if approved by FNS. The rules of procedure must be available for public inspection and copying.

(c) *How may an individual request a fair hearing?* An individual, or an individual's parent or guardian, may request a fair hearing by making a clear expression, verbal or written, to a State or local agency official, that an appeal of the adverse action is desired.

(d) *How much time does an individual have to request a fair hearing?* The State or local agency must allow an individual at least 60 days from the date the agency mails or gives the individual the notification of adverse action to request a fair hearing.

(e) *When may a State or local agency deny a request for a fair hearing?* The State or local agency may deny a request for a fair hearing when:

(1) The request is not received within the time limit established in paragraph (d) of this section.

(2) The request is withdrawn in writing by the individual requesting the hearing or by an authorized representative of the individual.

(3) The individual fails to appear, without good cause, for the scheduled hearing.

(f) *Does the request for a fair hearing have any effect on the receipt of CSFP benefits?* Participants who appeal the discontinuance of program benefits within the 15-day advance notification period required under §§ 247.17 and 247.20 must be permitted to continue to receive benefits until a decision on the appeal is made by the hearing official, or until the end of the participant's certification period, whichever occurs first. However, if the hearing decision finds that a participant received program benefits fraudulently, the local agency must include the value of benefits received during the time that the hearing was pending, as well as for any previous period, in its initiation and pursuit of a claim against the participant.

(g) *What notification must the State or local agency provide an individual in scheduling the hearing?* The State or local agency must provide an individual with at least 10 days' advance written notice of the time and place of the hearing, and must include the rules of procedure for the hearing.

(h) *What are the individual's rights in the actual conduct of the hearing?* The individual must have the opportunity to:

(1) Examine documents supporting the State or local agency's decision before and during the hearing.

(2) Be assisted or represented by an attorney or other persons.

(3) Bring witnesses.

(4) Present arguments.

(5) Question or refute testimony or evidence, including an opportunity to confront and cross-examine others at the hearing.

(6) Submit evidence to help establish facts and circumstances.

(i) *Who is responsible for conducting the fair hearing, and what are the specific responsibilities of that person?* The fair hearing must be conducted by an impartial official who does not have any personal stake or involvement in the decision and who was not directly involved in the initial adverse action that resulted in the hearing. The hearing official is responsible for:

(1) Administering oaths or affirmations, as required by the State.

(2) Ensuring that all relevant issues are considered.

(3) Ensuring that all evidence necessary for a decision to be made is presented at the hearing, and included in the record of the hearing.

(4) Ensuring that the hearing is conducted in an orderly manner, in accordance with due process.

(5) Making a hearing decision.

(j) *How is a hearing decision made?* The hearing official must make a decision that complies with Federal laws and regulations, and is based on the facts in the hearing record. In making the decision, the hearing official must summarize the facts of the case, specify the reasons for the decision, and identify the evidence supporting the decision and the laws or regulations that the decision upholds. The decision made by the hearing official is binding on the State or local agency.

(k) *What is the time limit for making a hearing decision and notifying the individual of the decision?* A hearing decision must be made, and the individual notified of the decision, in writing, within 45 days of the request for the hearing. The notification must include the reasons for the decision.

(l) *How does the hearing decision affect the individual's receipt of CSFP benefits?* If a hearing decision is in favor of an applicant who was denied CSFP benefits, the receipt of benefits must begin within 45 days from the date that the hearing was requested, if the

applicant is still eligible for the program. If the hearing decision is against a participant, the State or local agency must discontinue benefits as soon as possible, or at a date determined by the hearing official.

(m) *What must be included in the hearing record?* In addition to the hearing decision, the hearing record must include a transcript or recording of testimony, or an official report of all that transpired at the hearing, along with all exhibits, papers, and requests made. The record must be maintained in accordance with § 247.29(a). The record of the hearing must be available for public inspection and copying, in accordance with the confidentiality requirements under § 247.36(b).

(n) *What further steps may an individual take if a hearing decision is not in his or her favor?* If a hearing decision upholds the State or local agency's action, the State or local agency must describe to the individual any State-level review or rehearing process, and the right of the individual to pursue judicial review of the decision.

§ 247.34 Management reviews.

(a) *What must the State agency do to ensure that local agencies meet program requirements and objectives?* The State agency must establish a management review system to ensure that local agencies, subdistributing agencies, and other agencies conducting program activities meet program requirements and objectives. As part of the system, the State agency must perform an on-site review of all local agencies, and of all storage facilities utilized by local agencies, at least once every two years. As part of the on-site review, the State agency must evaluate all aspects of program administration, including certification procedures, nutrition education, civil rights compliance, food storage practices, inventory controls, and financial management systems. In addition to conducting on-site reviews, the State agency must evaluate program administration on an ongoing basis by reviewing financial reports, audit reports, food orders, inventory reports, and other relevant information.

(b) *What must the State agency do if it finds that a local agency is deficient in a particular area of program administration?* The State agency must record all deficiencies identified during the review and institute follow-up procedures to ensure that local agencies and subdistributing agencies correct all deficiencies within a reasonable period of time. To ensure improved program performance in the future, the State agency may require that local agencies adopt specific review procedures for use in reviewing their own operations and those of subsidiaries or contractors. The State agency must provide copies of review reports to FNS upon request.

§ 247.35 Local agency appeals of State agency actions.

(a) *What recourse must the State agency provide local agencies to appeal a decision that adversely affects their participation in CSFP?* The State agency must establish a hearing procedure to allow local agencies to appeal a decision that adversely affects their participation in CSFP—*e.g.*, the denial or termination of a local agency's participation in the program. The adverse action must be postponed until a decision on the appeal is made.

(b) *What must the State agency include in the hearing procedure to ensure that the local agency has a fair chance to present its case?* The hearing procedure must provide the local

(1) Adequate advance notice of the time and place of the hearing.

(2) An opportunity to review the record before the hearing, and to present evidence at the hearing.

(3) An opportunity to confront and cross-examine witnesses.

(4) An opportunity to be represented by counsel, if desired.

(c) *Who conducts the hearing and how is a decision on the appeal made?* The hearing must be conducted by an impartial person who must make a decision on the appeal that is based solely on the evidence presented at the hearing, and on program legislation and regulations. A decision must be made within 60 days from the date of the request for a hearing, and must be provided in writing to the local agency.

§ 247.36 Confidentiality of applicants or participants.

(a) *Can the State or local agency disclose information obtained from applicants or participants to other agencies or individuals?* State and local agencies must restrict the use or disclosure of information obtained from CSFP applicants or participants to persons directly connected with the administration or enforcement of the program, including persons investigating or prosecuting program violations. The State or local agency may exchange participant information with other health or welfare programs for the purpose of preventing dual participation. In addition, with the consent of the participant, as indicated on the application form, the State or local agency may share information obtained with other health or welfare programs for use in determining eligibility for those programs, or for program outreach. However, the State agency must sign an agreement with the administering agencies for these programs to ensure that the information will be used only for the specified purposes, and that agencies receiving such information will not further share it.

(b) *Can the State or local agency disclose the identity of persons making a complaint or allegation against another individual participating in or administering the program?* The State or local agency must protect the confidentiality, and other rights, of any person making allegations or complaints against another individual participating in, or administering CSFP, except as necessary to conduct an investigation, hearing, or judicial proceeding.

§ 247.37 Civil rights requirements.

(a) *What are the civil rights requirements that apply to CSFP?* State and local agencies must comply with the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq.*), the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), and Titles II and III of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*). State and local agencies must also comply with the Department's regulations on nondiscrimination (Parts 15, 15a, and 15b of this title), and with the provisions of FNS Instruction 113–2, including the collection of racial/ethnic participation data and public notification of nondiscrimination policy. State and local agencies must ensure that no person shall, on the grounds of race, color, national origin, age, sex, or disability, be subjected to discrimination under the program.

(b) *How does an applicant or participant file a complaint of discrimination?* CSFP applicants or participants who believe they have been discriminated against should file a discrimination complaint with the USDA Director, Office of Civil Rights, Room 326W, Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250–9410 or telephone (202) 720–5964.

Dated: September 25, 2003.

Eric M. Bost,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. 03–27305 Filed 10–30–03; 8:45 am]

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Part III

Department of Energy

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

Energy Conservation Program for Consumer Products: Test Procedure for Clothes Washers; Direct Final Rule and Proposed Rule

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

[Docket No. EE–RM/TP–03–100]

RIN 1904–AB43

Energy Conservation Program for Consumer Products: Test Procedure for Clothes Washers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Direct final rule.

SUMMARY: The Department of Energy (Department or DOE) today promulgates an amendment to the test procedure for measuring the energy consumption of clothes washers. The amendment changes one of the spin cycles required for testing the cloth used in the extraction phase of the test procedure by replacing the lowest spin cycle of 50 gravitation (g) force with a spin cycle of 100g. The 50g spin cycle produced inconsistent and unreliable test results. This amendment also adds as a testing requirement the use of an additional statistical analysis to qualify the interactive effect between different lots of the test cloth and spin speeds to improve consistency with the baseline data.

DATES: This direct final rule is effective on January 1, 2004, the same day that new energy efficiency standards for clothes washers become effective, unless significant adverse comments are received by December 1, 2003. If significant adverse comments are received, a timely withdrawal of this rule will be published in the **Federal Register**.

ADDRESSES: The Department will accept comments, data, and information regarding this direct final rule no later than the date provided in the **DATES** section. Please submit comments, data and information electronically to the following Internet address: *clotheswashertestclothtp@ee.doe.gov*. Electronic comments must be submitted in WordPerfect, Microsoft Word, PDF, or text (ASCII) format file and avoid the use of special characters or any form of encryption. Comments in electronic format should be identified by the docket number EE–RM/TP–03–100, and wherever possible carry the electronic signature of the author. Absent an electronic signature, comments submitted electronically must be followed and authenticated by submitting the signed original paper document. No telefacsimiles (telefaxes) will be accepted.

Written (paper) comments may be submitted to: Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Test Procedures for Clothes Washers, Docket Number: EE–RM/TP–03–100, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed copy—no telefacsimiles.

You may read copies of the public comments received in the resource room of the appliance office of the Building Technologies Program, room 1J–018 of the Forrestal Building at the U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards-Jones at the above telephone number for additional information regarding visiting the resource room. **Please note:** The Department's Freedom of Information Reading Room (room 1E–190 in the Forrestal Building) is no longer servicing rulemakings.

FOR FURTHER INFORMATION CONTACT: Barbara Twigg or Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9611, e-mail: *Barbara.Twigg@ee.doe.gov*, or *Bryan.Berringer@ee.doe.gov,* respectively; or Francine Pinto, Esq., or Thomas DePriest, Esq., U.S. Department of Energy, Office of General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9507, e-mail: *Francine.Pinto@hq.doe.gov,* or *Thomas.DePriest@hq.doe.gov,* respectively.

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I. Introduction

A. Authority

Title III of the Energy Policy and Conservation Act (EPCA) established the Energy Conservation Program for Consumer Products Other Than Automobiles (Program). (42 U.S.C. 6291 *et seq*.) The products currently subject to this Program (''covered products'') include residential clothes washers, the subject of today's direct final rule. (42 U.S.C. 6292(a)(7))

Under the Act, the Program consists of three parts: Testing, labeling, and the Federal energy conservation standards. The Department, in consultation with the National Institute of Standards and Technology (NIST), may amend or prescribe test procedures as appropriate for each of the covered products. (42 U.S.C. 6293) The purpose of the test procedures is to measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. The test procedures must not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

If DOE amends a test procedure, EPCA requires DOE to determine whether the new test procedure would change the measured energy efficiency or measured energy use of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that a change would result, DOE must amend the applicable energy conservation standard during the rulemaking that establishes the new test procedure. (42 U.S.C. 6293(e)(2)) In setting any new energy conservation standard, DOE must measure, with the new test procedure, the energy efficiency or energy use of a representative sample of covered products that minimally comply with the existing standard. The average energy efficiency or energy use of these representative samples under

the new test procedure shall constitute the amended energy conservation standard for the applicable covered products. (42 U.S.C. 6293(e)(2))

Effective 180 days after DOE prescribes or establishes an amended or new test procedure for a covered product, no manufacturer, distributor, retailer, or private labeler may make any representation with respect to the energy use, efficiency, or cost of energy consumed by the product, unless the product has been tested in accordance with such amended or new DOE test procedure and the representation fairly discloses the results of that testing. (42 U.S.C. 6293(c)(2)) This restriction on representations will take effect 180 days after the January 1, 2004, effective date of this amended test procedure. A manufacturer, distributor, retailer, or private labeler may begin using the new test procedure to make representations with respect to the energy use, efficiency, or cost of energy consumed by the product beginning with the January 1, 2004, effective date of this rule.

B. Background

The U.S. government established the first federal test procedures for clothes washers in 1977. In the 1990's, concurrent with the development of new energy conservation standards for clothes washers, the Department of Energy began revising the clothes washer test procedure. The existing test procedure did not cover a number of innovative clothes washer technologies such as high spin speed and adaptive water fill control, and DOE published several proposals to address those innovations including one on December 22, 1993, (58 FR 67710) and another on March 23, 1995 (60 FR 15330). In its comments on the March 23, 1995, proposed rule, the Association of Home Appliance Manufacturers (AHAM) requested that DOE adopt an additional new test procedure that would capture current consumer habits that showed a reduction in the use of hot water and energy. AHAM proposed that DOE incorporate this test as part of the process of revising the clothes washer energy conservation standards, and that the test go into effect concurrently with the issuance of new standards.

On April 22, 1996, the Department issued a supplemental Notice of Proposed Rulemaking proposing such a new test procedure, appendix J1, as well as certain additional revisions to the currently applicable test procedure in appendix J to subpart B of 10 CFR part 430. (61 FR 17589). The supplemental notice requested comments on whether DOE should adopt the AHAM-recommended test procedure with certain changes. The test procedure final rule published on August 27, 1997, adopted the AHAM recommendation. 62 FR 45484. Appendix J, the current test procedure, will expire on December 31, 2003. 66 FR 3313, 3330 (January 12, 2001).Appendix J1 is now informational but will become mandatory and replace appendix J when the energy conservation standards adopted on January 12, 2001, take effect on January 1, 2004.

A key difference between the appendix J and the appendix J1 test procedures is the basic energy efficiency descriptor. Appendix J specifies an energy efficiency descriptor called the energy factor (EF). The appendix J1 test procedure replaces the EF with an energy efficiency descriptor called the modified energy factor (MEF). In contrast with the previous EF descriptor which only calculated the energy use of the clothes washer itself, the MEF descriptor accounts for the remaining moisture content (RMC) of clothes leaving the clothes washer. In order to calculate the RMC, appendix J1 requires manufacturers to use a particular lot of standardized test cloth to simulate a washer load of clothes. Other substantive differences between the test procedures include using different water temperatures for testing and using test cloth loads for all classes of clothes washers in appendix J1, but not in appendix J.

As the Department proceeded with the standards rulemaking for clothes washers, DOE conducted tests on a number of clothes washers using the appendix J1 test procedure and shared the results with the manufacturers of the tested units. The manufacturers then indicated that some of the values for the RMC were higher than they would have expected from earlier test data. The Department investigated possible causes for the new test results being inconsistent with the values produced using the original lot of test cloth and summarized its findings in the DOE report, Development of a Standardized Energy Test Cloth for Measuring Remaining Moisture Content in a Residential Clothes Washer, May 2000. (Docket No. EE–RM–94–403, DOE, No. 200) To understand the effects of operating variables and cloth specifications, DOE decided to conduct additional laboratory tests to determine the RMC. To insure that the use of a specific manufacturer's product (clothes washer) would not influence or bias the test results in any way, the Department developed a test using an extractor to remove moisture content, instead of using a clothes washer. An extractor is a centrifuge—basically a rotating basket that has a controllable speed to produce a variety of centrifugal forces. The centrifuge test used a variety of speeds to impose different centripetal accelerations on the test load. These accelerations are reported in terms of gravitation forces (g forces). DOE also soaked the cloth in a tub at a controlled temperature to approximate the agitated soak cycle provided by a typical washer. Thus, the additional laboratory tests DOE conducted closely resembled those specified in the clothes washer test procedure.

The extractor-based test examined RMC values at different g forces so that new batches of test cloth could be compared to the RMC values of a standard reference test cloth. This comparison provided the basis for developing a correction methodology whereby the test results using any new lot of cloth could be ''corrected'' back to the test values of the base reference lot of cloth. The Department derived the correction factor from measuring the deviation between a new production batch of test cloth and a standard reference test cloth. This deviation is measured as the root mean square (RMS) between the set of measured RMC values and the set of standard RMC values. If this absolute deviation is below 2 percent, then correction factors are unnecessary in MEF tests using that batch of cloth. If the absolute RMS difference between the cloth RMC values and standard RMC values is above 2 percent, then correction factors are necessary when using the cloth to test the MEF of a clothes washer. (10 CFR part 430, subpart B, appendix J1, section 2.6.5)

The correction factors currently are derived by fitting the data points into a straight line (a linear least squares fit) based on the set of RMC values for the new production lot compared to the baseline RMC values for data taken at 50, 200, and 350 spin g's, with warm (100 °F) and cold (60 °F) rinse water, and with spin times of 4 minutes and 15 minutes. The fit criteria for an acceptable new lot of test cloth is an RMS error term <2%. (10 CFR part 430, subpart B, appendix J1, section 2.6.6)

Using data from clothes washer manufacturers, the Department selected the range of test conditions (50–350 g's, warm and cold, 4 and 15 minutes) to bracket the actual conditions under which manufactured residential clothes washers operate and will be tested according to the appendix J1 test procedure. The 50–350 g range bounds the lower and upper levels of spin speeds in a typical clothes washer. The use of both warm and cold water

temperatures serves to identify any changes in test results of the test cloth due to water temperature variation. The use of 4 and 15 minute spin times bounds the various spin cycle times in a typical clothes washer. Thus, by requiring the averaging of this combination of test cycles, the test procedure created a representative profile of the spin and extraction behavior of the test cloth. (10 CFR part 430, subpart B, appendix J1, sections 2.6.5.3.6 and 2.6.6.1)

When the Department published the energy conservation standards final rule for clothes washers on January 12, 2001, the rule included revisions to the 1997 test procedure based on DOE's May 2000 report dealing with the energy test cloth, RMC, extractor testing, and the correction factors. The Department believed that the system of using the correction factors would enable those conducting future tests to use new lots of test cloth in a manner consistent with the base test cloth, and produce reliable RMC values. In addition, the Department incorporated in their entirety AHAM's comments and the Joint Stakeholders Comment requesting minor editorial changes to help clarify both appendices J and J1. (Docket No. EE–RM–94–403, AHAM, Nos. 197 and 199, and Joint Comment, No. 204)

Although the revised appendix J1 was published as part of the 2001 final rule for clothes washers, appendix J1 was available for informational use only until the new clothes washer standards would take effect on January 1, 2004. Initial experimental tests using the new procedure to certify lots of test cloth using the correction factors worked well until several new lots again appeared to have unusually high RMC at the 50g test level. Correction factors notwithstanding, several manufacturers noticed that the corrected RMC values for these newer lots of test cloth were still significantly different from the RMC values determined from earlier lots of test cloth that had been tested in the same clothes washer. When the Department learned that these later lots of test cloth were producing 10 percent higher RMC values than the test cloth reference base, DOE conducted tests to explore the new inconsistency issue which the correction factor system in appendix J1 did not seem to have fixed. Test results confirmed that the RMC value at 50g shifted the correction curve so that the corrected RMC values at 100g, the typical spin g level of many vertical axis washers, were inconsistent with corrected RMC results using earlier lots of test cloth. Retests of both early and later lots of test cloth confirmed a basic lack of repeatability of 50g spin tests.

Ongoing RMC tests in the extractor, however, indicated that spin g levels of 100g's or more continued to produce repeatable results with good lot-to-lot consistency of the RMC compared to the g-curve shape. Only the 50g spin tests were producing the inconsistency and repeatability problems.

The Department had originally selected the 50g spin level as the lower end with which to bracket the spin speeds of clothes washers for computing the average RMC value. The other spin levels were 200g, 350g, and 500g, if a washer could achieve that high a spin speed. In discussions with clothes washer manufacturers regarding the repeatability problems with the 50g spin level, the Department learned that clothes washers use 50g spins only in delicate cycles and as an optional slow spin that is available in a limited number of models. Because it was not a commonly used spin cycle, DOE, AHAM and the clothes washer manufacturers agreed that it would be better to use the more dependable 100g spin speed as the lower end of the range of spin speeds. A linear least squares fit test cloth correction procedure based on 100g and greater RMC test data will result in more reliable correction factors for the vast majority of clothes washer models in production.

In a letter to DOE dated April 2, 2003, AHAM requested that the Department implement this change in the test procedure. (AHAM No. 1 at 1) Because the 50g anomalies discussed above were unexpected, AHAM also recommended in the letter that a statistical procedure be adopted to recognize any other unexpected anomaly that might occur in future lots of energy test cloths. This statistical test will identify deviations in RMC as compared with g-curve shape beyond the magnitude where the linear least squares fit correction factor is appropriate. In statistical terms, these anomalies are referred to as a ''lot-to-lot interactive effect''—a lot-to-lot difference in characteristics that produces a different relationship of RMC to g, spin time, and/or final rinse temperature.

A ''lot-to-lot interactive effect'' statistical test that could be used to screen out lots whose RMC as compared with g-behavior is inconsistent with the baseline lot is a standard statistical procedure called ''analysis of variance'' or ''ANOVA.'' As applied to new lots of energy test cloth, the ANOVA statistical test will detect the extent of the deviation of the shape of the RMC compared to the g-curve of a given lot from the shape of the RMC compared to the g-curve of the baseline lot. It would have detected the peculiarity of the RMC values at 50g in the later lots running very high relative to the RMC values at 100, 200, or 350g, compared to the baseline lot. Tests of new lots of cloth using the100g (instead of 50g), 200g, and 350g extractor test points have thus far all satisfied the ANOVA test criteria for an acceptable lot. The Department expects that the ANOVA test will detect any unanticipated RMC compared to g-curve shape deviation in future lots.

II. Discussion

In this direct final rule, the Department is correcting the typographical error in Table 2.6.5 of appendix J1 (10 CFR part 430, subpart B, appendix J1, section 2.6.5), modifying the procedure for developing the correction factors for new production lots of energy test cloth used in the test procedure for clothes washers, and introducing a second statistical test to validate new lots of energy test cloth.

A. Correction of the Typographical Error in Table 2.6.5 of Appendix J1

In this direct final rule, the Department is correcting the typographical error in Table 2.6.5 of appendix J1, by changing 14 minutes to 4 minutes. (66 FR at 3331–33; 10 CFR part 430, subpart B, appendix J1, section 2.6.5) Section 2.6.5.3.6 of appendix J1 specifies spin times of 4 and 15 minutes (66 FR at 3332) and the May 2000 report documents that these are the intended spin times selected to bracket the range of spin times commonly used in production clothes washers. All extractor testing to derive correction factors has been carried out with 15 minute and 4 minute spin times at both cold and warm soak temperatures.

B. Determination of Correction Factors for New Lots of Energy Test Cloth

In this direct final rule, the Department is modifying the procedure for developing the correction factors for new production lots of energy test cloth by replacing the extractor test points at 50g with 100g test points. The linear least squares fit to the baseline set of RMC's is otherwise unchanged. The Department has confirmed through tests of new lots of test cloth in the extractor and analysis of previous data that RMC, g forces, spin time, and temperature at spin g levels at 100g's or more, continue to produce repeatable results with good lot-to-lot consistency of the RMC compared to g-curve shape. The 50g test point, which DOE had selected to provide an all-inclusive range of spin g levels, can be deleted with minimal

effect because spin g levels below 100g are used only in delicate cycles (not tested in the appendix J1 test procedure) and as an optional slow spin that is available in a limited number of models. The Department agrees that a linear least squares fit test cloth correction procedure based on 100g and greater RMC test data would result in a more reliable correction curve for the vast majority of clothes washer models in production. Using 100, 200, 350, and 500g as test points would still bracket the range of spin speeds in most clothes washers and provide a comprehensive and representative test for establishing the correction curves for new batches of test cloth. In light of these circumstances and the problems with use of the 50g test points, discussed above, the Department believes it is appropriate to modify the clothes washer test procedure in appendix J1 by replacing these test points with 100g test points.

C. Statistical Test To Validate New Lots of Energy Test Cloth

In this direct final rule, the Department is adopting a standard statistical procedure called ''analysis of variance'' or ''ANOVA'' as the lot-to-lot interactive-effect statistical test for screening out lots of test cloth whose RMC compared to g behavior is inconsistent with the baseline lot. The ANOVA statistical test detects the extent of the deviation of the shape of the RMC compared to the g-curve of a given lot of the test cloth from the shape of the RMC compared to the g-curve of the baseline lot. It would have detected the peculiarity of the 50g RMC values in the later lots running very high relative to the 100g, 200g, or 350g RMC values, compared to the baseline lot. With the 100g (instead of 50g), 200g, and 350g extractor test points, all of the lots that DOE has tested so far satisfy the ANOVA test criteria for an acceptable lot. The Department believes that the test will catch any unanticipated RMC compared to g-curve shape deviation in future lots.

The ANOVA test adds a second method for determining the ''acceptability'' of a new lot of test cloth that a manufacturer will use in conjunction with the criterion currently prescribed in appendix J1 for making this determination. That criterion is that the RMS error term (of the least squares fit used to determine the correction factors for a new lot of test cloth) must be <2%. The RMS error term measures the ''goodness of fit'' of the derived linear relationship between the baseline set of RMC values and corresponding RMC values for the new lot obtained at each test condition. That is, it is intended to characterize the ''closeness'' or ''lack of scatter'' of the 12 data points to the ''best-fit'' (least squares) line that is subsequently used to calibrate (''correct'') the new-lot RMC value to the RMC value of the baseline lot.

Although the later lots discussed above met the criterion of an RMS of <2%, other difficulties subsequently emerged when using these lots for actual machine testing. Most notably, RMC measurements behaved erratically at the low (50g) spin speed conditions. Although linearly related to corresponding baseline RMC measurements, the RMC measurements of later lots (over an observed range of 30% to 70%) were inconsistent with baseline values in a more subtle way. Additional testing of the later lots (and other test lots as well) strongly supports the assertion that RMC values—recently obtained when conducting extractor tests at 50g spin speed conditions with any lot—are inconsistent with RMC results that were obtained at 50g of the original baseline lot.

Whatever the reason(s), recent extractor tests have yielded higher RMC measurements at all test conditions than those previously obtained for the baseline. If the measurements for a new lot of test cloth are consistently higher over the entire range of test conditions, the correction curve (as originally configured) and the test criterion (RMS <2%) would be sufficient to establish the acceptance—or rejection—of a new test lot. However, with the benefit of hindsight, the Department now knows that the difference between recent extractor tests and the baseline is not the same at all test conditions; in fact, the difference is most pronounced in the four time/temperature tests conducted at the 50g spin speed. In statistical terms, this inherent inconsistency is referred to as an ''interactive effect'' between test lots and spin speeds. The ANOVA is a commonly used statistical procedure for detecting interactive effects, if and when they exist. As applied to new lots of energy test cloths, this statistical test will detect the extent of the deviation of the RMC compared to the g-curve shape of a given lot from the RMC compared to the g-curve shape of the baseline lot. This could be either a gross difference in the overall slope or the peculiarity that has been observed in the later lots of the RMC values at 50g running very high relative to the RMC values at 100g, 200g, or 350g, compared to the baseline lot. The ''P-value'' (a theoretically-based probability) that ANOVA produces is interpreted as evidence of a real, repeatable interactive effect between lots and spin speeds. The lower the P-value, the stronger the evidence of an interaction. A value less than 0.10 is sufficient to conclude that there is a problematic interaction, and the lot of test cloth being tested should not be used to measure RMC.

The Department evaluated an analysis of all cloth lot samples tested thus far. Analytical results and conclusions support the use of 100g test data rather than 50g data. It is interesting to note that there is no evidence of an interactive effect for earlier lots of test cloth, justifying the use of the correction curves based on the 50g to 350g range for those lots. Starting with later lots, interactive effects attributable to 50g test data are clearly evident. However, over the 100g-to-350g range, there is no evidence of an interactive effect with any of these lots. The Department believes that the P-value from the ANOVA test is an appropriate test for acceptance of new lots of test cloth.

D. Effect of Changes on Measured Efficiencies

In any rulemaking to amend a test procedure, section 323(e) of EPCA requires the Department to determine whether the amended test procedure would alter the measured energy efficiency of any covered product. (42 U.S.C. 6293(e)) If the amendment does alter measured efficiency, the Secretary must amend the applicable energy conservation standard so that products that minimally comply with the standard prior to the test procedure amendment will continue to comply. (42 U.S.C. 6293(e)(2)) These provisions prevent changes in a test procedure that would cause a product that complied with applicable Federal energy conservation standards using the previous test procedure from being forced into non-compliance as a result of using the new test procedure.

Today's rule amends the test procedure for clothes washers, appendix J1, which is designed to measure performance under new energy conservation standards that will take effect on January 1, 2004. Appendix J1 is not mandatory until then. Today's rule will produce insignificant changes in the measured efficiency of a limited number of models of clothes washers. These changes are important, however, because they will assure that measured efficiencies conform more closely to the results that would occur if a reference test cloth were used in every test. Use of the reference test cloth produces results that most accurately measure a clothes washer's performance under the energy conservation standards that will go into effect on January 1, 2004.

The Department has no information to indicate that there are clothes washers that ''minimally comply'' with existing energy conservation standards using the existing test procedure, and that would fall out of compliance with the standard once the newly modified test procedure is used. Therefore, DOE is not required by EPCA section 323(e)(2) to make any changes to energy conservation standards. The Department has therefore determined that although today's amended test procedure will alter the measured efficiency or measured energy use of some clothes washer models, it is not necessary to test models with the new test procedure to consider or make any modifications to energy conservation standards.

The Department also notes that even if today's amendments do change the energy efficiency rating of any model and would cause it not to comply with the current energy conservation standards, the standard for that model is becoming more stringent on January 1, 2004, in any event. As a result, the new energy conservation standards, which already have been finalized through notice and comment rulemaking, will supersede the current standards and render irrelevant the model's ability or inability to comply with the current standard. Thus, a change resulting from today's amendments to the test procedure would simply mean that the product in question does not meet the new efficiency standard that will become effective on January 1. The Department has no information to indicate that there are clothes washers that will fail to comply with the new standards solely as a result of today's amendments to the test procedure.

III. Discussion of Direct Final Rulemaking

The Department is publishing this direct final rule without having published a Notice of Proposed Rulemaking because DOE views this amendment as noncontroversial and anticipates no significant adverse comments. However, in the event that the Department receives significant adverse comments, DOE has prepared a Notice of Proposed Rulemaking (NOPR) proposing the same amendment. The Department is publishing this NOPR as a separate document in this issue of today's **Federal Register**. The direct final rule will be effective January 1, 2004, unless DOE receives significant adverse comments by December 1, 2003. If DOE receives significant adverse comments, it will withdraw the revisions before their effective date. In case of the withdrawal of this direct final rule, DOE will announce the withdrawal in the **Federal Register**. DOE will then address all public comments in a separate final rule based on the proposed rule that DOE is publishing today. DOE will not implement a second comment period on this action. Any parties interested in commenting on this rule should do so at this time.

IV. Procedural Requirements

A. Review Under the National Environmental Policy Act of 1969

In this rule, the Department promulgates a minor change to the test procedure for measuring the energy consumption of clothes washers. The Department has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (NEPA). (42 U.S.C. 4321 *et seq.*) The rule is covered by Categorical Exclusion A5, for rulemakings that interpret or amend an existing rule without changing the environmental effect, as set forth in the Department's NEPA regulations in appendix A to subpart D, 10 CFR part 1021. This rule will not affect the quality or distribution of energy usage and, therefore, will not result in any environmental impacts. Accordingly, neither an environmental impact statement nor an environmental assessment is required.

B. Review Under Executive Order 12866, ''Regulatory Planning and Review''

Today's rule is not a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review.'' (58 FR 51735, October 4, 1993) Accordingly, today's action is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative impacts. 5 U.S.C. 605. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.*

Today's rule prescribes minor amendments to the test procedures that will be used to test compliance with energy conservation standards and labeling. Because the rule affects only test procedures and not the minimum energy efficiency standard levels for clothes washer models, the Department believes that it will not have a significant economic impact. Instead, it will provide common testing methods for all clothes washer manufacturers or private labelers, and will improve the accuracy of information provided to consumers. Because this rule makes only minor revisions to the new test procedure scheduled to go into effect with the new clothes washer standard on January 1, 2004, it is not expected that this rule will have a significant (if any) economic impact on manufacturers performing the test procedure.

The overall size of the clothes washer manufacturing industry also negates the necessity for a regulatory flexibility analysis. The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs fewer than a threshold number of workers specified in 13 CFR part 121 according to the North American Industry Classification System (NAICS) codes. The threshold number for NAICS classification 335224 for household laundry equipment manufacturers, which includes clothes washers, is 1000 employees. Of the five firms in the clothes washer industry that account for nearly 99 percent of clothes washer sales, the Department has determined that none would be considered ''small'' by the above definition. Using this SBA size standard, the Department is aware of only one small entity among clothes washer manufacturers or private labelers. Because the clothes washer models of that manufacturer already exceed the new standard which takes effect on January 1, 2004, it is not expected that the test procedure revision in this rule will have any adverse impact. Therefore, DOE certifies that today's rule will not have a ''significant economic impact on a substantial number of small entities,'' and the preparation of a regulatory flexibility analysis is not warranted.

D. Review Under Executive Order 12630

DOE has determined pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' (53 FR 8859, March 18, 1988) that this regulation would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

E. Review Under Executive Order 13132, ''Federalism''

Executive Order 13132, ''Federalism,'' (64 FR 43255, August 4, 1999) requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are substantial direct effects, then this Executive Order requires preparation of a Federalism assessment to be used in all decisions involved in promulgating and implementing a policy action.

The rule published today would not regulate or otherwise affect the States. Accordingly, DOE has determined that preparation of a Federalism assessment is unnecessary.

F. Review Under the Paperwork Reduction Act

No new information or record keeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

G. Review Under Executive Order 12988, ''Civil Justice Reform''

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' (61 FR 4729, February 7, 1996) imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by sections 3(a) and 3(b) of Executive Order 12988, it specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE reviewed today's rule under the standards of section 3 of the Executive Order and determined that, to the extent permitted by law, the proposed regulations meet the relevant standards.

H. Review Under the Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act'') requires that the Department prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. The budgetary impact statement must include: (i) Identification of the Federal law under which the rule is promulgated; (ii) a qualitative and quantitative assessment of anticipated costs and benefits of the Federal mandate and an analysis of the extent to which such costs to state, local, and tribal governments may be paid with Federal financial assistance; (iii) if feasible, estimates of the future compliance costs and of any disproportionate budgetary effects the mandate has on particular regions, communities, non-Federal units of government, or sectors of the economy; (iv) if feasible, estimates of the effect on the national economy; and (v) a description of the Department's prior consultation with elected representatives of state, local, and tribal governments and a summary and evaluation of the comments and concerns presented.

The Department has determined that the action today does not include a Federal mandate that may result in estimated costs of $100 million or more to State, local or to tribal governments in the aggregate or to the private sector. Therefore, the requirements of Sections 203 and 204 of the Unfunded Mandates Act do not apply to this action.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. No. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' (66 FR 28355, May 22, 2001, requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's rule will not have a significant adverse effect on the supply, distribution, or the use of energy, and, therefore, is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has

reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under the Small Business Regulatory Enforcement Fairness Act

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

M. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's direct final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Energy conservation, Household appliances.

Issued in Washington, DC, on October 27, 2003.

David K. Garman,

Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons set forth in the preamble, the Department amends Part 430 of Chapter II of Title 10, Code of Federal Regulations, to read as follows:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Appendix J1 to subpart B of part 430, as amended at 66 FR 3330 to become effective January 1, 2004, is further amended in section 2 by revising:

■ a. Table 2.6.5.

■ b. Section 2.6.5.3.6.

■ c. Table 2.6.6.1.

■ d. Section 2.6.6.2.

The revisions read as follows:

Appendix J1 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers.

* * * * *

2. * * *

2.6. * * *

2.6.5. * * *

TABLE 2.6.5.—MATRIX OF EXTRACTOR RMC TEST CONDITIONS

''g Force''	Warm soak		Cold soak	
	15 min. spin	4 min. spin	15 min. spin	4 min. spin
100	.....	.....	.....	.....
200	.....	.....	.....	.....
350	.....	.....	.....	.....
500	.....	.....	.....	.....

* * * * *

2.6.5.3.6 The RMC of the test load shall be measured at three (3) g levels: 100g; 200g; and 350g, using two different spin times at each g level: 4 minutes; and 15 minutes. If a clothes washer design can achieve spin speeds in the 500g range then the RMC of the test load shall be measured at four (4) g levels: 100g; 200g; 350g; and 500g, using two different spin times at each g level: 4 minutes; and 15 minutes.

* * * * *

2.6.6. * * *

2.6.6.1. * * *

TABLE 2.6.6.1.—STANDARD RMC VALUES (RMC STANDARD)

''g Force''	RMC %			
	Warm soak		Cold soak	
	15 min. spin	4 min. spin	15 min. spin	4 min. spin
100	45.9	49.9	49.7	52.8
200	35.7	40.4	37.9	43.1
350	29.6	33.1	30.7	35.8
500	24.2	28.7	25.5	30.0

2.6.6.2. Perform an analysis of variance test using two factors, spin speed and lot, to check the interaction of speed and lot. Use the values from Table 2.6.5 and Table 2.6.6.1 in the calculation. The ''P'' value in the variance analysis shall be greater than or equal to 0.1. If the ''P'' value is less than 0.1 the test cloth is unacceptable. ''P'' is a theoretically based probability of interaction based on an analysis of variance.

* * * * *

[FR Doc. 03–27468 Filed 10–30–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 430

[Docket No. EE–RM/TP–03–100]

RIN 1904–AB43

Energy Conservation Program for Consumer Products: Test Procedure for Clothes Washers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking contains an amendment to the test procedure for measuring the energy consumption of clothes washers. The amendment changes one of the spin cycles required for testing the cloth used in the extraction phase of the test procedure by replacing the lowest spin cycle of 50 gravitation (g) force with a spin cycle of 100g. The 50g spin cycle produced inconsistent and unreliable test results. This amendment also includes an additional statistical analysis as a criterion to establish the acceptance of a future lot of the test cloth when it is submitted for testing. These changes will improve the reliability of the test cloth data and the repeatability of the clothes washer test procedure. Because the Department of Energy (DOE or the Department) does not expect this proposed amendment to the rule to receive any significant adverse comments, it is also issuing the amendment as a direct final rule in the ''Rules and Regulations'' section of this **Federal Register**.

DATES: Public comments on the amendment proposed herein will be accepted until December 1, 2003.

ADDRESSES: The Department will accept comments, data and information regarding the proposed rule no later than the date provided in the **DATES** section. Please submit comments, data and information electronically to the following Internet address: *clotheswashertestclothtp@ee.doe.gov.* Electronic comments must be submitted in WordPerfect, Microsoft Word, PDF, or text (ASCII) format file and avoid the use of special characters or any form of encryption. Comments in electronic format should be identified by the docket number EE–RM/TP–03–100, and wherever possible carry the electronic signature of the author. Absent an electronic signature, comments submitted electronically must be followed and authenticated by submitting the signed original paper document. No telefacsimiles (telefaxes) will be accepted.

Written (paper) comments may be submitted to: Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Test Procedures for Clothes Washers, Docket Number: EE–RM/TP–03–100, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed copy—no telefacsimiles.

You may read copies of the public comments received in the resource room of the appliance office of the Building Technologies Program, room 1J–018 of the Forrestal Building at the U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards-Jones at the above telephone number for additional information regarding visiting the resource room. **Please note:** The Department's Freedom of Information Reading Room (room 1E–190 in the Forrestal Building) is no longer servicing rulemakings.

FOR FURTHER INFORMATION CONTACT: Barbara Twigg or Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9611, e-mail: *Barbara.Twigg@ee.doe.gov,* or *Bryan.Berringer@ee.doe.gov,* respectively; or Francine Pinto, Esq., or Thomas DePriest, Esq., U.S. Department of Energy, Office of General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9507, e-mail: *Francine.Pinto@hq.doe.gov,* or *Thomas.DePriest@hq.doe.gov,* respectively.

SUPPLEMENTARY INFORMATION: In this Notice of Proposed Rulemaking (NOPR), DOE proposes an amendment to the test procedure for measuring the energy consumption of clothes washers. The proposed amendment replaces the 50g force spin cycle required for testing the cloth used in the extraction phase of the test procedure with a spin cycle of 100g. Recent tests have disclosed that the slow 50g spin cycle, unlike the test cycles at spin speeds of 100g and above, produced inconsistent results and unreliable data. In this NOPR, DOE also proposes to require the use of a statistical procedure, Analysis of Variance (ANOVA), that can detect the interactive effect between test lots and spin speeds and improve consistency with the baseline data.

Today, the Department is also publishing, elsewhere in this issue of the **Federal Register**, a direct final rule that makes the change to this test procedure that DOE is proposing in this NOPR. As DOE explains in the preamble of the direct final rule, the Department considers this amendment to be uncontroversial and unlikely to generate any significant adverse comments. If the Department receives no significant adverse comments on the amendment, the direct final rule will become effective on the date specified in that rule, and there will be no further action on this proposal. If DOE receives significant adverse comments on the direct final rule, DOE will withdraw the direct final rule. DOE will then address the public comments in a subsequent final rule based on the rule proposed in this NOPR (which is the same as the rule set forth in the direct final rule). Because the Department will not institute a second comment period on this proposed rule, any parties interested in commenting should do so during this comment period.

For further supplemental information, the detailed rationale, and the rule amendment, see the information provided in the direct final rule in this **Federal Register**.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Energy conservation, Household appliances.

Issued in Washington, DC, on October 27, 2003.

David K. Garman,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 03–27469 Filed 10–30–03; 8:45 am]

BILLING CODE 6450–01–P

Federal Register

Friday,
October 31, 2003

Part IV

The President

Notice of October 29, 2003—Continuation of Emergency Regarding Weapons of Mass Destruction

Notice of October 29, 2003—Continuation of National Emergency With Respect to Sudan

Federal Register
Vol. 68, No. 211
Friday, October 31, 2003

Presidential Documents

Title 3—

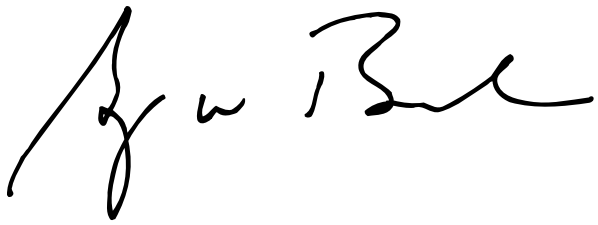
The President

Notice of October 29, 2003

Continuation of Emergency Regarding Weapons of Mass Destruction

On November 14, 1994, by Executive Order 12938, President Clinton declared a national emergency with respect to the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States posed by the proliferation of nuclear, biological, and chemical weapons (weapons of mass destruction) and the means of delivering such weapons. On July 28, 1998, the President issued Executive Order 13094 to amend Executive Order 12938 to respond more effectively to the worldwide threat of proliferation of weapons of mass destruction and the means of delivering such weapons. Because the proliferation of weapons of mass destruction and the means of delivering them continues to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, the national emergency first declared on November 14, 1994, must continue in effect beyond November 14, 2003. Consistent with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 12938, as amended.

This notice shall be published in the **Federal Register** and transmitted to the Congress.



THE WHITE HOUSE,
October 29, 2003.

[FR Doc. 03–27621
Filed 10–30–03; 9:04 am]
Billing code 3195–01–P

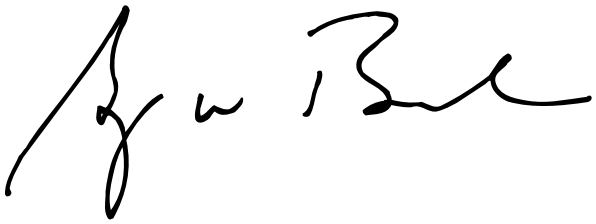
Presidential Documents

Notice of October 29, 2003

Continuation of the National Emergency With Respect to Sudan

On November 3, 1997, by Executive Order 13067, the President declared a national emergency with respect to Sudan pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of the Government of Sudan. Because the actions and policies of the Government of Sudan continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, the national emergency declared on November 3, 1997, and the measures adopted on that date to deal with that emergency must continue in effect beyond November 3, 2003. Therefore, consistent with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to Sudan.

This notice shall be published in the **Federal Register** and transmitted to the Congress.



THE WHITE HOUSE,
October 29, 2003.

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Batch certification requirements, etc.; obsolete and redundant regulations removed; comments due by 11-6-03; published 8-8-03 [FR 03-20244]

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Boeing; comments due by 11-3-03; published 9-18-03 [FR 03-23820]

Consolidated, Consolidated Vultee, and Convair; comments due by 11-3-03; published 9-3-03 [FR 03-22382]

Empresa Brasileira de Aeronautica, S.A. (EMBRAER); comments due by 11-3-03; published 10-2-03 [FR 03-24978]

General Electric Aircraft Engines; comments due by 11-7-03; published 9-8-03 [FR 03-22713]

McDonnell Douglas; comments due by 11-3-03; published 9-18-03 [FR 03-23821]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction

with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.nara.gov/fedreg/plawcurr.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.access.gpo.gov/nara/nara005.html*. Some laws may not yet be available.

H.R. 1900/P.L. 108–101

To award a congressional gold medal to Jackie Robinson (posthumously), in recognition of his many contributions to the Nation, and to express the sense of the Congress that there should be a national day in recognition of Jackie Robinson. (Oct. 29, 2003; 117 Stat. 1195)

H.R. 3229/P.L. 108–102

To amend title 44, United States Code, to transfer to the Public Printer the authority over the individuals responsible for preparing indexes of the Congressional Record, and for other purposes. (Oct. 29, 2003; 117 Stat. 1198)

S. 1591/P.L. 108–103

To redesignate the facility of the United States Postal Service located at 48 South Broadway, Nyack, New York, as the ''Edward O'Grady, Waverly Brown, Peter Paige Post Office Building''. (Oct. 29, 2003; 117 Stat. 1199)

Last List October 29, 2003

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