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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Treasury

12 CFR Part 3

[Docket No. 03–24]

RIN 1557–AB97

Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Final rule; technical correction.

SUMMARY: The OCC published in the **Federal Register** of December 17, 2003 (68 FR 70122), a final rule implementing authority provided to national banks by sections 1204, 1205, and 1206 of the American Homeownership and Economic Opportunity Act of 2000 (AHEOA). This document makes technical corrections to that final rule.

EFFECTIVE DATE: January 16, 2004.

FOR FURTHER INFORMATION CONTACT: Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090.

SUPPLEMENTARY INFORMATION: In FR Doc. 03–31093, published on December 17, 2003 (68 FR 70131), make the following corrections:

Appendix A to Part 3 [Corrected]

1. On page 70128, in the third column, instruction 2.b. is revised to read as follows:

b. In section 4, amend paragraph (a)(11)(ii) by removing ''section 4(a)(8)(i) and (ii)'' and adding in its place ''section 4(a)(9)(i) and (ii).''

Dated: December 17, 2003.

Julie L. Williams,

First Senior Deputy Comptroller and Chief Counsel.

[FR Doc. 03–31651 Filed 12–23–03; 8:45 am]

BILLING CODE 4810–33–M

FEDERAL RESERVE SYSTEM

12 CFR Part 222

FEDERAL TRADE COMMISSION

16 CFR Part 602

[Regulation V; Docket No. R–1172]

RIN 3084–AA94 Project No. P044804

Effective Dates for the Fair and Accurate Credit Transactions Act of 2003

AGENCIES: Board of Governors of the Federal Reserve System (Board) and Federal Trade Commission (FTC).

ACTION: Joint interim final rules.

SUMMARY: The recently enacted Fair and Accurate Credit Transactions Act of 2003 (FACT Act or the Act) requires the Board and the FTC (the Agencies) jointly to adopt rules establishing the effective dates for provisions of the Act that do not contain specific effective dates. The Agencies are taking two related actions to comply with this requirement. In this action, the Agencies are jointly adopting interim final rules that establish December 31, 2003, as the effective date for provisions of the Act that determine the relationship between the Fair Credit Reporting Act (FCRA) and state laws and provisions that authorize rulemakings or other implementing action by various agencies. In the second action, published elsewhere in today's **Federal Register**, the Agencies jointly propose rules establishing a schedule of effective dates for other provisions of the FACT Act.

DATES: Comments must be submitted on or before January 12, 2004. The Agencies' interim final rules are effective on December 31, 2003.

ADDRESSES: Because the Agencies will jointly review all of the comments submitted, interested parties may send comments to either of the Agencies and need not send comments (or copies) to both of the Agencies. Because paper mail in the Washington area and at the Agencies is subject to delay, please consider submitting your comments by e-mail. Commenters are encouraged to use the title ''Interim Final Rules for the FACT Act'' to facilitate the organization and distribution of comments among the Agencies. Interested parties are invited to submit written comments to:

Board of Governors of the Federal Reserve System: Comments should refer to Docket No. R–1172 and may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. Please consider submitting your comments by e-mail to *regs.comments@federalreserve.gov*, or faxing them to the Office of the Secretary at (202) 452–3819 or (202) 452–3102. Members of the public may inspect comments in Room MP–500 between 9 a.m. and 5 p.m. on weekdays pursuant to section 261.12, except as provided in section 261.14, of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

Federal Trade Commission: Comments should refer to ''Interim Final Rules for the FACT Act, Project No. P044804.'' Comments filed in paper form should be mailed or delivered to: Federal Trade Commission/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) should be sent to: *FACTAdates@ftc.gov*. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled ''Confidential.''[1] Regardless of the form in which they are filed, the Commission will consider all timely comments, and will make the comments available (with confidential material redacted) for public inspection and copying at the Commission's principal office and on the Commission Web site at *http://www.ftc.gov*. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site.

FOR FURTHER INFORMATION CONTACT:

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must also be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

Board: Thomas E. Scanlon, Counsel, Legal Division, (202) 452–3594; David A. Stein, Counsel, Minh-Duc T. Le, Ky Tran-Trong, Senior Attorneys, Krista P. DeLargy, Attorney, Division of Consumer and Community Affairs, (202) 452–3667 or (202) 452–2412; for users of Telecommunications Device for the Deaf (''TDD'') only, contact (202) 263–4869.

FTC: Christopher Keller or Katherine Armstrong, Attorneys, Division of Financial Practices, (202) 326–3224.

SUPPLEMENTARY INFORMATION: Congress enacted the FACT Act, which the President signed into law on December 4, 2003. Pub. L. 108–159, 117 Stat. 1952. In general, the Act amends the FCRA to enhance the ability of consumers to combat identity theft, to increase the accuracy of consumer reports, and to allow consumers to exercise greater control regarding the type and amount of marketing solicitations they receive. The FACT Act also restricts the use and disclosure of sensitive medical information that is contained in a consumer report. To bolster efforts to improve financial literacy among consumers, title V of the Act (entitled the ''Financial Literacy and Education Improvement Act'') creates a new Financial Literacy and Education Commission empowered to take appropriate actions to improve the financial literacy and education programs, grants, and materials of the Federal government. Lastly, to promote increasingly efficient national credit markets, the FACT Act establishes uniform national standards in key areas of regulation regarding consumer report information.

The Act includes effective dates for many of its sections that vary to take account of the need for rulemaking, implementation efforts by industry, and other policy concerns. Section 3 of the FACT Act requires the Agencies to prescribe joint regulations establishing an effective date for each provision of the Act for which the Act itself does not specifically provide an effective date. The FACT Act requires that the Agencies jointly adopt final rules establishing the effective dates within two months of the date of enactment of the Act. The Act also provides that each of these effective dates must be ''as early as possible, while allowing a reasonable time for the implementation'' of that provision, but in no case later than ten months after the date of issuance of the Agencies' joint final rules establishing the effective dates for the Act (117 Stat. 1953).

The Agencies are jointly adopting these interim final rules that establish December 31, 2003, as the effective date for section 711 and certain other provisions of the Act that establish the relationship between the FCRA and state laws, as well as for the provisions that authorize rulemaking and other agency action under the FACT Act. In a separate notice published in conjunction with this action, the Agencies are jointly proposing regulations that establish effective dates for the other applicable provisions of the FACT Act. As noted above, the Agencies must complete these effective date rules by February 4, 2004.

The Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) generally requires an agency to publish a notice of a proposed rule and afford interested persons an opportunity to participate in the rulemaking by providing comments prior to promulgation of the rule. The requirement for providing notice of the proposed rule and an opportunity for public comment do not apply ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Correspondingly, a rule may not be made effective less than thirty days after publication, unless as otherwise provided by the agency for good cause found and published with the rule.[2]

The current FCRA contains provisions that preempt state laws in seven areas governed by the FCRA. Under section 624(d)(2) of the FCRA, these provisions expire on January 1, 2004.[3] One of the central aims of the FACT Act is to eliminate this so-called sunset provision and make permanent the current preemption provisions and add others.[4] In these interim final rules, the Agencies are establishing December 31, 2003, as the effective date for section 711 of the FACT Act, which amends section 624(d)(2) of the FCRA, as well as for sections 151(a)(2), 212(e), 214(c), and 311(b) of the FACT Act, each of which similarly determines the relationship of state laws to areas governed by the FCRA.

The Agencies believe that there is good cause for adopting these rules as interim final rules effective without advance public comment or delay. As noted above, the current preemption provisions in the FCRA expire on January 1, 2004. Delaying final action on these provisions of the FACT Act would undermine the purpose of these provisions and is likely to provoke substantial confusion about the applicability of some state laws in areas that Congress has determined should be governed by uniform nationwide standards. Adopting these rules in final form on an interim basis also will have the effect of preserving the current state of the law while comment is received. Implementing these interim final rules is consistent with the statutory directive to act quickly and to ''establish effective dates that are as early as possible.''

Certain provisions of the Act require one or more agencies to undertake an action or rulemaking within a specified period of time after enactment of the Act. For example, section 213(b) states that the Commission's regulations implementing that section ''shall be issued in final form not later than 1 year after the date of enactment of this Act.'' The Agencies have determined that no joint regulations under section 3 of the FACT Act are required to make these provisions effective. The Agencies believe that, in these cases, Congress has specified the date of enactment as the lawful effective date because that is the predicate for mandating that an agency action be performed within a specified period of time after the date of enactment.

There are, however, several sections of the Act that do not specify the period for rulemaking or other action. To address this, the Agencies' interim final rules establish December 31, 2003, as the effective date for each provision of the FACT Act that authorizes an agency, without establishing an implementation date, to issue a regulation or to take other action to implement the Act or the applicable provision of the FCRA, as amended by the FACT Act. The Agencies believe that there is good cause for adopting these rules in final form on an interim basis without advance public comment or delay. Establishing an early effective date for these regulatory provisions would allow the agencies to begin immediately to perform their responsibilities under the FACT Act. The Agencies note that this section of the interim final rules applies only to the provisions of the FACT Act without effective dates that relate to an agency's authority to issue a regulation or to take other action to implement the Act. These interim final rules do not affect the substantive provisions of the FACT Act implemented by an agency rule. The substantive provisions of the Act become effective as provided in the Act, as provided in the Agencies joint effective date rules, or as provided by the substantive rules promulgated by the agencies, as appropriate.

[2] 5 U.S.C. 553(b)(3)(B) and (d)(3).

[3] 15 U.S.C. 1681t(d)(2).

[4] See, *e.g.*, S. Rep. No. 108–166 (2003) at 10–11, 25.

Accordingly, the Agencies find good cause for adopting these rules as interim final rules effective on December 31, 2003.

To allow for public participation and assure that these interim rules are appropriate, the Agencies invite comment on the interim final rules and on the Agencies' findings. Based on comments received, the Agencies may adjust the effective date of a section governed by the interim final rules as necessary.

Regulatory Analysis

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Agencies have reviewed the interim final rules. (The Board has done so under authority delegated to the Board by the Office of Management and Budget.) The rules contain no collections of information pursuant to the Paperwork Reduction Act.

Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. 16 CFR 1.26(b)(5)

Solicitation of Comments on Use of Plain Language

Section 722(a) of the Gramm-Leach-Bliley Act requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000.[5] In light of this requirement, the Board has sought to present the provisions of the joint interim final rule in a simple and straightforward manner. The Board invites your comments on how to make the rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

[5] Pub. L. 106–102, 113 Stat. 1338 (1999), codified at 12 U.S.C. 4809.

List of Subjects

12 CFR Part 222

Banks, banking, Holding companies, state member banks.

16 CFR Part 602

Consumer reports, Consumer reporting agencies, Credit, Trade practices.

12 CFR Chapter II—Federal Reserve System

Authority and Issuance

For the reasons set forth in the preamble, the Board adds a new 12 CFR part 222 to read as follows:

PART 222—FAIR CREDIT REPORTING (REGULATION V)

Authority: 15 U.S.C. 1681s; Sec 3, Pub. L. 108–159, 117 Stat. 1953.

Subpart A—General Provisions

§ 222.1 Purpose, scope, and effective dates.

(a)–(b) [Reserved]

(c) *Effective dates.* The applicable provisions of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), Pub. L. 108–159, 117 Stat. 1952, shall be effective in accordance with the following schedule:

(1) *Provisions effective December 31, 2003.*

(i) Sections 151(a)(2), 212(e), 214(c), 311(b), and 711, concerning the relation to state laws; and

(ii) Each of the provisions of the FACT Act that authorizes an agency to issue a regulation or to take other action to implement the applicable provision of the FACT Act or the applicable provision of the Fair Credit Reporting Act, as amended by the FACT Act, but only with respect to that agency's authority to propose and adopt the implementing regulation or to take such other action.

(2) [Reserved]

16 CFR Chapter I—Federal Trade Commission

Authority and Issuance

For the reasons set forth in the preamble, the FTC adds a new 16 CFR part 602 to read as follows:

PART 602—FAIR CREDIT REPORTING

Authority: 15 U.S.C. 1681s; Sec. 3, Pub. L. 108–159, 117 Stat. 1953.

Subpart A—General Provisions

§ 602.1 Purpose, scope, and effective dates.

(a)–(b) [Reserved]

(c) *Effective dates.* The applicable provisions of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), Pub. L. 108–159, 117 Stat. 1952, shall be effective in accordance with the following schedule:

(1) *Provisions effective December 31, 2003.*

(i) Sections 151(a)(2), 212(e), 214(c), 311(b), and 711, concerning the relation to state laws; and

(ii) Each of the provisions of the FACT Act that authorizes an agency to issue a regulation or to take other action to implement the applicable provision of the FACT Act or the applicable provision of the Fair Credit Reporting Act, as amended by the FACT Act, but only with respect to that agency's authority to propose and adopt the implementing regulation or to take such other action.

(2) [Reserved]

By order of the Board of Governors of the Federal Reserve System, December 16, 2003.

Jennifer J. Johnson,

Secretary of the Board.

Dated: December 15, 2003.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 03–31359 Filed 12–23–03; 8:45 am]

BILLING CODE 6210–01–P, 6750–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 33

[Docket No. NE126; Special Conditions No. 33–005–SC]

Special Conditions: General Electric Aircraft Engines, Model CT7–8A, –8A5, –8B, –8B5, –8E, –8E5, –8F, and –8F5 Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: The FAA is issuing special conditions for the General Electric Aircraft Engines (GEAE) models CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, CT7–8F5, engines. On August 2, 2000, the FAA issued Special Conditions (SC) No. 33–003–SC for the GEAE CT7–6e, and CT7–8, turboshaft engines. The CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, CT7–8F5 engines will have a novel or unusual rated 30-minute power, and rated continuous one engine inoperative (OEI) power. The

applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. This document contains the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is December 31, 2003. The FAA must receive comments on or before January 31, 2004.

ADDRESSES: Mail or deliver comments on these special conditions to: Federal Aviation Administration, Office of the Assistant Chief Counsel, Attention: Rules Docket NE126. You must identify the docket number NE126 at the beginning of your comments, and you should submit two copies of your comments. You may review the public docket containing comments to these special conditions in person at the Office of the Regional Counsel between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Chung Hsieh, FAA, Engine and Propeller Standards Staff, Engine and Propeller Directorate, Aircraft Certification Service, ANE–110, 12 New England Executive Park, Burlington, Massachusetts, 01803–5229; telephone (781) 238–7115; fax (781) 238–7199; e-mail *chung.hsieh@faa.gov.*

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

Comments Invited

The FAA has determined that good cause exists for making these special conditions effective December 31, 2003; however, the FAA invites interested parties to submit comments on the special conditions. Comments should identify the Rules Docket and special conditions number and be submitted in duplicate to the address specified above. The FAA will consider all comments received by the closing date. These special conditions may be changed in light of the comments received. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this proposal will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. NE126.'' The postcard will be date-stamped and returned to the commenter.

Background

On March 12, 2003, General Electric Aircraft Engines (GEAE) applied for an amendment to Type Certificate No. E8NE to include the new model CT7–8A turboshaft engine. The application was subsequently amended to include the CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, and CT7–8F5 engines. These engine models, which are derivatives of the CT7–8 currently approved under Type Certificate (TC) No. E8NE, will have the same engine rating structure as the CT7–8 model except that they will include rated continuous one engine inoperative (OEI) power instead of rated 30-minute OEI power. These engine models will be rated at 30-second OEI, 2-minute OEI, continuous OEI, 30-minute, takeoff, and maximum continuous ratings. The requirements in the existing regulations do not contain adequate or appropriate safety standards of this new and unusual engine rating structure.

The rated 30-minute power is the approved brake horsepower developed under static conditions at specified altitudes and temperatures within the operating limitations established under part 33 for periods of use no longer than 30 minutes each. This rating power would provide for rotorcraft hovering operations at a power level greater than maximum continuous power. The certification requirements have been defined around the worst case scenario of unrestricted periods of use, up to 30 minutes each, in one flight. Therefore, the total accumulated time for endurance testing of 30-minute periods, at rated 30-minute power for each period, must be 25 hours for certification. However, when the CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, or CT7–8F5 engine models have a rated continuous OEI power equal to or higher than rated 30-minute power, the test run time of 25 hours under § 33.87(d) may be credited to satisfy the required running time of 25 hours at rated 30-minute power.

Type Certification Basis

Under the provisions of 14 CFR § 21.101, GEAE must show that the CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, CT7–8F5 turboshaft engines meet the applicable provisions of the regulations incorporated by reference in TC No. E8NE or the applicable regulations in effect on the date of application for the change to the CT7–8. The regulations incorporated by reference in the TC are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in TC No. E8NE are part 33, effective February 1, 1965, as amended by amendments 33–1 through 33–19 and Special Conditions Numbers 33–002–SC and 33–003–SC.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 33) do not contain adequate or appropriate safety standards for the CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, CT7–8F5 engines because of a novel or unusual design feature, special conditions are prescribed under the provisions of 14 CFR 21.16.

Special conditions, as appropriate, are issued in accordance with 14 CFR 11.49, as required by 14 CFR 11.28 and 11.29(b), and become part of the type certification basis in accordance with 14 CFR 21.101(b)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of 14 CFR 21.101(a)(1).

Novel or Unusual Design Features

The GEAE CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, and CT7–8F5 turboshaft engines will incorporate the following novel or unusual design feature: rated 30-minute power. The power available for rotorcraft hovering to perform search and rescue or similar missions is limited to the maximum continuous rating power under the current part 33 requirements. The rated 30-minute power will provide a higher power level than currently available for use up to 30 minutes at any time between takeoff and landing during any flight. This new rating will enhance rotorcraft safety through the availability of increased

power for hovering operations calling for greater than maximum continuous power.

Applicability

As discussed above, these special conditions apply to the CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, and CT7–8F5 turboshaft engines. Should GEAE apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of 14 CFR 21.101(a)(1).

Conclusion

This action affects only certain novel or unusual design features on these models of engines. It is not a rule of general applicability, and it affects only the applicant who applied to the FAA for approval of these features on the engine.

The substance of these special conditions has been subjected to the notice and comment period in one prior instance and has been derived without substantive change from those previously issued. The FAA has determined that prior public notice and comment are unnecessary and that good cause exists for adopting these special conditions immediately. Therefore, these special conditions are being made effective December 31, 2003. The FAA is, however, requesting comments to allow interested parties to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 33

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for GEAE model CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, and CT7–8F5 turboshaft engines. The type certificate basis for the CT7–8A, CT7–8A5, CT7–8B, CT7–8B5, CT7–8E, CT7–8E5, CT7–8F, and CT7–8F5 engines is part 33, effective February 1, 1965, as amended by amendments 33–1 through 33–19 and Special Conditions Numbers 33–002–SC and 33–005–SC.

(a) *Section 33.4, Instructions for Continued Airworthiness (ICA).* In addition to the requirements of § 33.4, the ICA procedures must:

(1) Ensure that the engine deterioration in service will not exceed the level shown in certification using the rated 30-minute power.

(2) Be included in the airworthiness limitations section of the ICA.

(b) *Section 33.7, Engine Ratings and Operating Limitations.* In addition to the ratings provided in § 33.7, a rated 30-minute power is available. The rated 30-minute power is the approved brake horsepower developed under static conditions at specified altitudes and temperatures within the operating limitations established under part 33 and limited in use to periods of not over 30 minutes each.

(c) *Section 33.87, Endurance Test.* Unless already substantiated by the tests run under § 33.87(d), in addition to the requirements of § 33.87, conduct the following test:

Rated 30-minute power: One hour and ten minutes at alternate 5-minute periods at maximum continuous power, and 30-minute periods at rated 30-minute power during the 25 six-hour endurance test cycles.

Issued in Burlington, Massachusetts, on December 17, 2003.

Peter A. White,

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

[FR Doc. 03–31734 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16359; Airspace Docket No. 03–ASO–18]

Establishment of Class D Airspace; Hilton Head Island, SC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class D airspace at Hilton Head Island, SC. A federal contract tower with a weather reporting system has been constructed at the Hilton Head Airport. Therefore, the airport meets criteria for Class D Airspace. Class D surface area airspace is required when the control tower is open to contain Standard Instrument Approach Procedures (SIAPs) and other Instrument Flight Rules (IFR) operations at the airport. This action establishes Class D airspace extending upward from the surface to and including 2,800 feet MSL within a 4.1-mile radius of the airport.

EFFECTIVE DATE: 0901 UTC, February 19, 2004.

FOR FURTHER INFORMATION CONTACT: Walter R. Cochran, Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5627.

SUPPLEMENTARY INFORMATION:

History

On November 14, 2003, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) by establishing Class D airspace at Hilton Head Island, SC, (68 FR 64574). This action provides adequate Class D airspace for IFR operations at Hilton Head Airport. Designations for Class D are published in FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR part 71.1. The Class D designations listed in this document will be published subsequently in the Order.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) establishes Class D airspace at Hilton Head Island, SC.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO SC D Hilton Head Island, SC [NEW]

Hilton Head Airport, SC
(Lat. 32°13′28″ N, long. 80°41′51″ W)

That airspace extending upward from the surface to and including 2,000 feet MSL within a 3.9-mile radius of the Hilton Head Airport. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in College Park, Georgia, on December 12, 2003.

Walter R. Cochran,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 03–31743 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–15465; Airspace Docket No. 03–AGL–11]

Modification of Class E Airspace; Chicago, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace at Chicago, IL. Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAPS) have been developed for Aurora Municipal Airport, Chicago, IL. Controlled airspace extending upward from the surface of the earth is needed to contain aircraft executing these approaches. This action would add an extension to the controlled airspace for Aurora Municipal Airport.

EFFECTIVE DATE: 0901 UTC, April 15, 2003.

FOR FURTHER INFORMATION CONTACT: Patricia A. Graham, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7568.

SUPPLEMENTARY INFORMATION:

History

On Monday, September 29, 3003, the FAA proposed to amend 14 CFR part 71 to modify Class E airspace at Zanesville, OH (68 FR 55915). The proposal was to modify controlled airspace extending upward from the surface of the earth to contain Instrument Flight Rules (IFR) operations in controlled airspace during portions of the terminal operation and while transiting between the enroute and terminal environments. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Class E airspace areas designated as an extension to a class D surface area are published in paragraph 6004, of FAA Order 7400.9L dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the order.

The Rule

This amendment to 14 CFR part 71 modifies Class E airspace at Chicago, IL to accommodate aircraft executing instrument flight procedures into and out of Aurora Municipal Airport. The area will be depicted on appropriate aeronautical charts.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

* * * * *

Paragraph 6004 Class E Airspace Areas designated as an extension to a Class D surface area

* * * * *

AGL IL E4 Chicago, Aurora Municipal Airport, IL [Revised]

Chicago, Aurora Municipal Airport, IL
(Lat. 41°46′19″ N., long. 88°28′32″ W.)
DuPage VOR/DME
(Lat. 41°53′25″ N., long. 88°21′01″ W.)
I–ARR Localizer
(Lat. 41°46′14″ N., long. 88°27′32″ W.)

That airspace extending upward from the surface within 1.3 miles each side of the DuPage VOR/DME 216° radial extending from the 4.2-mile radius of the Aurora Municipal Airport to 6.6 miles northeast of the airport and within 1.4 miles each side of the I–ARR Localizer west course extending from the 4.2-mile radius of the Aurora Municipal Airport to 6.7 miles west of the airport. This Class E airspace is effective during the specific date and time established in advance by Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in Des Plaines, Illinois, on December 10, 2003.

Nancy B. Shelton,

Manager, Air Traffic Division, Great Lakes Region.

[FR Doc. 03–31739 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–15834; Airspace Docket No. 03–AGL–13]

Modification of Class E Airspace; Wilmington Clinton Field, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace at Wilmington Clinton Field, OH. An Area Navigation (RNAV) Standard Instrument Approach Procedure (SIAP) has been developed for Wilmington Clinton Field, OH. Controlled airspace extending upward from 700 feet above the surface of the earth is needed to contain aircraft executing this approach. This action increases the area of the existing controlled airspace at Wilmington Clinton Field.

EFFECTIVE DATE: 0901 UTC, April 15, 2003.

FOR FURTHER INFORMATION CONTACT: Patricia A. Graham, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7568.

SUPPLEMENTARY INFORMATION:

History

On Monday, September 29, 2003, the FAA proposed to amend 14 CFR part 71 to modify Class E airspace at Zanesville, OH (68 FR 55913). The proposal was to modify controlled airspace extending upward from 700 feet above the surface of the earth to contain Instrument Flight Rules (IFR) operations in controlled airspace during portions of the terminal operation and while transiting between the enroute and terminal environments.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005, of FAA Order 7400.9L dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the order.

The Rule

This amendment to 14 CFR part 71 modifies Class E airspace at Wilmington Clinton Field, OH, to accommodate aircraft executing instrument flight procedures into and out of Wilmington Clinton Field. The area will be depicted on appropriate aeronautical charts.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

* * * * *

Paragraph 6005 Class E Airspace Areas extending upward from 700 feet or more above the surface of the earth

* * * * *

AGL OH E5 Wilmington Clinton Field, OH [Revised]

Wilmington Clinton Field, OH
(Lat. 39°30′10″ N., long. 83°51′47″ W.)

That airspace extending upward from 700 feet above the surface within an 8.1-mile radius of Wilmington Clinton Field, excluding that airspace within the Wilmington, OH, and Dayton, Greene County Airport, OH Class E airspace areas.

* * * * *

Issued in Des Plaines, Illinois, on December 10, 2003.

Nancy B. Shelton,

Manager, Air Traffic Division, Great Lakes Region.

[FR Doc. 03–31738 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–15877; Airspace Docket No. 03–AGL–15]

Establishment of Class E Airspace; Canby, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Canby, MN. An area Navigation (RNAV) Standard Instrument Approach Procedure (SIAP) has been developed for Myers Field, Canby, MN. Controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing this approach. This action establishes an area of controlled airspace for Myers Field.

EFFECTIVE DATE: 0901 UTC, April 15, 2003.

FOR FURTHER INFORMATION CONTACT: Patricia A. Graham, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7568.

SUPPLEMENTARY INFORMATION:

History

On Monday, September 29, 2003, the FAA proposed to amend 14 CFR part 71 to establish Class E airspace at Canby, MN (68 FR 55914). The proposal was to establish controlled airspace extending upward from 700 feet or more above the surface of the earth to contain

Instrument Flight Rules (IFR) operations in controlled airspace during portions of the terminal operation and while transiting between the enroute and terminal environments.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9L dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 establishes Class E airspace at Canby, MN, to accommodate aircraft executing instrument flight procedures into and out of Myers Field. The area will be depicted on appropriate aeronautical charts.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 95665, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

* * * * *

Paragraph 6005 Class E Airspace Areas extending upward from 700 Feet or more above the surface of the earth

* * * * *

AGL MN E5 Canby, MN [New]

Myers Field, MN

(Lat. 44°43′41″ N., long. 96°15′45″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Myers Field.

* * * * *

Issued in Des Plaines, Illinois, on December 10, 2003.

Nancy B. Shelton,

Manager, Air Traffic Division, Great Lakes Region.

[FR Doc. 03–31737 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16119; Airspace Docket No. 03–AEA–13]

Amendment of Class E Airspace; Erie, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Erie, PA. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain aircraft operating into Life Star Base Heliport, Harbor Creek, PA, under Instrument Flight Rules (IFR).

EFFECTIVE DATE: 0901 UTC April 15, 2004.

FOR FURTHER INFORMATION CONTACT: Mr. Francis Jordan, Airspace Specialist, Airspace Branch, AEA–520, Air Traffic Division, Eastern Region, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, New York 11434–4809, telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

History

On November 14, 2003, a notice proposing to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) by modifying the Class E airspace area at Erie, PA was published in the **Federal Register** (68 FR 64575–64576). The proposed action would provide additional controlled airspace to accommodate a Standard Instrument Approach Procedure (SIAP), based on area navigation (RNAV), to the Life Star Base Heliport. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA on or before December 15, 2003. No comments to the proposal were received. The rule is adopted as proposed.

The coordinates for this airspace docket are based on North American Datum 83. Class E airspace area designations for airspace extending upward from the surface of the earth are published in paragraph 6005 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published in the Order.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) provides controlled Class E airspace extending upward from 700 feet above the surface for aircraft conducting IFR operations within a 6-mile radius of Life Star Base Heliport, Harbor Creek, PA.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

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

§ 71.1 [Amended]

The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

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

* * * * *

AEA PA E5 Erie, PA (Revised)

Erie International Tom Ridge Field Airport, PA
(Lat. 42°04′55″ N., long. 80°10′34″ W.)
Life Star Base Heliport
Lat. 42°10′19″ N., long. 79°56′34″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Erie International/Tom Ridge Field Airport and within 4.4 miles each side of the 054° bearing from the airport extending from the 6.7-mile radius to 14 miles northeast of the airport and within a 6-mile radius of Life Star Base Heliport.

* * * * *

Issued in Jamaica, New York, on December 16, 2003.

John G. McCartney.

Assistant Manager, Air Traffic Division, Eastern Region.

[FR Doc. 03–31732 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16120; Airspace Docket No. 03–AEA–12]

Amendment of Class E Airspace; Jamestown, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Jamestown, NY. Controlled airspace extending upward form 700 feet Above Ground Level (AGL) is needed to contain aircraft operating into WCA Hospital Heliport, Jamestown, NY under Instrument Flight Rules (IFR).

DATE: 0901 UTC April 15, 2004.

FOR FURTHER INFORMATION CONTACT: Mr. Francis Jordan, Airspace Specialist, Airspace Branch, AEA–520, Air Traffic Division, Eastern Region, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, New York 11434–4809, telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

History

On November 12, 2003, a notice proposing to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) by modifying the Class E airspace area at Jamestown, NY was published in the **Federal Register** (68 FR 64008–64009). The proposed action would provide additional controlled airspace to Standard Instrument Approach Procedure (SIAP), based on area navigation (RNAV), to the WCA Hospital Heliport, Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA on or before December 12, 2003, No comments to the proposal were received. The rule is adopted as proposed.

The coordinates for this airspace docket are based on North American Datum 83. Class E airspace area designations for airspace extending upward from the surface of the earth are published in paragraph 6005 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) provides controlled Class E airspace extending upward from 700 feet above the surface for aircraft conducting IFR operations within a 6-mile radius of WCA Hospital Heliport, Jamestown, NY.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

Paragraph 6005 Class E Airspace Areas extending upward from 700 feet or more above the surface of the earth

* * * * *

AEA NY E5, Jamestown, NY [Revised]

Chautauqua County/Jamestown Airport, Jamestown, NY
(Lat. 42°09′12″ N., long. 79°15′29″ W.)
WCA Hospital Heliport
(Lat. 42°05′24″ N., long. 79°13′50″ W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Chautauqua County/Jamestown Airport and within 2.2 miles each side of the Runway 31 extended centerline extending from the 6.6-mile radius to 7 miles northwest of the runway and within 2.2 miles each side of Runway 13 extended centerline extending from the 6.6-mile radius to 7.9 miles southeast of the runway and within a 6-mile radius of WCA Hospital Heliport.

* * * * *

Dated: Issued in Jamaica, New York, on December 16, 2003.

John G. McCartney,

Assistant Manager, Air Traffic Division, Eastern Region.

[FR Doc. 03–31733 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16220; Airspace Docket No. 03–AEA–15]

Amendment of Class E Airspace; Honesdale, PA

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at Honesdale, PA. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain aircraft operating into Spring Hill Airport, Sterling, PA under Instrument Flight Rules (IFR).

EFFECTIVE DATE: 0901 UTC April 15, 2004.

FOR FURTHER INFORMATION CONTACT: Mr. Francis Jordan, Airspace Specialist, Airspace Branch, AEA–520, Air Traffic Division, Eastern Region, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, New York 11434–4809, telephone: (718) 553–4521.

SUPPLEMENTARY INFORMATION:

History

On November 6, 2003, a notice proposing to amend part 71 of the Federal Aviation Regulations (14 CFR Part 71) by amending Class E airspace extending upward from 700 feet above the surface of Spring Hill Airport, Sterling, PA was published in the **Federal Register** (68 FR 62759–62760). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA on or before December 5, 2003. No comments to the proposal were received. The rule is adopted as proposed. The coordinates for this airspace docket are based on North American Datum 83. Class E airspace area designations for airspace extending upward from the surface of the earth are published in paragraph 6005 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published in the Order.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) provides controlled Class E airspace extending upward from 700 feet above the surface for aircraft conducting IFR operations within a 6-mile radius of Spring Hill Airport, Sterling, PA.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

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

* * * * *

AEA PA E5, Honesdale, PA [Revised]

Cherry Ridge Airport, Honesdale, PA
(Lat. 41°30′55″ N., long 75°15′05″ W.)
Spring Hill Airport, Sterling, PA
(Lat. 41°20′50″ N., long. 75°24′57″ W.)
Wilkes-Barre VORTAC
(Lat. 41°16′22″ N., long. 75°41′22″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Cherry Ridge Airport and within 4.4 miles each side of the Wilkes-Barre VORTAC 054° radial extending from the 6.3-mile radius to 8.7 miles northeast of the VORTAC and within a 6-mile radius of Spring Hill Airport.

* * * * *

Issued in Jamaica, New York, on December 9, 2003.

John G. McCartney,

Assistant Manager, Air Traffic Division, Eastern Region.

[FR Doc. 03–31735 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–15876; Airspace Docket No. 03–AGL–14]

Modification of Class E Airspace; Zanesville, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E Airspace at Zanesville, OH. An Area Navigation (RNAV) Standard Instrument Approach Procedure (SIAP) has been developed for Zanesville Municipal Airport. Controlled airspace extending upward from 700 feet above the surface of the earth is needed to contain aircraft executing this approach. This action increases the area of the existing controlled airspace at Zanesville Municipal Airport.

EFFECTIVE DATE: 0901 UTC, April 15, 2003.

FOR FURTHER INFORMATION CONTACT: Patricia A. Graham, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7568.

SUPPLEMENTARY INFORMATION:

History

On Monday, September 29, 2003, the FAA proposed to amend 14 CFR part 71 to modify Class E airspace at Zanesville, OH (69 FR 55911). The proposal was to modify controlled airspace extending upward from 700 feet above the surface of the earth to contain Instrument Flight Rules (IFR) operations in controlled airspace during portions of the terminal operation and while transiting between the enroute and terminal environments.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005, of FAA Order 7400.9L dated September 2, 2003,

and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the order.

The Rule

This amendment to 14 CFR part 71 modifies Class E airspace at Zanesville, OH, to accommodate aircraft executing instrument flight procedures into and out of Zanesville Municipal Airport. The area will be depicted on appropriate aeronautical charts.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

* * * * *

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

* * * * *

AGL OH E5 Zanesville, OH [Revised]

Zanesville Municipal Airport, OH
(Lat. 39°56′40″ N., long. 81°53′32″ W.)
Zanesville VOR/DME
(Lat. 39°56′27″ N., long. 83°53′33″ W.)

That airspace extending upward from 700 feet above the surface within an 8.5-mile radius of the Zanesville Municipal Airport and within 7 miles east and 4.4 miles west of the Zanesville VOR/DME 220° radial extending from the VOR/DME to 10.5 miles southwest of the VOR/DME, excluding that airspace within the Cambridge, OH Class E airspace area.

* * * * *

Issued in Des Plaines, Illinois, on December 10, 2003.

Nancy B. Shelton,

Manager, Air Traffic Division, Great Lakes Region.

[FR Doc. 03–31736 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–02–035]

RIN 1626–AA09

Drawbridge Operation Regulation Change, St. Croix River, Minnesota and Wisconsin

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the regulations governing the operation of the Burlington Northern Santa Fe Railroad Bridge, Mile 0.2, Prescott, Wisconsin; U.S. 16–61 Bridge, Mile 0.3, Prescott, Wisconsin, the Union Pacific Railroad Bridge, Mile 17.3, Hudson, Wisconsin across the St. Croix River, and the S36 Highway Bridge at Stillwater, mile 23.4. This rule modifies the dates and hours requiring advanced notice for openings on each of the bridges. These changes are intended to reduce the number of hours that a drawtender is required to be on site at each of the bridges while maintaining satisfactory service to vessels navigating the area.

DATES: This rule is effective January 23, 2004.

ADDRESSES: Comments and materials received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD08–02–035 and are available for inspection or copying at room 2.107f in the Robert A. Young Federal Building at Eighth Coast Guard District, Bridge Branch, 1222 Spruce Street, St. Louis, MO 63103–2832, between 7 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (314) 539–3900, extension 2378.

FOR FURTHER INFORMATION CONTACT: Mr. Roger K. Wiebusch, Eighth Coast Guard District, Bridge Branch, Bridge Administrator, (314) 539–3900, extension 2378.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On April 16, 2002, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation Change, St. Croix River, MN in the **Federal Register** (67 FR 18521). We received six letters commenting on the proposed rule. On March 25, 2003, we clarified a statement in the NPRM and reopened the comment period to receive additional comments (68 FR 14364). No comments were received during the additional comment period. On September 9, 2003, we published a Supplemental Notice of Proposed Rulemaking (SNPRM) (68 FR 53079) in which we amended the original proposed rule based on comments received in response to the April 16, 2002 NPRM. No additional comments were received in response to the SNPRM. No public hearing was requested, and none was held.

Background and Purpose

In accordance with 33 CFR 117.667, the draws of the Burlington Northern Santa Fe Railroad Bridge, Mile 0.2 at Prescott, Wisconsin, the U.S. 16–61 Bridge, Mile 0.3, at Prescott, Wisconsin and the Union Pacific Railroad Bridge, Mile 17.3, at Hudson, Wisconsin, currently open on signal; except that, from December 15 through March 31, the draws open on signal if at least 24-hours notice is given. Currently, the S36 Stillwater Highway Bridge, Mile 23.4 at Stillwater, Minnesota opens on signal at various times throughout the day from May 15 through October 15, and on signal from October 16 through May 14. The NPRM proposed to amend the regulations governing drawbridges across the St. Croix River by adding a notice requirement for bridge openings during the summer season. Specifically, the NPRM requiring that advance notice be given prior to 11 p.m. for openings between midnight and 7 a.m. from April 1 to October 15 for three of the four bridges.

The Burlington Northern Santa Fe Railroad, Mile 0.2 at Prescott initially

requested a change to the regulation for the Burlington Northern Santa Fe Railroad, to open on signal from 7 a.m. to midnight and to open between midnight and 7 a.m., if the bridge was notified prior to 11 p.m. during the summer tourism months. Although the request was submitted by only one bridge owner, the approval would also impact the U.S. 16–61 Bridge and the Union Pacific Railroad Bridge. Therefore, the proposal was expanded to include these two bridges. The S36 Bridge at Stillwater is more remotely located than the other three bridges, and we have proposed a separate opening requirement for the S36 Bridge rather than including it with the other three bridges.

Discussion of Comments and Changes

The Coast Guard received no comment letters in response to the SNPRM. No changes will be made to this final rule.

Regulatory Evaluation

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

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

Implementing the regulation will allow the owners of drawbridges to reduce the number of hours drawtenders are required to be on site due to a reduction in requests to open the drawbridges between midnight and 8 a.m. from 1 April to 31 October. Previously, these advance notification requirements were temporarily instated to facilitate maintenance on the bridges. During the maintenance periods, the bridge owners received no complaints from commercial or recreational vessel operators. Additionally, this has become the widely accepted method of voluntarily requesting bridge openings from local vessel operators during non-maintenance periods without complaint.

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. This Coast Guard identified local marinas as small entities that might be affected by this rule due to restricted access to the marinas during periods when drawtenders are not on site. These Entities were consulted prior to initiating this rulemaking process to minimize the economic impact that might result from this rule.

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

We have analyzed this rule under Commandant Instruction M16475.1D,

which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation. Promulgation of changes to drawbridge regulations have been found to not have significant effect on the human environment. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' are available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 117

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. In § 117.667, paragraph (a) and paragraph (b), introductory text, are revised and a new paragraph (b)(3) is added to read as follows:

§ 117.667 St. Croix River.

(a) The draws of the Burlington Northern Santa Fe Railroad Bridge, Mile 0.2, the Prescott Highway Bridge, Mile 0.3, and the Hudson Railroad Bridge, Mile 17.3, shall operate as follows:

(1) From April 1 to October 31:

(i) 8 a.m. to midnight, the draws shall open on signal;

(ii) Midnight to 8 a.m., the draws shall open on signal if notification is made prior to 11 p.m.,

(2) From November 1 through March 31, the draw shall open on signal if at least 24 hours notice is given.

(b) The draw of the Stillwater Highway Bridge, Mile 23.4, shall open on signal as follows:

* * *

(3) From October 16 through May 14, if at least 24 hours notice is given.

* * * * *

Dated: December 12, 2003.

R.F. Duncan,

Commander, 8th CG District.

[FR Doc. 03–31625 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09–03–241]

RIN 1625–AA11

Regulated Navigation Area; Reporting Requirements for Barges Loaded With Certain Dangerous Cargoes, Illinois Waterway System Within the Ninth Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Interim final rule; notice of approval of revised collection of information.

SUMMARY: On October 3, 2003, the Coast Guard published an interim final rule in the **Federal Register** that established a regulated navigation area (RNA) within all portions of the Illinois Waterway System located in the Ninth Coast Guard District and contained reporting requirements for barges loaded with certain dangerous cargoes. This document provides notice that the Office of Management and Budget has approved the revised collection of information contained in that interim rule.

DATES: OMB approved revised collection of information 1625–1505 on November 3, 2003.

FOR FURTHER INFORMATION CONTACT: For information regarding this document, or if you have questions on viewing or submitting material to the docket, write or call Commander (CDR) Michael Gardiner or Lieutenant (LT) Matthew Colmer, Project Managers for the Ninth Coast Guard District Commander, 1240 East Ninth Street, Cleveland, Ohio 44199–2060, telephone (216) 902–6059.

SUPPLEMENTARY INFORMATION: On October 6, 2003, the Coast Guard published an interim final rule entitled ''Regulated Navigation Area; Reporting Requirements for Barges Loaded with Certain Dangerous Cargoes, Illinois Waterway System Within the Ninth Coast Guard District'' in the **Federal Register** (68 FR 57616). In the preamble of that interim rule, we stated that we would publish a separate notice when and if the Office of Management and Budget (OMB) approved the revised collection of information (1625–1505) contained in the rule (68 FR 57621). On November 3, 2003, OMB announced that they had approved this revised collection of information.

Dated: December 15, 2003.

Ronald F. Silva,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 03–31624 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

37 CFR Parts 2 and 7

[Docket No. 2003–T–030]

RIN 0651–AB45

Modification to Temporary Postponement of Electronic Filing and Payment Rules for Certain Madrid Protocol-related Rules

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule; modification to suspension of applicability dates.

SUMMARY: The United States Patent and Trademark Office (USPTO) is extending, until November 2, 2004, a temporary postponement of those provisions of the Trademark Rules of Practice that require electronic transmission to the USPTO of applications for international registration, responses to irregularity notices, and subsequent designations submitted pursuant to the Madrid Protocol. The postponement was announced most recently in a document published in the **Federal Register** on November 7, 2003.

The USPTO is also extending a temporary suspension, announced in the same **Federal Register** document, of those provisions of the Rules of Practice that allow payment of fees charged by the International Bureau of the World Intellectual Property Organization (IB) to be submitted through the USPTO, and those provisions of the Trademark Rules of Practice that require that all fees for international trademark applications and subsequent designations be paid at the time of filing.

The extensions and postponements announced herein are procedural in nature and do not affect any substantive rights.

APPLICABILITY DATES: January 2, 2004, until November 2, 2004. The applicability dates for certain rules in 37 CFR parts 2 and 7, published September 26, 2003, and thereafter suspended until January 4, 2004, are hereby further suspended until November 2, 2004.

DATES: The applicability date for regulations at 37 CFR 2.190(a),

2.198(a)(1), 7.7(a) and (b), 7.11(a) introductory text and (a)(9), 7.14(e), 7.21(b) introductory text and (b)(7) is suspended until November 2, 2004.

FOR FURTHER INFORMATION CONTACT: Ari Leifman, Office of the Commissioner for Trademarks, by telephone at (703) 308–8910, extension 155, or by e-mail to ari.leifman@uspto.gov.

SUPPLEMENTARY INFORMATION:

Background

As set forth below, the USPTO is extending the postponement of the applicability date of those regulations that require use of electronic forms in connection with certain Madrid Protocol submissions *until November 2, 2004.* Additionally, the USPTO is likewise extending *to November 2, 2004*, the postponement of the applicability date of those regulations that require that international fees be paid concurrently with Madrid filings, and that these fees be paid through the USPTO.

The Madrid Protocol provides a system for obtaining an international trademark registration. The Madrid Protocol Implementation Act of 2002, Pub. L. 107–273, 116 Stat. 1758, 1913–1921 (MPIA) amends the Trademark Act of 1946 to implement the provisions of the Madrid Protocol in the United States.

On September 26, 2003, the USPTO published new regulations to implement the MPIA. 68 FR 55748, posted on the USPTO Web site at *http://www.uspto.gov/web/offices/com/sol/notices/68fr55748.pdf.* These regulations took effect on November 2, 2003. The regulations require that certain submissions that are made to the USPTO in connection with the Madrid Protocol be transmitted using the Trademark Electronic Application System (TEAS). Specifically, 37 CFR 7.11(a) requires that an international application be submitted through TEAS; 37 CFR 7.21(b) requires that a subsequent designation (a request that protection be extended to countries not identified in the original international application) be submitted through TEAS; and 37 CFR 7.14(e) requires that where the International Bureau of the World Intellectual Property Organization (IB) has issued a notice of irregularity to an international applicant, and the international applicant submits a response to that notice through the USPTO, the response must be transmitted through TEAS.

Madrid Submissions Must Be Prepared Using Paper

On October 24, 2003, the USPTO published a document in which it announced that it would permit international applications, responses to irregularity notices, and subsequent designations to be submitted on paper rather than through TEAS, for a temporary period of time. The document accordingly postponed the applicability of 37 CFR 7.11(a), 7.21(b), and 7.14(e), to the extent that those provisions require transmission through TEAS. The document further provided that this postponement would remain in effect until January 2, 2004.

Thereafter, on November 7, 2003, the USPTO published a second document in which it announced that the postponement remained in effect but was modified. The original postponement had provided that applicants could make their submission either on paper or through TEAS. However, the document of November 7, 2003, provided that all Madrid submissions *must* be made on paper. That modification was necessary, because technical difficulties had prevented the deployment of TEAS.

Some of these difficulties have not yet been resolved, and the TEAS forms cannot yet be posted. Therefore, the postponement of the applicability date of 37 CFR 7.11(a), 7.21(b), and 7.14(e) *is hereby extended to November 2, 2004.*

If the TEAS forms are posted while the extended postponement of the applicability dates of 37 CFR 7.11(a), 7.21(b), and 7.14(e) is still in effect, then applicants will be able to file international applications, responses to irregularity notices, and subsequent designations either on paper or through TEAS. Under any circumstances, there will be a transition period during which the USPTO will accept both electronic and paper submissions. This additional period will give applicants the flexibility and the opportunity to become comfortable with the electronic system when it becomes available.

International Fees Must Be Paid Directly to the IB

In addition to requiring that certain submissions that are made to the USPTO in connection with the Madrid Protocol be transmitted using TEAS, the Rules of Practice that took effect on November 2, 2003, also require that international application fees be paid at the time of submission. However, the document of November 7, 2003, temporarily suspended the applicability of those requirements, until January 4, 2004. Thus, the document suspended 37 CFR 7.11(a)(9), to the extent that it requires that international application fees for all classes and the fees for all designated Contracting Parties identified in an international application be paid at the time of submission. Likewise, the document suspended 37 CFR 7.21(b)(7), to the extent that it requires that all international fees for a subsequent designation be paid at the time of submission.

The document of November 7, 2003, further provided that (1) applicants who file Madrid submissions on paper must pay the USPTO certification fee at the time of submission, but must pay the international fees directly to the IB, and that (2) applicants who submit a subsequent designation on paper must pay the USPTO transmittal fee at the time of submission, but must pay the international fees directly to the IB. Additionally, the notice provided that applicants may pay the international fees to the IB either before or after submission of the international application or subsequent designation.

These provisions of the document of November 7, 2003, are hereby extended to November 2, 2004.

If the TEAS forms are posted while the postponement of the applicability dates of 37 CFR 7.11(a)(9) and 7.21(b)(7) remains in effect, then applicants who elect to use those forms will pay the international fees (1) at the time of submission, and (2) through the USPTO.

Applicants Should Utilize Madrid Forms Provided by the IB

Applicants making Madrid submissions should use forms provided by the IB for that purpose. These forms may be downloaded from the IB Web site *http://www.wipo.int/madrid/en/.* Please note that the IB will not process paper submissions that are not prepared using IB forms.

Applicants Should Mail Madrid Submissions to a Designated Address

Pursuant to 37 CFR 2.190(a), all trademark-related documents submitted on paper must be mailed to a designated USPTO address. However, the document of November 7, 2003, waived that rule with respect to international applications, subsequent designations, and responses to notices of irregularities that are filed on paper. The document further provided that all Madrid submissions made on paper should be mailed to the following address: Commissioner for Trademarks, P.O. Box 16471, Arlington, Virginia 22215–1471, Attn: MPU.

The Limited Waiver of 37 CFR 2.190(a) Is Hereby Extended to November 2, 2004

Please note that any trademark-related correspondence other than international applications, subsequent designations, and responses to irregularity notices that is sent to the above-identified address will not be accepted, and will be returned to the sender.

If a submission mailed to the above address pursuant to this document and to the document of November 7, 2003, is delivered by the Express Mail service of the United States Postal Service, the USPTO will deem that the date of receipt of the submission in the USPTO is the date the submission was deposited as Express Mail, provided that the submitter complies with the requirements set forth in 37 CFR 2.198.

Please note that the USPTO is not suspending those rules that require electronic filing of extensions of time to oppose and notices of opposition with the Trademark Trial and Appeal Board, namely 37 CFR 2.101(b)2 and 37 CFR 2.102(a)2.

Dated: December 18, 2003.

Jon W. Dudas,

Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.

[FR Doc. 03–31698 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–16–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 259

[Docket No. 2003–4 CARP]

Filing of Claims for DART Royalty Funds

AGENCY: Copyright Office, Library of Congress.

ACTION: Waiver of regulation.

SUMMARY: Due to continuing delays in the receipt of mail, the Copyright Office of the Library of Congress is announcing alternative methods for the filing of claims to the DART royalty funds for the year 2003. In order to ensure that claims are timely received, claimants are encouraged to file their DART claims online or by fax, utilizing the special procedures described in this document.

EFFECTIVE DATE: January 1, 2004.

ADDRESSES: Claims may be filed online through the Copyright Office Web site at *http://www.copyright.gov/carp/dart/index.html.* Submissions by facsimile should be sent to (202) 252–3423. Submissions sent by a commercial courier must be delivered to the Congressional Courier Acceptance Site, located at 2nd and D Streets, NE., between 8:30 a.m. and 4 p.m. If sent by mail, an original and two copies of each claim should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If hand delivered by a party, an original and two copies of each claim should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, room 403, First and Independence Avenue, SE., Washington, DC 20540. *See* **SUPPLEMENTARY INFORMATION** for information about online electronic filing through the Copyright Office Web site.

FOR FURTHER INFORMATION CONTACT: William J. Roberts, Jr., Senior Attorney, Susan Grimes, CARP Specialist, or Ralphael Small, Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION:

Background

Chapter 10 of the Copyright Act, 17 U.S.C., places a statutory obligation on manufacturers and importers of digital audio recording devices and media (''DART'') who distribute the products in the United States to submit royalty fees to the Copyright Office. 17 U.S.C. 1003. Distribution of these royalty fees may be made to any interested copyright owner who has filed a claim and (1) whose sound recording was distributed in the form of digital musical recordings or analog musical recordings and (2) whose musical work was distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions. 17 U.S.C. 1006.

Section 1007 provides that claims to these royalty fees must be filed ''[d]uring the first 2 months of each calendar year'' with the Librarian of Congress ''in such form and manner as the Librarian of Congress shall prescribe by regulation.'' 17 U.S.C. 1007. Part 259 of title 37 of the Code of Federal Regulations sets forth the procedures for the filing of claims to the DART royalty funds. Section 259.5 states that in order for a claim to be considered timely filed with the Copyright Office, the claims either have to be hand delivered to the Office by the last day in February [1] or if sent by mail, received by the Office by the last day in February or bear a January or February United States Postal Service postmark. 37 CFR 259.5(a). Claims received after the last day in February will be accepted as timely filed only upon proof that the claim was placed within the United States Postal Service during the months of January or February. 37 CFR 259.5(e). A January or February postmark of the United States Postal Service on the envelope containing the claim or, if sent by certified mail return receipt requested, on the certified mail receipt constitutes sufficient proof that the claim was timely filed.[2] 37 CFR 259.5(e). The regulations do not provide for the filing of DART claims by alternative methods such as online submission or facsimile transmission.

In the year 2001, due to severe disruptions in the delivery of mail to the Office caused by threat of possible anthrax contamination, the Copyright Office waived the regulations requiring that claims bear ''the original signature of the claimant or of a duly authorized representative of the claimant,'' 37 CFR 259.3(b), and prohibiting the filing by ''facsimile transmission,'' 37 CFR 259.5(d), for the filing of claims to the DART royalty funds for the year 2001. *See* 67 FR 5213 (February 5, 2002). Due to continued security measures affecting the delivery of mail, the Copyright Office waived regulations for the filing of 2002 DART claims last year as well. Certain incoming mail continues to be irradiated and all mail is diverted to an off-site location for screening, resulting in delays in its delivery to the Office. In light of these continuing delays, the Office once again is waiving §§ 259.3(b) and 259.5(d) and allowing the online and facsimile submission of DART claims to the 2003 royalty funds. Online forms are available and may be submitted via the Office's Web site. Note however, that the alternative methods set forth in this Notice apply only to the filing of DART claims for the 2003 royalties which are due by March 1, 2004, and in no way apply to other filings with the Office. Please note that as a result of the last date in February occurring on a Sunday this year, the DART claims are due on Monday, March 1, 2004, in accordance with 37 CFR 259.5(b).

This Notice covers only the means by which claims may be accepted as timely filed; all other filing requirements, such

[1] In any year in which the last day of February falls on Saturday, Sunday, a holiday or other nonbusiness day within the District of Columbia or the Federal Government, claims received by the Copyright Office by the first business day in March, or properly addressed and deposited with sufficient postage with the United States Postal Service and postmarked by the first business day in March, shall be considered timely filed. 37 CFR 259.5(b).

[2] Claims dated only with a business meter that are received after the last day in February will not be accepted as having been timely filed. 37 CFR 259.5(c).

as the content of claims, remain unchanged, except as noted herein. *See* 37 CFR part 259.

Acceptable Methods of Filing DART Claims for the Year 2003

Claims to the 2003 DART royalty funds may be submitted as follows:

a. Online Submission

In order to best ensure the timely receipt by the Copyright Office of DART claims, the Office strongly encourages claimants to file their claims online by February 29, 2004, via the Copyright Office Web site. The Office has devised online electronic forms for filing both single and joint DART claims. Claimants will be able to access and complete the forms via the Copyright Office Web site and may submit the forms online as provided in the instructions accompanying the forms. DART forms will be posted on the Office Web site at *http://www.copyright.gov/carp/dart/index.html.* Claimants filing a joint claim may list each of their joint claimants directly on the Office's online joint claim form or may submit the list of joint claimants as a file attachment to the submission page. Lists of joint claimants sent as an attachment must be in a single file in either Adobe Portable Document (''PDF'') format, in Microsoft Word Version 2000 or earlier, in WordPerfect 9 or earlier, or in ASCII text. There will be a browse button on the form that will allow claimants to attach the file containing the list of joint claimants and then to submit the completed form to the Office. The attachment must contain only the list of names of joint claimants. Joint claims with attachments containing information other than the joint claimants' names will be rejected.

The DART forms will be available for use during the months of January, February and on March 1, 2004. It is critically important to follow the instructions in completing the forms before submitting them to the Office. Claims submitted online using forms or formats other than those specified in this Notice will not be accepted by the Office. Claims filed online must be received by the Office no later than 11:59 p.m. E.S.T. on March 1, 2004. Specifically, the completed electronic forms must be received in the Office's server by that time. Any claim received after that time will be considered untimely filed. Claimants will receive an electronic mail message in response stating that the Office has received their submission. Therefore, claimants utilizing this filing option are required to provide an e-mail address. Claimants submitting their claims online are strongly encouraged to send their claim no later than February 29, 2004, in order to avoid any unforseen delays in receipt of claims by the Office.

When filing claims online, all provisions set forth in 37 CFR part 259 apply except § 259.3(b), which requires the original signature of the claimant or of the claimant's duly authorized representative on the claim. The Office is waiving this provision for this filing period because at this time the Office is not equipped to receive and process electronic signatures.

b. Facsimile

Claims may be filed with the Office via facsimile transmission and such filings must be sent to (202) 252–3423. Claims filed in this manner must be received in the Office no later than 5 p.m. E.S.T. on March 1, 2004. The fax machine will be disconnected at that time. Claims sent to any other fax number will not be accepted by the Office.

When filing claims via facsimile transmission, claimants must follow all provisions set forth in 37 CFR part 259 with the exception of § 259.5(d), which prohibits the filing of claims by facsimile transmission. The Office is waiving this provision at this time in order to assist claimants in the timely filing of their claims.

c. By Mail

Section 259.5(a)(2) directs claimants filing their claims by mail to send the claims to the Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024. Claimants electing to send their claims by mail are encouraged to send their claims by certified mail return receipt requested, to have the certified mail receipt (PS Form 3800) stamped by the United States Postal Service, and to retain the certified mail receipt in order to provide proof of timely filing, should the claim reach the Office after March 1, 2004. In the event there is a question as to whether the claim was deposited with the United States Postal Service during the months of January, February, or on March 1, 2004, the claimant must produce the certified mail receipt (PS Form 3800) which bears a United States Postal Service postmark, indicating an appropriate date.

Because of delays in the receipt of mail, claimants are urged not to use the mail as a means of filing their claims to the 2003 DART royalty funds. While the Office is not prohibiting the filing of claims by mail, those who do so assume the risk that their claim will not reach the Office in a timely manner. Claims sent by mail must be addressed in accordance with § 259.5(a)(2), and the Office again strongly encourages the claimant to send the claim by certified mail return receipt requested, to have the certified mail receipt (PS Form 3800) stamped by the United States Postal Service, and to retain the certified mail receipt, as it constitutes the only acceptable proof of timely filing of the claim. Claims dated only with a business meter that are received by the Office after March 1, 2004, will be rejected as being untimely filed.

When filing claims by this method, claimants must follow all provisions set forth in 37 CFR part 259.

d. Hand Delivery

Beginning December 29, 2003, the Library of Congress will no longer accept in-person, on site deliveries from non-governmental, commercial couriers or messengers. *See* 68 FR 70039 (December 16, 2003). Instead, couriers must deliver materials for staff at the Library of Congress, including claims to DART royalties, directly to the Congressional Courier Acceptance Site (''CCAS''), located on 2nd and D Streets, NE. The CCAS will accept items from couriers with proper identification, *e.g.*, a valid driver's license, Monday through Friday between 8:30 a.m. and 4 p.m. The date of receipt as documented by CCAS will be considered the date of receipt by the Copyright Office for purposes of timely filing. Any claim received from CCAS which does not have a date stamp of March 1, 2004 or earlier, will be considered untimely for this filing period and rejected by the Copyright Office. Alternatively, if a party chooses to hand deliver its claim personally, it can still do so. However, it is possible that under the new system such deliveries may still be redirected to CCAS for processing. For this reason, claimants who choose to have their claims hand delivered to the Copyright Office are strongly encouraged to have their claims delivered by 4 p.m. on Friday, February 27, 2004. The Copyright Office cannot guarantee timely receipt of a hand delivered claim after this date.

Waiver of Regulation

The regulations governing the filing of DART claims require ''the original signature of the claimant or of a duly authorized representative of the claimant,'' 37 CFR 259.3(b), and do not allow claims to be filed by ''facsimile transmission,'' 37 CFR 259.5(d). This Notice, however, waives these provisions as set forth herein solely for the purpose of filing claims to the 2003 DART royalties. The Office is not, and indeed cannot, waive the statutory

deadline for the filing of DART claims. *See, United States* v. *Locke,* 471 U.S. 84, 101 (1985). Thus, claimants are still required to file their claims by March 1, 2004.

Waiver of an agency's rules is ''appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.'' *Northeast Cellular Telephone Company* v. *FCC,* 897 F.2d 1164, 1166 (D.C. Cir. 1990); *see also, Wait Radio* v. *FCC,* 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied,* 409 U.S. 1027 (1972). Under ordinary circumstances, the Office is reluctant to waive its regulations. However, the continuing delays in the receipt of the mail constitutes a special circumstance which has led the Office to deviate from its usual mail processing procedures. Thus, given the delays in the receipt of mail, the Office believes that the public interest will best be served by waiving, for this filing period, the requirement that DART claims bear the original signature of the claimant or of a duly authorized representative of the claimant, when, and only when, such claim is filed online through the Office's Web site. *See* 67 FR at 5214.

The Office cannot waive the statutory deadline set forth in 17 U.S.C. 1007 and accept claims filed after March 1, 2004. *See Locke, supra.* Therefore, in order to serve the public interest the Office is providing claimants with alternative methods of filing, in addition to those set forth in the regulations, in order to assist them in timely filing their claims. By allowing claims to be filed online and by facsimile transmission, the Office is affording to all claimants an equal opportunity to meet the statutory deadline.

Dated: December 19, 2003.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 03–31774 Filed 12–23–03; 8:45 am]

BILLING CODE 1410–33–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AD–FRL–7601–5]

RIN 2060–AK28

Approval and Promulgation of Implementation Plans; Prevention of Significant Deterioration (PSD)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final action revises implementation plans concerning the Prevention of Significant Deterioration (PSD) program mandated by part C of title I of the Clean Air Act (CAA or Act). These revisions include changes to incorporate newly promulgated paragraphs in the Federal PSD rule into the Federal Implementation Plan (FIP) portion of the State plan where a State agency does not have an approved PSD State Implementation Plan (SIP) in place. Specifically, the revisions provide a category of equipment replacement activities that are not subject to Major New Source Review (NSR) requirements under the routine maintenance, repair and replacement (RMRR) exclusion. The changes are intended to provide greater regulatory certainty without sacrificing the current level of environmental protection and benefit derived from the NSR program, and to ensure comprehensive and consistent implementation of the Federal PSD program by State, local, and tribal agencies where EPA has determined that they have the responsibility to implement the Federal PSD program.

EFFECTIVE DATE: This final rule is effective on December 26, 2003.

ADDRESSES: *Docket.* Docket No. A–2002–04 is located at the EPA Docket Center, EPA West, U.S. EPA (6102T), 1301 Constitution Avenue, NW, Room B–102, Washington, DC 20460. The E-docket OAR–2002–0068 for this rulemaking is available electronically at *http://www.epa.gov/edocket.*

FOR FURTHER INFORMATION CONTACT: Mrs. Pamela S. Long, Information Transfer and Program Integration Division (C339–03), U.S. EPA Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone number (919) 541–0641, facsimile number (919) 541–5509, electronic mail email address: *long.pam@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially affected by this final action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry group	SIC [a]	NAICS [b]
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	32411
Industrial Inorganic Chemicals	281	325181, 32512, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	48621, 22121
Pulp and Paper Mills	261	322110, 322121, 322122, 32213
Paper Mills	262	322121, 322122
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414

[a] Standard Industrial Classification

[b] North American Industry Classification System.

Entities potentially affected by this final action also include State, local, and tribal governments that are delegated authority to implement these regulations.

The EPA has established an official public docket for this action under E-docket OAR–2002–0068 (Legacy Docket No. A–2002–04). The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center, EPA West, Room B–102, 1301 Constitution Avenue, NW, Washington, DC 20460. The Docket Center 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 Docket is (202) 566–1742. A reasonable fee may be charged for copying docket materials.

Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/.*

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of today's final rule will also be available on the WWW through EPA's Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of the rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at: *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Judicial Review

Under section 307(b) of the CAA, judicial review of the final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit February 23, 2004. Under section 307(d)(7)(B) of the CAA, only an objection to the rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by today's final action may not be challenged separately in any civil or criminal proceeding we bring to enforce these requirements.

Outline

The information presented in this preamble is organized as follows:

I. Today's Final Action
A. Background
B. Revisions to Part 52
C. Effective Date for Today's Final Action
II. Statutory and Executive Order Reviews
A. Executive Order 12866—Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Analysis (RFA)
D. Unfunded Mandates Reform Act of 1995
E. Executive Order 13132—Federalism
F. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks
H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act of 1995
J. Congressional Review Act

I. Today's Final Action

A. *Background*

The 1970 CAA at section 110 required States to submit plans to provide for the implementation and maintenance of the national ambient air quality standards (NAAQS). While the 1970 CAA established requirements for protecting the NAAQS through SIP's, it did not address prevention of significant deterioration of air quality. On May 31, 1972 (37 FR 10842), the Administrator published initial approvals and disapprovals of SIP's submitted pursuant to section 110 of the CAA. On November 9, 1972 (37 FR 23836), all SIP's were disapproved insofar as they failed to provide for significant deterioration of air quality. This action was taken in response to a preliminary injunction issued by the District Court for the District of Columbia, which also required the Administrator to promulgate regulations as to any State plan that either permits the significant deterioration of air quality in any portion of any State, or fails to take the measures necessary to prevent significant deterioration.

On July 16, 1973 (38 FR 18986), ''we'' [1] proposed several alternative plans for prevention of significant deterioration. On December 5, 1974 (39 FR 42510), we promulgated the Federal PSD program, 40 CFR 52.21. These regulations established a Federal program under section 101(b)(1) of the 1970 CAA to conduct preconstruction review of specified source categories where State agencies fail to provide for prevention of significant deterioration of air quality. This final action also disapproved all State plans as lacking procedures or regulations for preventing significant deterioration of air quality and incorporated the Federal PSD regulations by reference into all State plans. Specifically, it incorporated the provisions of section 52.21 by reference into the SIP's in subparts B through DDD of part 52. (See 39 FR 42514 concerning section 52.21(a), plan disapproval.)

On June 19, 1978 (43 FR 26388), we amended our PSD regulations to implement the new requirements of the Clean Air Act Amendments of 1977 (Pub. L 95–95). These regulations built on the previous ones, but provided a more comprehensive program pursuant to part C (sections 160–165) of title I, which was added in the 1977 CAA Amendments. The 1977 CAA Amendments also added the specific requirement that the PSD program be implemented through SIP's submitted pursuant to CAA section 110. Our final rules in 1978 also amended section 52.21 to incorporate all of the new requirements of CAA sections 160–165 into the Federal PSD program. This final rule contained the same language concerning plan disapprovals that is contained in section 52.21(a)(1) as promulgated on December 31, 2002, as follows:

Section 52.21(a) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable in subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal government and Indian reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligation of States, emission sources, or other persons with respect to all portions of these plans approved or promulgated under this part (46 FR 26403).

The 1978 final rule also incorporated section 52.21 by reference into the SIP's for 54 programs (50 States, Puerto Rico, Virgin Islands, American Samoa, and Guam) as follows:

(a) The requirements of sections 160 through 165 of the Clean Air Act are not met, since the plan does not include approvable procedures for preventing the significant deterioration of air quality.

(b) The provisions of section 52.21 (b) through (v) are hereby incorporated and made part of the applicable State plan for the State of_____(see 43 FR 26410).

On August 7, 1980 (43 FR 52676), we amended our PSD regulations in response to the decision by the U.S. Court of Appeals for the D.C. Circuit in *Alabama Power Company* v. *Costle,* 636 F.2d. 323 (D.C. Cir. 1979). In addition to revising the PSD rules to respond to the court, this final rule disapproved a number of SIP's for PSD purposes and incorporated section 52.21 by reference into the Federal implementation plan portions of the SIP's for those programs. It also contained the same language concerning plan disapprovals that is contained in the December 31, 2002 provisions at section 52.21(a)(1), as well as the same language concerning incorporation by reference in the relevant subparts of part 52 (*see* 45 FR 52741).

B. Revisions to Part 52

Today, we are making administrative amendments to the Federal implementation plan portions of State plans to update the reference to the PSD FIP that is already incorporated into these plans. When we proposed the

[1] In this preamble the term ''we'' refers to EPA and the term ''you'' refers to major stationary sources of air pollution and their owners and operators. All other entities are referred to by their respective names (for example, reviewing authorities.)

RMRR regulation, we indicated that the rule would impact State and local authorities implementing the Federal PSD program through delegations. In the rule that was published in the **Federal Register** on October 27, 2003 (68 FR 61248), consistent with the proposal, we unambiguously announced our intent to finalize an update to the State plans that had delegated FIPs for PSD. Today's final rule makes administrative amendments to the these delegated programs to incorporate the provisions published in the **Federal Register** on October 27, 2003. This rule is similar in effect to the amendments published in the **Federal Register** on March 10, 2003 (68 FR 11316). In that action, EPA adjusted the citations incorporated into the Federal implementation plan portions of State plans so that all of the substantive amendments as of December 31, 2002 to the PSD regulations would become part of the Federal implementation plan portions of State plans. In today's action, we are further revising references for each FIP to incorporate the equipment replacement provision amendments into the Federal implementation plan portions of State plans.

Today's rule differs in one respect from the previous action to revise the Federal implementation portions of State plans. In the previous rule, we incorporated the relevant subsection 52.21 by referring to the paragraphs as ''(a)(2) and (b) to (bb).'' The purpose of that reference was to incorporate all the substantive provisions of 52.21. Today's rule adopts a different cross-referencing format—''40 CFR 52.21 except paragraph (a)(1).'' Using this format, the Agency intends for the Federal implementation plan portions of State plans to automatically update whenever new sections are added to 52.21.

No tribal government currently has an approved tribal implementation plan (TIP) under the CAA to implement the NSR program. The Federal government is currently the NSR reviewing authority in Indian country. Pursuant to section 52.21(a)(1), the provisions of section 52.21 are applicable to all lands owned by the Federal Government and Indian Reservations located in each State. Therefore, we are incorporating the PSD regulations in section 52.21 by reference into the FIP portion of SIP's where the requirements of CAA sections 160–165 are not met for federally designated Indian lands. By this final action, we are not changing the authority for implementing and enforcing the Federal PSD permitting program for any sources located in Indian country. This incorporation by reference only applies to those sections of subparts B through DDD of part 52 that currently incorporate the PSD FIP program for Indian lands.

C. Effective Date for Today's Final Action

Today's final regulations are effective on December 26, 2003. This is consistent with the December 26, 2003 effective date for the changes to the Federal PSD program in section 52.21 that were published in the **Federal Register** on October 27, 2003. (See 68 FR 61248.)

II. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order 12866, [58 FR 51735 (October 4, 1993)] the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to EO 12866 review.

B. Paperwork Reduction Act

The information collection requirements for the final rule published October 27, 2003 (68 FR 61248) has been submitted for approval to OMB under the requirements of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* An ICR document has been prepared by EPA (ICR No. 1230.14), and a copy may be obtained from Susan Auby, U.S. Environmental Protection Agency, Office of Environmental Information, Collection Strategies Division (2822T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0001, by e-mail at *auby.susan@epa.gov,* or by calling (202) 566–1672. A copy may also be downloaded off the Internet at *http://www.epa.gov/icr.* The information requirements included in ICR No. 1230.14 are not enforceable until OMB approves them.

The information that ICR No. 1230.14 covers is required for the submittal of a complete permit application for the construction or modification of all major new stationary sources of pollutants in attainment and nonattainment areas, as well as for applicable minor stationary sources of pollutants. This information collection is necessary for the proper performance of EPA's functions, has practical utility, and is not unnecessarily duplicative of information we otherwise can reasonably access. We have reduced, to the extent practicable and appropriate, the burden on persons providing the information to or for EPA. In fact, we expect that this rule will result in less burden on industry and reviewing authorities since it streamlines the process of determining whether a replacement activity is RMRR.

However, as we articulated in ICR No. 1230.14, we do anticipate an initial increase in burden for reviewing authorities as a result of the rule changes, to account for revising state implementation plans to incorporate these rule changes. As discussed above, we expect those one-time expenditures to be no more than $580,000 for the estimated 112 affected reviewing authorities. For the number of respondent reviewing authorities, the analysis uses the 112 reviewing authorities count used by other permitting ICR's for the one-time tasks (for example, SIP revisions).

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 purpose of responding to the information collection; adjust existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information; search existing data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

We will continue to present OMB control numbers in a consolidated table format to be codified in 40 CFR part 9 of the Agency's regulations, and in each CFR volume containing EPA regulations. The table lists the section numbers with reporting and recordkeeping requirements, and the current OMB control numbers. This listing of the OMB control numbers and their subsequent codification in the CFR satisfy the requirements of the *Paperwork Reduction Act* (44 U.S.C. 3501 *et seq.*) and OMB's implementing regulations at 5 CFR part 1320.

C. Regulatory Flexibility Analysis (RFA)

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. The EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) Any small business employing fewer than 500 employees (based on Small Business Administration's size definition); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, we have concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities'' (5 U.S.C. sections 603 and 604). Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect, on all of the small entities subject to the rule.

Today's rule will not have a significant economic impact on a substantial number of small entities because it will decrease the regulatory burden of the existing regulations and have a positive effect on all small entities subject to the rule. This rule improves operational flexibility for owners or operators of major stationary sources and clarifies applicable requirements for determining if a change qualifies as a major modification. We have therefore concluded that today's rule will relieve regulatory burden for all small entities.

D. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 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, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost effective or least burdensome alternative if the Administrator publishes with the final rule an explanation as to why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determine that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. There is no burden for State, local, and tribal agencies in order for this rule to be included in the SIP, as this final action directly incorporates the changes into the SIP. Moreover, these revisions will ultimately provide greater operational flexibility to sources permitted by the States, which will in turn reduce the overall burden of the program on State and local authorities by reducing the number of required permit modifications. In addition, we believe the rule changes will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators and improving the clarity of requirements. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

For the same reasons stated above, we have determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled ''federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. We do not expect this final rule to result in expenditures by the States. Today's final rules only apply in States that have been delegated the authority to implement the Federal PSD rules. Therefore, reviewing authorities will not incur a burden to revise their SIP's. Moreover, these revisions provide greater operational flexibility to sources permitted by the States, which will in turn reduce the overall burden of the program on State and local authorities by reducing the number of required permit modifications. Thus, Executive Order 13132 does not apply to this rule. Nevertheless, in the spirit of Executive Order 13132, and consistent with EPA policy to promote communications

between EPA and State and local governments, we specifically solicited comment on the proposed rule from State and local officials.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' We believe that this final rule does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

The EPA began considering potential revisions to the NSR rules in the early 1990's and proposed changes in 1996. The purpose of today's final rule is to add greater flexibility to the existing major NSR regulations. These changes will benefit both reviewing authorities and the regulated community by providing increased certainty as to when the requirements apply, and by providing alternative ways to comply with the requirements. Taken as a whole, today's final rule should result in no added burden or compliance costs and should not substantially change the level of environmental performance achieved under the previous rules.

No tribal government currently has an approved tribal implementation plan (TIP) under the CAA to implement the NSR program. The Federal government is currently the NSR reviewing authority in Indian country, thus tribal governments should not experience added burden, nor should their laws be affected with respect to implementation of this rule. Additionally, although major stationary sources affected by today's final rule could be located in or near Indian country and/or be owned or operated by tribal governments, such sources would not incur additional costs or compliance burdens as a result of this rule. Instead, the only effect on such sources should be the benefit of the added certainty and flexibility provided by the rule.

We recognize the importance of including tribal consultation as part of the rulemaking process. Although we did not include specific consultation with tribal officials as part of our outreach process on this final rule, which was developed largely prior to issuance of Executive Order 13175 and which does not have tribal implications under Executive Order 13175, we will continue to consult with tribes on future rulemakings to assess and address tribal implications, and will work with tribes interested in seeking TIP approval to implement the NSR program to ensure consistency of tribal plans with this rule.

G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children because we believe that this package as a whole will result in equal or better environmental protection than currently provided by the existing regulations, and do so in a more streamlined and effective manner.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical.

Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. This final rule does not create new requirements but, rather, revises an existing permitting program by providing a series of program options that affected facilities may choose to adopt. These options will reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators, improving the clarity of requirements, and providing alternatives that sources may take advantage of to further improve their operational flexibility. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA submitted 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). Therefore, this rule will be effective on December 26, 2003.

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practices and procedures, Air pollution control, Carbon monoxide, Hydroocarbons, Intergovernmental relations, Nitrogen oxides, Ozone, Particular matter, Sulfur oxides.

Dated: December 16, 2003.

Michael O. Leavitt,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart C—[Amended]

■ 2. Section 52.96 is amended by revising paragraph (b) to read as follows:

§ 52.96 Significant deterioration of air quality.

* * * * *

(b) The requirements of sections 160 through 165 of the Clean Air Act are not met for Indian reservations since the plan does not include approvable procedures for preventing the significant deterioration of air quality on Indian reservations and, therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made part of the applicable reservation in the State of Alaska.

Subpart D—[Amended]

■ 3. Section 52.144 is amended by revising paragraph (b) to read as follows:

§ 52.144 Significant deterioration of air quality.

* * * * *

(b) Regulation for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Arizona for that portion applicable to the Pima County Health Department and the Maricopa County Department of Health Services and sources locating on Indian lands.

Subpart E—[Amended]

■ 4. Section 52.181 is amended by revising paragraph (b) to read as follows:

§ 52.181 Significant deterioration of air quality.

* * * * *

(b) The requirements of sections 160 through 165 of the Clean Air Act are not met for federally designated Indian lands. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable implementation plan and are applicable to sources located on land under the control of Indian governing bodies.

Subpart F—[Amended]

■ 5. Section 52.270 is amended by revising paragraphs (a)(3), (b)(1) introductory text, (b)(2) introductory text, (b)(3) introductory text, and (b)(4) introductory text to read as follows:

§ 52.270 Significant deterioration of air quality.

(a) * * *

(3) The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of California.

(b) * * *

(1) The PSD rules for Sacramento County Air Pollution Control District are approved under Part C, Subpart 1, of the Clean Air Act. However, EPA is retaining authority to apply § 52.21 in certain cases. The provisions of § 52.21 except paragraph (a)(1) are therefore incorporated and made a part of the State plan for California for the Sacramento County Air Pollution Control District for:

* * * * *

(2) The PSD rules for North Coast Unified Air Quality Management District are approved under Part C, Subpart 1, of the Clean Air Act. However, EPA is retaining authority to apply § 52.21 in certain cases. The provisions of § 52.21 except paragraph (a)(1) are therefore incorporated and made a part of the State plan for California for the North Coast Unified Air Quality Management District for:

* * * * *

(3) The PSD rules for Mendocino County Air Pollution Control District are approved under Part C, Subpart 1, of the Clean Air Act. However, EPA is retaining authority to apply § 52.21 in certain cases. The provisions of § 52.21 except paragraph (a)(1) are therefore incorporated and made a part of the State plan for California for the Mendocino County Air Pollution Control District for:

* * * * *

(4) The PSD rules for Northern Sonoma County Air Pollution Control District are approved under Part C, Subpart 1, of the Clean Air Act. However, EPA is retaining authority to apply § 52.21 in certain cases. The provisions of § 52.21 except paragraph (a)(1) are therefore incorporated and made a part of the State plan for California for the Northern Sonoma County Air Pollution Control District for:

* * * * *

Subpart G—[Amended]

■ 6. Section 52.343 is amended by revising paragraph (b) to read as follows:

§ 52.343 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Colorado for the sources identified in paragraph (a) of this section as not meeting the requirements of sections 160–165 of the Clean Air Act.

* * * * *

Subpart H—[Amended]

■ 7. Section 52.382 is amended by revising paragraph (b) to read as follows:

§ 52.382 Significant deterioration of air quality.

* * * * *

(b) The increments for nitrogen dioxide promulgated on October 17, 1988 (53 FR 40671), and related requirements in 40 CFR 52.21 except paragraph (a)(1), are hereby incorporated and made part of the applicable implementation plan for the State of Connecticut.

Subpart J—[Amended]

■ 8. Section 52.499 is amended by revising paragraph (b) to read as follows:

§ 52.499 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the District of Columbia.

Subpart K—[Amended]

■ 9. Section 52.530 is amended by revising paragraph (d) introductory text to read as follows:

§ 52.530 Significant deterioration of air quality.

* * * * *

(d) The requirements of sections 160 through 165 of the Clean Air Act are not met since the Florida plan, as submitted, does not apply to certain sources. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated by reference and made a part of the Florida plan for:

* * * * *

Subpart M—[Amended]

■ 10. Section 52.632 is amended by revising paragraph (b) to read as follows:

§ 52.632 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except

paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Hawaii.

Subpart N—[Amended]

■ 11. Section 52.683 is amended by revising paragraphs (b) and (c) to read as follows:

§ 52.683 Significant deterioration of air quality.

* * * * *

(b) The requirements of sections 160 through 165 of the Clean Air Act are not met for Indian reservations since the plan does not include approvable procedures for preventing significant deterioration of air quality on Indian reservations. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made part of the applicable plan for Indian reservations in the State of Idaho.

(c) The requirements of section 165 of the Clean Air Act are not met for sources subject to prevention of significant deterioration requirements prior to August 22, 1986, the effective date of EPA's approval of the rules cited in paragraph (a) of this section. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made part of the applicable plan for sources subject to § 52.21 prior to August 22, 1986.

Subpart O—[Amended]

■ 12. Section 52.738 is amended by revising paragraph (b) to read as follows:

§ 52.738 Significant deterioration of air quality.

* * * * *

(b) *Regulations for preventing significant deterioration of air quality.* The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Illinois.

* * * * *

Subpart Q—[Amended]

■ 14. Section 52.833 is amended by revising paragraph (b) to read as follows:

§ 52.833 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Iowa for sources wishing to locate on Indian lands; sources constructed under permits issued by EPA; and certain sources as identified in Iowa's April 22, 1987, letter.

Subpart T—[Amended]

■ 15. Section 52.986 is amended by revising paragraph (b) to read as follows:

§ 52.986 Significant deterioration of air quality.

* * * * *

(b) The requirements of sections 160 through 165 of the Clean Air Act are not met for federally designated Indian lands since the plan (specifically LAC: 33:III:509.A.1) excludes all federally recognized Indian lands from the provisions of this regulation. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable implementation plan, and are applicable to sources located on land under the control of Indian governing bodies.

Subpart W—[Amended]

■ 16. Section 52.1165 is amended by revising paragraph (b) to read as follows:

§ 52.1165 Significant deterioration of air quality.

* * * * *

(b) Regulation for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Massachusetts.

Subpart X—[Amended]

■ 17. Section 52.1180 is amended by revising paragraph (b) to read as follows:

§ 52.1180 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Michigan.

* * * * *

Subpart Y—[Amended]

■ 18. Section 52.1234 is amended by revising paragraph (b) to read as follows:

§ 52.1234 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Minnesota.

* * * * *

Subpart BB—[Amended]

■ 19. Section 52.1382 is amended by revising paragraph (b) to read as follows:

§ 52.1382 Prevention of significant deterioration of air quality.

* * * * *

(b) Regulation for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the Montana State implementation plan and are applicable to proposed major stationary sources or major modifications to be located on Indian Reservations.

* * * * *

Subpart CC—[Amended]

■ 20. Section 52.1436 is amended by revising the introductory text to read as follows:

§ 52.1436 Significant deterioration of air quality.

The requirements of sections 160 through 165 of the Clean Air Act are met except as noted in paragraphs (a) and (b) of this section. The EPA is retaining § 52.21 except paragraph (a)(1) as part of the Nebraska SIP for the following types of sources:

* * * * *

Subpart DD—[Amended]

■ 21. Section 52.1485 is amended by revising paragraph (b) to read as follows:

§ 52.1485 Significant deterioration of air quality.

* * * * *

(b) Regulation for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are incorporated and made a part of the applicable State plan for the State of Nevada except for that portion applicable to the Clark County Health District.

* * * * *

Subpart FF—[Amended]

■ 22. Section 52.1603 is amended by revising paragraph (b) to read as follows:

§ 52.1603 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of New Jersey.

Subpart GG—[Amended]

■ 23. Section 52.1634 is amended by revising paragraph (b) to read as follows:

§ 52.1634 Significant deterioration of air quality.

* * * * *

(b) The requirements of section 160 through 165 of the Clean Air Act are not met for federally designated Indian lands. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable implementation plan, and are applicable to sources located on land under the control of Indian governing bodies.

* * * * *

Subpart HH—[Amended]

■ 24. Section 52.1689 is amended by revising paragraph (b) to read as follows:

§ 52.1689 Significant deterioration of air quality.

* * * * *

(b) *Regulations for preventing significant deterioration of air quality.* The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable state plan for the State of New York.

Subpart JJ—[Amended]

■ 25. Section 52.1829 is amended by revising paragraph (b) to read as follows:

§ 52.1829 Prevention of significant deterioration of air quality.

* * * * *

(b) Regulation for preventing of significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the North Dakota State implementation plan and are applicable to proposed major stationary sources or major modifications to be located on Indian Reservations.

Subpart LL—[Amended]

■ 26. Section 52.1929 is amended by revising paragraph (a) introductory text to read as follows:

§ 52.1929 Significant deterioration of air quality.

(a) Regulation for preventing significant deterioration of air quality. The Oklahoma plan, as submitted, does not apply to certain sources in the State. Therefore the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated, and made part of the Oklahoma State implementation plan, and are applicable to the following major stationary sources or major modifications:

* * * * *

Subpart MM—[Amended]

■ 27. Section 52.1987 is amended by revising paragraph (c) to read as follows:

§ 52.1987 Significant deterioration of air quality.

* * * * *

(c) The requirements of sections 160 through 165 of the Clean Air Act are not met for Indian reservations since the plan does not include approvable procedures for preventing the significant deterioration of air quality on Indian reservations and, therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made part of the applicable plan for Indian reservations in the State of Oregon.

Subpart QQ—[Amended]

■ 28. Section 52.2178 is amended by revising paragraph (b) to read as follows:

§ 52.2178 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of South Dakota.

* * * * *

Subpart RR—[Amended]

■ 29. Section 22.2233 is amended by revising paragraph (b) introductory text to read as follows:

§ 52.2233 Significant deterioration of air quality.

* * * * *

(b) The requirements of § 52.21 except paragraph (a)(1) are hereby incorporated and made part of the applicable SIP for the State of Tennessee for the following purposes:

* * * * *

Subpart SS—[Amended]

■ 30. Section 52.2303 is amended by revising paragraphs (c) and (d) to read as follows:

§ 52.2303 Significant deterioration of air quality.

* * * * *

(c) The requirements of section 160 through 165 of the Clean Air Act are not met for federally designated Indian lands. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby adopted and made a part of the applicable implementation plan and are applicable to sources located on land under the control of Indian governing bodies.

(d) The requirements of section 160 through 165 of the Clean Air Act are not met for new major sources or major modifications to existing stationary sources for which applicability determinations would be affected by dockside emissions of vessels. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby adopted and made a part of the applicable implementation plan and are applicable to such sources.

Subpart TT—[Amended]

■ 31. Section 52.2346 is amended by revising paragraph (b) to read as follows:

§ 52.2346 Significant deterioration of air quality.

* * * * *

(b) *Regulation for prevention of significant deterioration of air quality.* The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the Utah State implementation plan and are applicable to proposed major stationary sources or major modifications to be located on Indian Reservations.

* * * * *

Subpart WW—[Amended]

■ 32. Section 52.2497 is amended by revising paragraph

(b) to read as follows:

§ 52.2497 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Washington.

* * * * *

Subpart YY—[Amended]

■ 33. Section 52.2581 is amended by revising paragraph (e) to read as follows:

§ 52.2581 Significant deterioration of air quality.

* * * * *

(e) Regulations for the prevention of the significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Wisconsin for sources wishing to locate in Indian country; and sources constructed under permits issued by EPA.

Subpart ZZ—[Amended]

■ 34. Section 52.2630 is amended by revising paragraph (b) introductory text to read as follows:

§ 52.2630 Prevention of significant deterioration of air quality.

* * * * *

(b) Regulation for preventing significant deterioration of air quality. The Wyoming plan, as submitted, does not apply to certain sources in the State. Therefore, the provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the State implementation plan for the State of Wyoming and are applicable to the following proposed major stationary sources or major modifications:

* * * * *

Subpart AAA—[Amended]

■ 35. Section 52.2676 is amended by revising paragraph (b) to read as follows:

§ 52.2676 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Guam.

Subpart BBB—[Amended]

■ 36. Section 52.2729 is amended by revising paragraph (b) to read as follows:

§ 52.2729 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Puerto Rico.

Subpart CCC—[Amended]

■ 37. Section 52.2779 is amended by revising paragraph (b) to read as follows:

§ 52.2779 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the Virgin Islands.

Subpart DDD—[Amended]

■ 38. Section 52.2827 is amended by revising paragraph (b) to read as follows:

§ 52.2827 Significant deterioration of air quality.

* * * * *

(b) Regulations for preventing significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for American Samoa.

[FR Doc. 03–31586 Filed 12–23–03; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 411

[CMS–1809–F4]

RIN 0938–AM21

Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships: Extension of Partial Delay of Effective Date

AGENCY: Centers for Medicare & Medicaid Services (CMS), DHHS.

ACTION: Final rule; extension of partial delay in effective date.

SUMMARY: This final rule further delays for 6 months, until July 7, 2004, the effective date of the last sentence of 42 CFR 411.354(d)(1). This section was promulgated in the final rule entitled ''Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships,'' published in the **Federal Register** on January 4, 2001. A 1-year delay of the effective date of the last sentence in this section was published in the **Federal Register** on December 3, 2001. A 6-month delay, until July 7, 2003, was published in the **Federal Register** on November 22, 2002. An additional 6-month delay, until January 7, 2004, was published on April 25, 2003. This further extension of the delay in the effective date of that sentence will give us additional time to reconsider the definition of compensation that is ''set in advance'' as it relates to percentage compensation methodologies in order to avoid unnecessarily disrupting existing contractual arrangements for physician services. Accordingly, the last sentence of § 411.354(d)(1), which would have become effective January 7, 2004, will not become effective until July 7, 2004. We expect that the definition of ''set in advance'' will be addressed definitively before July 7, 2004 in a final rule with comment period, entitled ''Medicare Program; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships'' (Phase II).

DATES: *Effective date:* The effective date of the last sentence in § 411.354(d)(1) of the final rule published in the **Federal Register** on January 4, 2001 (66 FR 856), is delayed to July 7, 2004.

FOR FURTHER INFORMATION CONTACT: Karen Raschke, (410) 786–0016.

SUPPLEMENTARY INFORMATION: This **Federal Register** document is available from the **Federal Register** online database through *GPO Access*, a service of the U.S. Government Printing Office. The Web site address is: *http://www.access.gpo.gov/nara/index.html*.

In addition, the information in this final rule will be available soon after publication in the **Federal Register** on our MEDLEARN Web site: *http://cms.hhs.gov/medlearn/refphys.asp*.

I. Background

The final rule, entitled ''Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships,'' published in the **Federal Register** on January 4, 2001 (66 FR 856), interpreted certain provisions of section 1877 of the Social Security Act (the Act). Under section 1877, if a physician or a member of a physician's immediate family has a financial relationship with a health care entity, the physician may not make referrals to that entity for the furnishing of designated health services (DHS) under the Medicare program, and the entity may not bill for the services, unless an exception applies. Many of the statutory and new regulatory exceptions that apply to compensation relationships require that the amount of compensation be ''set in advance.'' Section 411.354(d)(1) of the final rule defines the term ''set in advance.''

The last sentence of § 411.354(d)(1) reads: ''Percentage compensation arrangements do not constitute compensation that is 'set in advance' in which the percentage compensation is based on fluctuating or indeterminate measures or in which the arrangement results in the seller receiving different payment amounts for the same service from the same purchaser.'' Many of the comments we received regarding the January 4, 2001 physician self-referral final rule indicated that physicians are commonly paid for their professional services using a formula that takes into account a percentage of a fluctuating or indeterminate measure (for example, revenues billed or collected for physician services). According to the

commenters, this compensation methodology is frequently used by hospitals, physician group practices, academic medical centers, and medical foundations. Several commenters pointed out that this aspect of the final rule, which is applicable to academic medical centers and medical foundations (among others), is inconsistent with the compensation methods permitted under the statute for many physician group practices and employed physicians (that is, neither section 1877(h)(4)(B)(i) of the Act nor section 1877(e)(2) of the Act contains the ''set in advance'' requirement). We understand that hospitals, academic medical centers, medical foundations and other health care entities would have to restructure or renegotiate thousands of physician contracts to comply with the language in § 411.354(d)(1) regarding percentage compensation arrangements.

Accordingly, we published a 1-year delay of the effective date of the last sentence in § 411.354(d)(1) in the **Federal Register** on December 3, 2001 (66 FR 60154), an additional 6-month delay in the effective date on November 22, 2002 (67 FR 70322), and a further 6-month delay on April 25, 2003 (68 FR 20347) in order to reconsider the definition of compensation that is ''set in advance'' as it relates to percentage compensation methodologies.

II. Provisions of this Final Rule

To avoid any unnecessary disruption to existing contractual arrangements while we consider modifying this provision, we are further postponing, for an additional 6 months, until July 7, 2004, the effective date of the last sentence of § 411.354(d)(1). This delay is intended to avoid disruptions in the health care industry, and potential attendant problems for Medicare beneficiaries, which could be caused by allowing the last sentence of § 411.354(d)(1) to become effective on January 7, 2004. In the meantime, compensation that is required to be ''set in advance'' for purposes of compliance with section 1877 of the Act may continue to be based on percentage compensation methodologies, including those in which the compensation is based on a percentage of a fluctuating or indeterminate measure. We note that the remaining provisions of § 411.354(d)(1) will still apply and that all other requirements for exceptions must be satisfied (including, for example, the fair market value and ''volume and value'' requirements.)

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking and invite public comment on the proposed rule. This procedure can be waived, however, if an agency finds good cause that the notice and comment rulemaking procedure is impracticable, unnecessary, or contrary to the public interest and if the agency incorporates in the rule a statement of such a finding and the reasons supporting that finding.

Our implementation of this action without opportunity for public comment is based on the good cause exception in 5 U.S.C. 553(b). We find that seeking public comment on this action would be impracticable and unnecessary. We believe public comment is unnecessary because we are implementing this additional delay of effective date as a result of our review of the public comments that we received on the January 4, 2001 physician self-referral final rule. As discussed above, we understand from those comments and the comments we received on the December 3, 2001 interim final rule that, unless we further delay the effective date of the last sentence of § 411.354(d)(1), hospitals, academic medical centers, and other entities will have to renegotiate numerous contracts for physician services, potentially causing significant disruption within the health care industry. We are concerned that the disruption could unnecessarily inconvenience Medicare beneficiaries or interfere with their medical care and treatment. We do not believe that it is necessary to offer yet another opportunity for public comment on the same issue in the limited context of whether to delay this sentence of the regulation. In addition, given the imminence of the January 7, 2004 effective date, we find that seeking public comment on this delay in effective date would be impracticable because it would generate uncertainty regarding an imminent effective date. This uncertainty could cause health care providers to renegotiate thousands of contracts with physicians in an effort to comply with the regulation by January 7, 2004 if the proposed delay is not finalized until after the opportunity for public comment. Thus, providing the opportunity for public comment could result in the very disruption that this delay of effective date is intended to avoid.

(Catalog of Federal Domestic Assistance Program No. 93.773 Medicare—Hospital Insurance Program; Program No. 93.774, Medicare—Supplementary Medical Insurance Program; and Program No. 93.778, Medical Assistance Program)

Dated: September 29, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: October 27, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–31469 Filed 12–23–03; 8:45 am]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 02–60, FCC 03–288]

Rural Health Care Support Mechanism

AGENCY: Federal Communications Commission.

ACTION: Final rule; denial of petition for reconsideration.

SUMMARY: In this document, the Commission modifies its rules to improve the effectiveness of the rural health care support mechanism, which provides discounts to rural health care providers to access modern telecommunications for medical and health maintenance purposes. Because participation in the rural health care support mechanism has not met the Commission's initial projections, the Commission amends its rules to improve the program, increase participation by rural health care providers, and ensure that the benefits of the program continue to be distributed in a fair and equitable manner. In addition, the Commission denies Mobile Satellite Ventures Subsidiary's petition for reconsideration of the *1997 Universal Service Order.*

DATES: Effective February 23, 2004 except for §§ 54.609(a)(2), 54.609(A)(3)(ii), and 54.621(a) which contain information collection requirements that have not been approved by the Office of Management Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections.

FOR FURTHER INFORMATION CONTACT: Shannon Lipp, Attorney, (202) 418–7400 or Regina Brown, Attorney, (202) 418–7400, Wireline Competition Bureau, Telecommunications Access Policy Division.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order and Order on Reconsideration*, in WC Docket No. 02–60 released On November 17, 2003. The full text of this document is available for

public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. There was also a companion Further Notice of Proposed Rulemaking in WC Docket No. 02–60 released on November 17, 2003.

I. Introduction

1. In this *Report and Order and Order on Reconsideration*, we modify our rules to improve the effectiveness of the rural health care support mechanism, which provides discounts to rural health care providers to access modern telecommunications for medical and health maintenance purposes. Because participation in the rural health care support mechanism has not met the Commission's initial projections, we amend our rules to improve the program, increase participation by rural health care providers, and ensure that the benefits of the program continue to be distributed in a fair and equitable manner. Specifically, we expand the scope of entities eligible to receive discounts, provide support for Internet access, and modify the way in which we calculate discounts to offer rural health care providers more flexibility. In addition, in the *Order on Reconsideration*, we deny Mobile Satellite Ventures Subsidiary's petition for reconsideration of the *1997 Universal Service Order*, 62 FR 32862 (June 17, 1997). The actions we take encourage the development of public/private partnerships and other creative solutions to meet the needs of rural communities and increase participation in the rural health care mechanism.

2. The actions we take will also strengthen telemedicine and telehealth networks across the nation, help improve the quality of health care services available in rural America, and better enable rural communities to rapidly diagnose, treat, and contain possible outbreaks of disease. Moreover, enhancing access to an integrated nation-wide telecommunications network for rural health care providers will further the Commission's core responsibility to make available a rapid nation-wide network for the purpose of the national defense, particularly with the increased awareness of the possibility of biological or chemical terrorist attacks. Finally, these changes will further the Commission's efforts to improve its oversight of the operation of the program to ensure that the statutory goals of section 254 of the Telecommunications Act of 1996 are met without waste, fraud, or abuse.

II. Report and Order

A. Eligible Health Care Provider

3. We now further define the statutory term ''public health care provider.'' We conclude that dedicated emergency departments of rural for-profit hospitals that participate in Medicare should be deemed ''public'' health care providers eligible to receive prorated rural heath care support. We agree with commenters that this clarification is consistent with congressional intent and is necessary to give meaning to the term ''public'' health care provider under the rural health care program. Dedicated emergency departments in for-profit hospitals, including the emergency departments of critical access hospitals, are required, pursuant to the Emergency Medical Treatment and Labor Act (EMTALA), to provide medical screening examinations to all patients who present themselves and to stabilize or arrange for appropriate transfer of those patients with emergency conditions. Thus, such providers are ''public'' in nature by virtue of the persons they are required, pursuant to EMTALA, to examine and/or treat for emergency medical conditions.

4. Moreover, we now determine that dedicated emergency departments in for-profit rural hospitals constitute ''rural health clinics.'' As UVA notes, in most communities, emergency departments are the only ambulatory care entities that serve the public on a 24-hour a day, 7-day a week basis. In many instances, emergency departments of rural for-profit hospitals and critical access hospitals are the only health care providers in rural areas serving the medical needs of the community. Dedicated emergency departments typically provide the types of medical services often provided in traditional health clinics. Therefore, we find that dedicated emergency departments in rural for-profit hospitals should be eligible to receive prorated discounts as ''public'' ''health providers,'' and more specifically as ''public'' ''rural health clinics.'' It is necessary to clarify the definition of ''rural health clinic'' in this way to promote timely access to acute specialty healthcare services, chronic disease management programs and other preventive services essential to public health and safety. These entities are generally the initial point of entry into the healthcare system for any person suffering the consequences of a severe catastrophe or accident and constitute a vital segment of the health care community, particularly in the event of a national public health emergency.

5. Additionally, as suggested by several commenters, given the realities of rural health care providers in offering quality health care services in rural areas, we clarify the entities listed in section 254(h)(7)(B) that qualify as rural ''health care providers.'' We conclude that entities listed in section 254(h)(7)(B) include non-profit entities that function as one of the listed entities on a part-time basis. Pursuant to this modification, non-profit entities that provide ineligible services, even on a primary basis, would be able to receive prorated support commensurate with their provision of eligible rural health care services. For example, if a doctor operated a rural health clinic on a non-profit basis in a rural community one day per week or during evenings in the local community center, that community center would be able to receive prorated support, because it serves as a ''rural health clinic'' on a part-time basis. Similarly, if a non-profit community mental health center also operated as a for-profit pharmacy, that center would also be able to receive prorated support as a part-time ''community mental health center.'' Our goal in implementing this proposal is two-fold—to encourage the development of public/private partnerships and other creative solutions to meet the needs of rural communities, and to increase participation in the rural health care support mechanism.

6. We decline to expand the definition of health care provider to include nursing homes, hospices, and other long-term care facilities. Congress specifically listed seven categories of entities eligible for support under this program in section 254(h)(7)(B). Given this specific listing, we find that if Congress had intended to include nursing homes, hospices, and other long-term care facilities as health care providers, it would have explicitly done so in the statute. The Commission is not authorized to amend the statute to add categories to the definition, as suggested by commenters. Thus, we affirm the Commission's previous decision that nursing homes, hospices, and other long-term care facilities are ineligible for support, whether operated on a for-profit or non-profit basis. However, because Congress did specifically list seven categories of entities qualifying as health care providers, the Commission may clarify the types of entities that fit within those seven categories. Therefore, consistent with our clarification that entities that serve as a non-profit rural health care clinic on a part-time basis are ''health care providers,'' part-time non-profit rural health care clinics are eligible for

prorated support, even when associated with a nursing home, hospice, or other long-term care facility.

7. In addition, at this time, we decline to expand the definition of rural health care provider to include any rural, non-profit health care entity with a certified Medicare and/or Medicare provider number as proposed by commenters. The record lacks sufficient information to identify the types of entities that would become eligible under this proposal, as Medicare/Medicaid supports a wide range of services, drugs, and products. We are concerned that by including such entities within the definition of ''health care provider'' we may exceed our statutory authority. Moreover, with the information in the record we are unable to determine the potential impact on the demand for support.

B. Eligible Services

1. Internet Access

8. Given the rapid development of the Internet's capacities, the proliferation of applications available on the Internet, and the increase in the number of Internet users since the *1997 Universal Service Order* was issued, we believe that it is now appropriate to provide funding for Internet access to rural health care providers. In particular, we conclude that support equal to twenty-five percent of the monthly cost for any form of Internet access reasonably related to the health care needs of the facility should be provided to rural health care providers. The definition for Internet access that we adopt here is intended to provide rural health care providers considerable flexibility to utilize the resources available over the Internet that will assist them in fulfilling their health care needs.

9. We agree with commenters that the Internet can serve as an invaluable resource, by providing on-line courses in health education, medical research, follow-up care, regulatory information such as compliance with the Health Insurance Portability and Accountability Act of 1996, video conferencing, web-based electronic benefit claim systems including on-line billing, and other crucial business functions. The incredible potential of the Internet to provide access to such a breadth of medical information may also help reduce isolation in rural communities. In light of the development of medical applications for the Internet since 1997, we conclude that encouraging access to this information service will improve the level of care available in rural areas.

10. Furthermore, health care information shared over the Internet may enable rural health care providers to diagnose, treat, and contain possible outbreaks of disease or respond to health emergencies. We agree with commenters that Internet access provides a vital link to information and instantaneous communications in times of natural disasters and public health emergencies. National connectivity of telehealth and telemedicine networks could also promote the national defense by serving as vehicles for rapid, secure communications in times of emergency, due to outbreaks of disease or biological and chemical attacks.

11. Accordingly, for purposes of the rural health care support mechanism only, we define ''eligible Internet access'' as ''an information service that enables rural health care providers to post their own data, interact with stored data, generate new data, or communicate over the World Wide Web.'' Eligible Internet access provides access to the world-wide information resource of the Internet, and includes all features typically provided by Internet service providers to provide adequate functionality and performance. To qualify as Internet access under the definition we adopt today for the rural health care support mechanism, transmissions must traverse the Internet in some fashion. Internet access may provide transport of digital communications using any Internet-based protocols, including encapsulation of data, video, or voice.

12. We specifically decline to adopt the definition of Internet access currently used in the schools and libraries support mechanism. Under those rules, Internet access includes: This definition thus specifically precludes support for features that provide the capability to generate or alter the content of information. We believe adopting such a limitation for the rural health care program would significantly undercut the utility of providing support for Internet access to rural health care providers, because the ability to alter and interact with information over the Internet is precisely the feature that could facilitate improved medical care in rural areas. Under the rural health care support mechanism, we will provide support for Internet access, as long as it is reasonably related to the health care needs of the facility, and it is the most cost-effective method of meeting those needs. We will not provide support, however, for the purchase of internal connections, computer equipment or other telecommunications equipment, even when used to access the Internet, because such items are not information services.

13. We conclude that a flat discount percentage of twenty-five percent off the cost of monthly Internet access will assist health care providers seeking to purchase Internet access, while also providing incentives for rural health care providers to make prudent economic decisions concerning their telemedical needs. We agree with commenters that a flat discount, analogous to the operation of the schools and libraries support mechanism, will lead to greater predictability and fairness among health care providers. A flat discount is consistent with section 254(b)(5), which requires ''a specific, sufficient, and predictable mechanism * * * because it limits the amount of support that each health care provider may receive per month to a reasonable level.'' A flat discount is also easy to administer. Although it is difficult to estimate the impact of providing support for Internet access service due to the wide range of costs between and among the various types of Internet access services, we agree with commenters' projections that our actions today regarding Internet access are unlikely to result in program demand in excess of the cap. We act conservatively by choosing a twenty-five percent flat discount initially because it will provide an incentive for rural health care providers to choose a level of service appropriate to their needs, will provide more certainty that demand for Internet access support will not exceed the annual funding cap, and will deter wasteful expenditures. Furthermore, we find that a twenty-five percent discount is reasonable because provision of support to health care providers under the rural health care support mechanism is not contingent on economic need, similar to the twenty-five percent discount provided to the least disadvantaged rural schools and libraries. As we gain more experience with this aspect of the support mechanism, we will determine whether an increase in the discount is necessary or advisable. Finally, we disagree with WorldCom that support for Internet access must be based on the difference between urban and rural rates, because section 254(h)(2)(A) of the Act, the statutory provision dealing with information services, makes no reference to an urban-rural comparison, unlike section 254(h)(1)(A). The urban-rural comparison for telecommunications services that WorldCom cites to in section 254(h)(1)(A) does not apply to information services such as Internet

access. Provision of Internet access and other information services is governed by section 254(h)(2)(A).

14. Consistent with the Commission's long-standing principles of competitive neutrality, rural health care providers may receive discounts for the most cost-effective form of Internet access, regardless of the platform. Thus, a provider could opt for dial-up Internet access or broadband Internet access over wireline, cable, wireless, or satellite platforms. Health care providers must certify, however, that the particular Internet access service selected is the most cost-effective way of meeting the facility's health care needs. We believe this policy will provide flexibility to rural health care providers to purchase the most appropriate offerings for their health care needs and may also facilitate the deployment of facilities-based broadband deployment in rural areas.

15. Moreover, we will continue to provide support for toll charges incurred by health care providers that cannot obtain toll-free access to an ISP, limited to the lesser of $180.00 or 30 hours of usage per month. The *1997 Universal Service Order* stated that the proliferation of ISPs and the competitive marketplace ''soon should eliminate the need for such support.'' However, we are persuaded by commenters' showings that the need for such support still exists. Providing support for limited toll charges will place those providers who cannot reach an ISP without incurring toll charges on the same footing as other health care providers with respect to Internet access.

2. Other Services

16. We decline at this time to provide support for services other than telecommunications services, Internet access, and limited toll charges. In the *NPRM*, 67 FR 34653 (May 15, 2002) the Commission sought comment on whether we should establish new policies to enhance access to advanced telecommunications and information services for health care providers consistent with the scope of our authority under section 254(h)(2)(A). Commenters suggested that telecommunications equipment, surcharges imposed by statewide or regional networks, internal connections, and health care providers' travel costs should be eligible for universal service support. We find that providing support for telecommunications equipment, surcharges, and travel costs exceeds the scope of our statutory authority under section 254(h), because these items are neither telecommunications nor information services. In addition, we believe there is insufficient information in the record to provide support for internal connections. Moreover, given our experience with the schools and libraries support mechanism, we are concerned that providing support for internal connections may place an undue burden on the rural health care support mechanism.

C. Calculation of Discounted Services

1. Interpretation of ''Similar Services''

17. We alter our current policy to allow rural health care providers to compare the urban and rural rates for functionally similar services as viewed from the perspective of the end user. We agree with commenters that our current policy of comparing technically similar services does not take into account that certain telecommunications services offered in urban areas are not always available in rural areas. In particular, new technologies are often first deployed in urban areas, and such services may be less expensive than services in rural areas based on older technologies. This modification to our rules will better effectuate the mandate of Congress to ensure comparable services for rural areas, as provided in section 254 of the Act, by allowing rural health care providers to benefit from obtaining telecommunications services at rates equivalent to those in urban areas. Eligible health care providers must purchase telecommunications services and compare their service to a functionally equivalent telecommunications service in order to receive this discount.

18. Accordingly, we create ''safe harbor'' categories of functionally equivalent services based on the advertised speed and nature of the service. For purposes of the rural health care support mechanism only, we establish the following advertised speed categories as functionally equivalent: low—144–256 kbps; medium—257–768 kbps; high—769–1400 kbps (1.4 mbps); T–1—1.41–8 mbps; T–3—8.1–50 mbps. We will also consider whether a service is symmetrical or asymmetrical when determining functional equivalencies. Telecommunications services will be considered functionally similar when operated at advertised speeds within the same category (low, medium, high, T–1, or T–3) and when the nature of the service is the same (symmetrical or asymmetrical). For example, a symmetrical fractional T–1 service operating at an advertised speed of 144 kbps would be considered functionally similar to a symmetrical DSL transmission service with an advertised speed of 256 kbps. By developing ''safe harbor'' categories of functionally equivalent speeds, we hope to minimize the disparity in rates of services available in rural and urban areas in an administratively easy fashion. We will update these categories, as needed, to reflect technological developments.

2. Urban Area

19. We now revise section 54.605 of our rules to allow rural health care providers to compare rural rates to urban rates in any city with a population of at least 50,000 in the state, as opposed to the nearest city with a population of 50,000. The Commission originally required comparison to the nearest city with 50,000 people, in part, because they believed health care providers would likely connect to a point in that nearest large city. Based on our experience with the program and information in the record, health care providers may not always find the needed expertise in the nearest large city. Allowing comparison to rates in any city in the state acknowledges that rural health care providers may communicate with experts in other cities in the state. Such action also should allow rural health care providers to benefit from the lowest rates for services in the State, thereby providing additional support to develop better telemedicine links. Verizon asserts that, under this policy, rural health care providers may receive better rates than those available in some urban areas of the state. However, we believe that the public interest in providing more flexibility in utilizing telemedicine services and quality health care facilities outweighs any minimal advantage gained by rural health care providers over those health care providers located in certain urban areas. Further, we do not believe the urban rates within states differ so significantly that revising this rule will increase demand to the extent that we may risk exceeding the funding cap of $400 million.

3. Maximum Allowable Distance

20. We revise the Maximum Allowable Distance (MAD) to equal the distance between the rural health care provider and the farthest point on the jurisdictional boundary of the largest city in that State. Accordingly, for distance-based charges actually incurred, we modify our rules to provide support to rural health care providers to any location that exceeds the SUD and is less than this revised MAD. As the Commission indicated in the *NPRM,* our experience to date suggests that limiting rural heath care providers to discounts for distance-based charges to the nearest city of

50,000 or more may not be adequate for purposes of creating a comprehensive telehealth and telemedicine network. Further, commenters contend that the current MAD assumes that the rural health care provider will connect with specialists in the nearest urban area, which may not necessarily have the essential complement of specialists to provide telemedicine services. We believe, in most instances, calculating the MAD as described will provide more support for distance-based charges than our current rules, without creating additional administrative burdens for the Administrator. In addition, this modification should provide rural health care providers access to high levels of care and greater flexibility in developing appropriate telehealth networks.

21. Although commenters generally favor eliminating the MAD, we decline to do so at this time. We are concerned that eliminating the MAD could result in wasteful expenditures for the program, as providers could connect to more distant locations when a closer one would suffice. Expanding the MAD to the largest city in a state should provide support sufficient to enable rural health care providers to connect with health care facilities with a wide range of medical expertise, without introducing the potential for waste associated with eliminating the MAD or making the MAD equal to the furthest point in the state. Moreover, we decline to expand the MAD to equal the distance between the health care provider and the nearest center of tertiary care. Although this proposal may have a more direct relationship to health care services, we agree with commenters that the nearest point of tertiary care may not provide the required specialized expertise. In addition, this proposal would require the identification and continued monitoring of all tertiary care centers throughout the Nation, which would impose significant administrative burdens upon the Administrator of the program.

4. Satellite Services

22. We revise our policy to allow rural health care providers to receive discounts for satellite services even where alternative terrestrial-based services may be available. As suggested by commenters, however, these discounts will be capped at the amount providers would have received if they purchased functionally similar terrestrial-based alternatives. Providers seeking discounts for satellite services will be required to provide to the Administrator documentation of the urban and rural rates for the terrestrial-based alternative services. We believe imposing a cap on support for satellite service is necessary because satellite services are often significantly more expensive than terrestrial-based services. Thus, pursuant to these changes, where rural health care providers opt for more expensive satellite-based services when a cheaper terrestrial-based alternative is available, the provider, and not the support mechanism, will be responsible for the additional cost. For example, if a health care provider pays $100 per month for satellite service, the rural rate for a comparable wireline service plan is $60 per month, and the urban rate is $40 per month, the health care provider would receive $20 per month towards the satellite service. We conclude this approach furthers the principle of competitive neutrality and recognizes the role that satellite services may play in rural areas without unduly increasing the size of the fund. We also seek further comment in the accompanying Further Notice on whether additional rule changes should be adopted to facilitate support for mobile rural health care providers.

5. Insular Areas

23. Although we continue to recognize that using urban rates within a State as the benchmark for reasonable rates may be ill-suited to certain insular areas, we believe that the proposal of some commenters to permit the comparison of insular rural rates to the nearest urban area outside the State is inconsistent with the statutory language set forth in section 254(h)(1)(A). As the Commission indicated in the *Fifteenth Order on Reconsideration,* 64 FR 66778 (November 30, 1999), Congress could have provided discounts for telecommunications services that connect rural health care providers to the nearest major hospital within or outside the State. Congress, however, explicitly provided that rates should be compared to the urban rate in that State. We continue to believe section 254(h)(1)(A) precludes us from designating an urban area outside of the State as the benchmark for comparison for remote, insular areas.

24. We also disagree with American Samoa Telecommunications Authority that section 254(h)(2)(A) authorizes the Commission to provide support for telecommunications links between American Samoa to an urban center outside the territory, such as Honolulu, Hawaii, without regard to the urban-rural rate difference. Section 254(h)(2)(A) authorizes the Commission to take action to increase access to advanced telecommunications and information services. Support for telecommunications services, however, is provided subject to section 254(h)(1)(A) and as discussed herein, requires an urban to rural comparison within the State. Although we do not believe we can grant the request of providers in insular areas, we do provide support for Internet access for all eligible rural health care providers, including those in insular areas, which we believe will functionally provide significant support to health care providers in insular areas.

D. Other Changes to the Rural Health Care Support Mechanism

1. Allocation Guidelines and Record-Keeping Requirements

25. Because entities that engage in both eligible and ineligible activities or that collocate with an entity that provides ineligible services will now be eligible for prorated support, we adopt rules requiring such providers to allocate their discounts to prevent discounts from flowing to ineligible activities or providers of services. Prorated discounts will be provided commensurate only with entities' eligible activities. The method of cost allocation chosen by an applicant should be based on objective criteria, and reasonably reflect the eligible usage of the facilities. Thus, if telecommunications facilities are used jointly for eligible and ineligible purposes, the allocation should be based on the percentage of time the facility is used for eligible purposes or some other method that reasonably reflects eligible usage. Health care providers must keep documentation explaining their allocation methods for five years and present that information to Universal Service Administrative Company upon request. We also direct USAC to evaluate the allocation methods selected by program participants in the course of its audit activities to ensure program integrity. Additionally, we codify the requirement that health care providers must maintain records for their purchases of supported services for at least five years sufficient to document their compliance with all Commission requirements.

26. To illustrate the general principle of discount allocation, we provide several ''safe harbor'' examples of allocation methods. First, if a dedicated emergency department in a for-profit rural hospital shares access to a T–3 with the rest of the hospital, and the T–3 is used seventy-five hours per week related to EMTALA-emergency care and the education of health care

professionals who work in the dedicated emergency department and fifty hours per week related to other hospital use, the T–3 would be used for eligible purposes sixty percent of the time (seventy-five hours of use by emergency department divided by 125 total hours of use by the entire hospital). Therefore, the eligible dedicated emergency department would receive sixty percent of the difference between the urban and rural rate for the T–3. Second, another dedicated emergency department in a for-profit rural hospital that shares access to a T–3 with the rest of the hospital, might choose to allocate discounts based on employee hours. For example, if the emergency department staff, including on-call physicians, is staffed at 3,360 hours per week (twenty employees covering 168 hours per week), and the rest of the hospital is staffed at 4,000 hours per week (100 employees covering 40 hours per week), the emergency department would receive forty-six percent of the difference between the urban and rural T–3 rate (3,360 emergency staff hours divided by 7,360 total staff hours). Third, if a non-profit rural health clinic operates in a local community center for five hours one evening per week and uses the community center's T–1 line, and the community center's normal operating hours are 10 a.m.–10 p.m., Monday through Saturday, the T–1 would be used for eligible purposes seven percent of the time (five hours divided by eighty-four open hours in a week). Therefore, the eligible non-profit rural health clinic would receive seven percent of the difference between the urban and rural rate for the T–1. Fourth, if a dedicated emergency department in a for-profit rural hospital shares access to a T–1 with the rest of the hospital, and the dedicated emergency department occupies 250 square feet and the hospital occupies 2,500 square feet, the T–1 would be used for eligible purposes ten percent of the time (250 square feet divided by 2,500 square feet). Therefore, the eligible dedicated emergency department would receive ten percent of the difference between the urban and rural rate for the T–1. If a rural health care provider can document that it adopted an allocation method consistent with one of these four examples, we will consider the method compliant with our requirements. Rural health care providers may choose a different allocation method, but will bear the burden of demonstrating, in the event of an audit or otherwise, that the chosen method was based on objective criteria and reasonably reflects the eligible usage of the facilities.

27. Conversely, when services are used solely by an eligible entity for eligible purposes, no allocation would be necessary. For example, if a T–1 is located solely in the dedicated emergency room and is used only for medical or educational purposes, the dedicated emergency room would be able to receive the full discount based on the difference between the urban and rural rate. Similarly, if there is a phone line in a private room at the community center that is dedicated exclusively to a rural health care clinic, no allocation would be necessary because the personnel staffing the part-time rural health care clinic would be the only ones to use the phone.

2 . Streamlining the Application Process

28. Since the *NPRM* was released, USAC has streamlined the application process significantly in response to the numerous comments submitted in this proceeding on this issue. For example, USAC has implemented electronic filing and e-certification for all forms and has arranged for electronic forms to be filled automatically with the previous year's information for repeat on-line filers. USAC has also created a database of urban rates on its Web site. As a result, a health care provider can now bypass the arduous step of having to retrieve this information from its carrier. In addition, USAC has significantly expanded its outreach efforts, such as by sending mailings to carriers and health care providers to alert them to changes in the program, holding monthly conference calls for carriers and health care providers to ask questions and raise concerns, and setting up a toll-free access number where carriers and health care providers can call at their convenience. Finally, USAC has eliminated the form submitted by service providers, FCC Form 468, by combining the relevant information into FCC Form 466, which is submitted by applicants. This modification to the reimbursement process has reduced to a great extent the interval between receipt of service and payments to service providers, thereby mitigating commenters' concerns.

29. We believe USAC's efforts to ease the burdens of applying to the program have been exemplary, as further evidenced by the number of completed applications received by USAC in Funding Year 2003 compared to Funding Year 2002. Nevertheless, in the Further Notice of Proposed Rulemaking, we seek comment on ways in which USAC could further streamline the application process and expand outreach efforts. In addition, we note that the Commission, through the Consumer & Governmental Affairs Bureau, will endeavor through its educational and outreach efforts, to ensure that those most likely affected are informed about the actions taken in this Order. In addition to making fact sheets and other informational materials available for dissemination through the Commission's Web site, the Commission will include the dissemination of such information as part of its on-going, grassroots outreach efforts directed at rural America and undertaken in coordination with other federal and state agencies.

3. Pro-Rata Reductions if Annual Cap Exceeded

30. Based on our estimates and the comments we have received, we continue to believe that our current rules requiring pro-rata distribution of funds if requests exceed the cap, are the most effective and equitable means of distributing limited funds in accordance with the goals and purposes of the statute. Therefore, we agree with the majority of commenters that the current rules should be maintained. We note that the rules adopted in this Order could increase the level of discounts requested in a year, so applicants are encouraged to submit applications during the filing window to secure their universal service funding. We disagree with the commenter that suggested we prioritize universal service support for telecommunication services over information services. We do not think such a measure is necessary at this time because program demand has never approached the cap. Moreover, prioritization would add another level of unnecessary administrative complexity to the support mechanism.

4. Ensuring the Selection of Cost-Effective Services

31. We agree with commenters that the current rules are adequate to ensure that health care providers select the most cost-effective services. Our certification requirements, combined with the requirement that health care providers remain responsible for a significant portion of service costs (*i.e.*, the urban rate of telecommunications services and 75% of Internet access) will ensure that rural health care providers make prudent economic decisions. We also agree with commenters that applicants should not be required to use the lowest-cost technology because factors other than cost, such as reliability and quality, may be relevant to fulfill their telemedical needs.

5. Other Non-Substantive Rule Changes

32. In the *NECA Order,* 62 FR 41294 (August 1, 1997), the Commission directed the National Exchange Carrier Association (NECA) to establish the Rural Health Care Corporation to administer the rural health care support mechanism. Subsequently, the Commission directed the Rural Health Care Corporation to be merged into a division of USAC. In light of the Commission's prior actions, we hereby amend our rules to replace all references to the ''Rural Health Care Corporation'' with the ''Rural Health Care Division.'' We also revise § 54.609(a)(1)(i) to conform to the *Fifteenth Order on Reconsideration.* We also adopt several other non-substantive rule changes to improve the clarity of the rules.

6. Implementation

33. Funding Year 2003 for the rural health care program ends June 30, 2003, and Funding Year 2004 begins July 1, 2004. Because we do not wish to introduce changes to the program in the middle of a funding year, the modifications to the program adopted in this Order will be implemented beginning with Funding Year 2004. We direct USAC to take the necessary operational steps to implement the improvements to the program adopted herein for Funding Year 2004.

III. Order on Reconsideration

34. Consistent with the policy objectives underlying our decision, we deny, to the extent indicated herein, Mobile Satellite Ventures' (MSV) petition for reconsideration of the *1997 Universal Service Order.* We decline to revise our policy, as MSV suggests, to subsidize satellite service at the same price as terrestrial mobile service. We agree with Verizon that equalizing these rates could undercut competition and competitive neutrality. Although we agree that MSV and similar carriers provide valuable services to rural areas, particularly insular areas unserved by wireline carriers, we are concerned that equalizing the rates for satellite and terrestrial mobile service could significantly increase program demand and disadvantage those carriers already providing functionally similar services at more competitive prices. Accordingly, we deny MSV's petition for reconsideration to the extent indicated herein.

IV. Procedural Matters

A. Regulatory Flexibility Analysis

35. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking. The Commission sought written public comments on the proposals in the *NPRM,* including comment on the IRFA. The Commission received seventy-five comments, fourteen reply comments, and six *ex partes* in response to the *NPRM.* This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

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

36. The Commission is required by section 254 of the Act to promulgate rules to implement the universal service provisions of section 254. On May 8, 1997, the Commission adopted rules that reformed its system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition. Among other things, the Commission adopted a mechanism to provide discounted telecommunications services to public or non-profit health care providers that serve persons in rural areas. Over the last few years, important changes in the rural health community prompt us to review the rural health care universal service support mechanism. In this *Report and Order,* we adopt several modifications to the Commission's rules to improve the effectiveness of the rural health care universal service support mechanism and increase utilization of this mechanism by rural health care providers.

37. Specifically, in the *Report and Order,* we clarify the scope of entities eligible to receive discounts. We conclude that dedicated emergency departments of rural for-profit hospitals that participate in Medicare should be deemed ''public'' health care providers eligible to receive prorated rural heath care support. We believe this clarification is necessary to give meaning to the term ''public'' health care provider under the rural health care program. Moreover, we also determine that dedicated emergency departments in for-profit rural hospitals constitute ''rural health clinics.'' These entities are generally the initial point of entry into the healthcare system for any person suffering the consequences of a severe catastrophe or accident and constitute a vital segment of the health care community, particularly in the event of a national public health emergency. Additionally, we conclude that entities listed in section 254(h)(7)(B) include non-profit entities that function as one of the listed entities on a part-time basis. Pursuant to this modification, non-profit entities that provide ineligible services, even on a primary basis, would be able to receive prorated support commensurate with their provision of eligible rural health care services. Our goal in implementing this proposal is two-fold—to encourage the development of public/private partnerships and other creative solutions to meet the needs of rural communities, and to increase participation in the rural health care support mechanism. Further, because entities that engage in both eligible and ineligible activities or that collocate with an entity that provides ineligible services will now be eligible for prorated support, we also adopt rules requiring such providers to allocate their discounts to prevent discounts from flowing to ineligible activities or providers of services.

38. We also provide funding for Internet access for rural health care providers. We conclude that support equal to twenty-five percent of the monthly cost for any form of Internet access reasonably related to the health care needs of the facility should be provided to rural health care providers. We believe that the Internet can serve as an invaluable resource, by providing on-line courses in health education, medical research, follow-up care, regulatory information such as compliance with Health Insurance Portability and Accountability Act of 1996, video conferencing, web-based electronic benefit claim systems including on-line billing, and other crucial business functions. The incredible potential of the Internet to access such a breadth of medical information may also help reduce isolation in rural communities. Furthermore, health care information shared over the Internet may enable rural health care providers to diagnose, treat, and contain possible outbreaks of disease or respond to health emergencies. Thus, in light of the development of medical applications for the Internet since 1997, we conclude that encouraging access to this information service will improve the level of care available in rural areas.

39. We also alter our current policy to allow rural health care providers to compare the urban and rural rates for functionally similar services as viewed from the perspective of the end user. This modification to our rules will better effectuate the mandate of Congress to ensure comparable services for rural areas, as provided in section 254 of the Act, by allowing rural health care providers to benefit from obtaining telecommunications services at rates equivalent to those in urban areas.

40. We also revise § 54.605 of our rules to allow rural health care providers to compare rural rates to urban rates in any city with a population of at least 50,000 in the state, as opposed to the nearest city with a population of 50,000. Allowing comparison to rates in any city in the state acknowledges that rural health care providers may communicate with experts in other cities in the state. Such action also should allow rural health care providers to benefit from the lowest rates for services in the State, thereby providing additional support to develop better telemedicine links.

41. Additionally, we revise the maximum allowable distance (MAD) to equal the distance between the rural health care provider and the farthest point on the jurisdictional boundary of the largest city in that State. Accordingly, for distance-based charges, we modify our rules to provide support to rural health care providers to any location (within or outside of the state) that exceeds the SUD and is less than this revised MAD. We believe, in most instances, calculating the MAD as described will provide more support for distance-based charges than our current rules, without creating additional administrative burdens for the Administrator. In addition, this modification should provide rural health care providers access to high levels of care and greater flexibility in developing appropriate telehealth networks.

42. Lastly, we revise our policy to allow rural health care providers to receive discounts for satellite services even where alternative terrestrial-based services may be available. However, these discounts will be capped at the amount providers would have received if they purchased functionally similar terrestrial-based alternatives. We conclude this approach furthers the principle of competitive neutrality and recognizes the role that satellite services may play in rural areas without unduly increasing the size of the fund.

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

43. No petitions for reconsideration or comments were filed directly in response to the IRFA or on issues affecting small businesses.

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

44. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

45. A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 1992, there were approximately 275,801 small organizations. The term ''small governmental jurisdiction'' is defined as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' As of 1997, there were approximately 87,453 government jurisdictions in the United States. This number includes 39,044 counties, municipal governments, and townships, of which 27,546 have populations of fewer than 50,000 and 11,498 counties, municipal governments, and townships have populations of 50,000 or more. Thus, we estimate that the number of small government jurisdictions must be 75,955 or fewer. Small entities potentially affected by the proposals herein include small rural health care providers, small local health departments and agencies, and small eligible service providers offering discounted services to rural health care providers, including telecommunications carriers and ISPs.

a. Rural Health Care Providers

46. Section 254(h)(5)(B) of the Act defines the term ''health care provider'' and sets forth seven categories of health care providers eligible to receive universal service support. Although SBA has not developed a specific size category for small, rural health care providers, recent data indicate that there are a total of 8,297 health care providers, consisting of: (1) 625 ''post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;'' (2) 866 ''community health centers or health centers providing health care to migrants;'' (3) 1633 ''local health departments or agencies;'' (4) 950 ''community mental health centers;'' (5) 1951 ''not-for-profit hospitals;'' and (6) 2,272 ''rural health clinics.'' We have no additional data specifying the numbers of these health care providers that are small entities. In addition, non-profit entities that act as ''health care providers'' on a part-time basis will now be eligible to receive prorated support. However, we have no data specifying the number of potential new applicants. Consequently, using the data we do have, we estimate that there are 8,297 or fewer small health care providers potentially affected by the actions proposed in this Notice.

47. As noted, non-profit businesses and small governmental units are considered ''small entities'' within the RFA. In addition, we note that census categories and associated generic SBA small business size categories provide the following descriptions of small entities. The broad category of Ambulatory Health Care Services consists of further categories and the following SBA small business size standards. The categories of providers with annual receipts of $6 million or less consists of: Offices of Dentists; Offices of Chiropractors; Offices of Optometrists; Offices of Mental Health Practitioners (except Physicians); Offices of Physical, Occupational and Speech Therapists and Audiologists; Offices of Podiatrists; Offices of All Other Miscellaneous Health Practitioners; and Ambulance Services. The category of Ambulatory Health Care Services providers with $8.5 million or less in annual receipts consists of: Offices of Physicians; Family Planning Centers; Outpatient Mental Health and Substance Abuse Centers; Health Maintenance Organization Medical Centers; Freestanding Ambulatory Surgical and Emergency Centers; All Other Outpatient Care Centers, Blood and Organ Banks; and All Other Miscellaneous Ambulatory Health Care Services. The category of Ambulatory Health Care Services providers with $11.5 million or less in annual receipts consists of: Medical Laboratories; Diagnostic Imaging Centers; and Home Health Care Services. The category of Ambulatory Health Care Services providers with $29 million or less in annual receipts consists of Kidney Dialysis Centers. For all of these Ambulatory Health Care Service Providers, census data indicate that there is a combined total of 345,476 firms that operated in 1997. Of these, 339,911 had receipts for that year of less than $5 million. In addition, an additional 3414 firms had annual receipts of $5 million to $9.99 million; and additional 1475 firms had receipts of $10 million to $24.99 million; and an additional 401 had receipts of $25

million to $49.99 million. We therefore estimate that virtually all Ambulatory Health Care Services providers are small, given SBA's size categories. In addition, we have no data specifying the numbers of these health care providers that are rural and meet other criteria of the Act.

48. The broad category of Hospitals consists of the following categories and the following small business providers with annual receipts of $29 million or less: General Medical and Surgical Hospitals, Psychiatric and Substance Abuse Hospitals; and Specialty Hospitals. For all of these health care providers, census data indicate that there is a combined total of 330 firms that operated in 1997, of which 237 or fewer had revenues of less than $25 million. An additional 45 firms had annual receipts of $25 million to $49.99 million. We therefore estimate that most Hospitals are small, given SBA's size categories. In addition, we have no data specifying the numbers of these health care providers that are rural and meet other criteria of the Act.

49. The broad category of Nursing and Residential Care Facilities consists of the following categories and the following small business size standards. The category of Nursing and Residential Care Facilities with annual receipts of $6 million or less consists of: Residential Mental Health and Substance Abuse Facilities; Homes for the Elderly; and Other Residential Care Facilities. The category of Nursing and Residential Care Facilities with annual receipts of $8.5 million or less consists of Residential Mental Retardation Facilities. The category of Nursing and Residential Care Facilities with annual receipts of less than $11.5 million consists of Nursing Care Facilities and Continuing Care Retirement Communities. For all of these health care providers, census data indicates that there are a combined total of 18,011 firms that operated in 1997. Of these, 16,165 or fewer firms had annual receipts of below $5 million. In addition, 1205 firms had annual receipts of $5 million to $9.99 million, and 450 firms had receipts of $10 million to $24.99 million. We therefore estimate that a great majority of Nursing and Residential Care Facilities are small, given SBA's size categories. In addition, we have no data specifying the numbers of these health care providers that are rural and meet other criteria of the Act.

50. The broad category of Social Assistance consists of the category of Emergency and Other Relief Services and small business size standard of annual receipts of $6 million or less. For all of these health care providers, census data indicates that there are a combined total of 37,778 firms that operated in 1997. Of these, 37,649 or fewer firms had annual receipts of below $5 million. An additional 73 firms had annual receipts of $5 million to $9.99 million. We therefore estimate that virtually all Social Assistance providers are small, given SBA's size categories. In addition, we have no data specifying the numbers of these health care providers that are rural and meet other criteria of the Act.

b. Providers of Telecommunications and Other Services

51. We have included small incumbent local exchange carriers in this present RFA analysis. As noted, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

52. Total Number of Telephone Companies Affected. The United States Bureau of the Census (the ''Census Bureau'') reports that, at the end of 1997, there were 6,239 firms engaged in providing telephone services, as defined therein. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 6,239 telephone service firms may not qualify as small entities because they are not ''independently owned and operated.'' For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that 6,239 or fewer telephone service firms are small entity telephone service firms that may be affected by the decisions and rules adopted in this *Report and Order.*

53. Local Exchange Carriers, Interexchange Carriers, Competitive Access Providers, Operator Service Providers, Payphone Providers, and Resellers. Neither the Commission nor SBA has developed a definition particular to small local exchange carriers (LECs), interexchange carriers (IXCs), competitive access providers (CAPs), operator service providers (OSPs), payphone providers or resellers. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that we collect annually on the Form 499–A. According to our most recent data, there are 1,335 incumbent LECs, 349 CAPs, 204 IXCs, 21 OSPs, 758 payphone providers and 454 resellers. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,335 incumbent LECs, 349 CAPs, 204 IXCs, 21 OSPs, 758 payphone providers, and 541 resellers that may be affected by the decisions and rules adopted in this *Report and Order.*

54. Internet Service Providers. The SBA has developed a small business size standard for ''On-Line Information Services,'' NAICS code 514191. This category comprises establishments ''primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others.'' Under this small business size standard, a small business is one having annual receipts of $18 million or less. Based on firm size data provided by the Bureau of the Census, 3,123 firms are small under SBA's $18 million size standard for this category code. Although some of these Internet Service Providers (ISPs) might not be independently owned and operated, we are unable at this time to estimate with greater precision the number of ISPs that would qualify as small business concerns under SBA's small business size standard. Consequently, we estimate that there are 3,123 or fewer small entity ISPs that may be affected.

55. Satellite Service Carriers. The SBA has developed a definition for small businesses within the category of Satellite Telecommunications. According to SBA regulations, a small business under the category of Satellite communications is one having annual receipts of $12.5 million or less. According to SBA's most recent data,

there are a total of 371 firms with annual receipts of $9,999,999 or less, and an additional 69 firms with annual receipts of $10,000,000 or more. Thus, the number of Satellite Telecommunications firms that are small under the SBA's $12 million size standard is between 371 and 440. Further, some of these Satellite Service Carriers might not be independently owned and operated. Consequently, we estimate that there are fewer than 440 small entity ISPs that may be affected by the decisions and rules of the present action.

56. Wireless Service Providers. The SBA has developed a definition for small businesses within the two separate categories of Cellular and Other Wireless Telecommunications or Paging. Under that SBA definition, such a business is small if it has 1,500 or fewer employees. According to the Commission's most recent Telephone Trends Report data, 1,495 companies reported that they were engaged in the provision of wireless service. Of these 1,495 companies, 989 reported that they have 1,500 or fewer employees and 506 reported that, alone or in combination with affiliates, they have more than 1,500 employees. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireless service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are 989 or fewer small wireless service providers that may be affected by the rules.

57. Cable and Other Subscription Programming or Other Program Distribution and Related Entities. The SBA has developed small business size standards which include all such companies generating $12.5 million or less in revenue annually. These standards cover two categories of Cable Services: Cable and Other Subscription Programming; and Cable and Other Program Distribution.

58. Cable and Other Subscription Programming. This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. According to Census Bureau data for 1997, there were a total of 234 firms in this category, total, that had operated for the entire year. Of this total, 188 firms had annual receipts of under $10 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

59. Cable and Other Program Distribution. This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

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

60. The *Report and Order* adopts several modifications to the Commission's rules to improve the effectiveness of the rural health care universal service support mechanism and increase utilization of this mechanism by rural health care providers. As articulated, in the *Report and Order*, we clarify the scope of entities eligible to receive discounts. Specifically, because entities that engage in eligible and ineligible activities or that collocate with an entity that provides ineligible services will now be eligible for prorated support, we adopt rules requiring such providers to allocate their discounts to prevent discounts from flowing to ineligible activities or providers of services. Health care providers are required to maintain documentation explaining their allocation methods for five years and present that information to USAC upon request. The method of cost allocation chosen by an applicant should be based on objective criteria and reasonably reflect the eligible usage of the facilities. Additionally, health care providers must maintain for their purchases of supported services procurement records for at least five years sufficient to document their compliance with all Commission requirements.

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

61. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach impacting small business, which may include the following four alternatives (among others): (1) the establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.

62. In this *Report and Order*, we amend our rules to improve the program, increase participation by rural health care providers, and ensure that the benefits of the program continue to be distributed in a fair and equitable manner. Specifically, we expand the scope of entities eligible to receive discounts, provide support for Internet access, and modify the way in which we calculate discounts to offer rural health care providers more flexibility. The actions taken in the *Report and Order* help improve the quality of health care services available in rural America, and better enable rural communities to rapidly diagnose, treat, and contain possible outbreaks of disease. Thus, rural health care providers stand to benefit directly from the modifications to our rules and policies.

6. Report to Congress

63. The Commission will send a copy of the *Report and Order and Order on Reconsideration* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order and Order on Reconsideration* including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order and Order on Reconsideration* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

B. Paperwork Reduction Act Analysis

64. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or

modified reported and recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the Act, and will go into effect upon announcement in the **Federal Register** of OMB approval.

C. Further Information

65. Alternative formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 voice, (202) 418–7365 TTY, or *bmillin@fcc.gov*. This *Report and Order* can also be downloaded in Microsoft Word and ASCII formats at <*http://www.fcc.gov/ccb/universalservice/highcost*>.

66. For further information, contact Shannon Lipp at (202) 418–7954 or Regina Brown at (202) 418–0792 in the Telecommunications Access Policy Division, Wireline Competition Bureau.

V. Ordering Clauses

67. Pursuant to the authority contained in sections 1, 4(i), 4(j), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 201–205, 214, 254, and 403, this *Report and Order and Order on Reconsideration* is adopted.

68. Pursuant to the authority contained in section 405, of the Communications Act of 1934, as amended, 47 U.S.C. 405, and 0.291 and 1.429 of the Commission's rules, Mobile Satellite Ventures Subsidiary's Petition for Clarification or Reconsideration is denied to the extent indicated herein.

69. Part 54 of the Commission's rules, is amended, effective January 23, 2004 except for §§ 54.609(a)(2), 54.609(A)(3)(ii), and 54.621(a) which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections.

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

List of Subjects in 47 CFR Part 54

Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority citation for Part 54 continues to read as follows:

Authority: 47 U.S.C. 1, 4(i), 201, 205, 214, and 254 unless otherwise noted.

■ 2. Amend § 54.601 by removing paragraphs (a)(3), (b)(3), and (b)(4), redesignating paragraphs (a)(4) and (a)(5) as (a)(3) and (a)(4), revising paragraphs (a)(1), newly designated (a)(3) and (c), and by adding paragraph (d) to read as follows:

§ 54.601 Eligibility.

(a) * * *

(1) Except with regard to those services provided under § 54.621(b), only an entity that is either a public or non-profit rural health care provider, as defined in this section, shall be eligible to receive supported services under this subpart.

* * * * *

(3) For purposes of this subpart, a rural health care provider is a public or non-profit health care provider located in a rural area, as defined in this subpart.

* * * * *

(c) *Services.* (1) Any telecommunications service that is the subject of a properly completed bona fide request by a rural health care provider shall be eligible for universal service support, subject to the limitations described in this paragraph. The length of a supported telecommunications service may not exceed the distance between the health care provider and the point farthest from that provider on the jurisdictional boundary of the largest city in a state as defined in § 54.625(a).

(2) Internet access and limited toll-free access to internet. (i) For purposes of this subpart, eligible Internet access is an information service that enables rural health care providers to post their own data, interact with stored data, generate new data, or communicate over the World Wide Web.

(ii) Internet access shall be eligible for universal service support under § 54.621(a).

(iii) Limited toll-free access to an Internet service provider shall be eligible for universal service support under § 54.621(b).

(d) *Allocation of discounts.* An eligible health care provider that engages in eligible and ineligible activities or that collocates with an entity that provides ineligible services shall allocate eligible and ineligible activities in order to receive a prorated discount for eligible activities. Health care providers shall choose a method of cost allocation that is based on objective criteria and reasonably reflects the eligible usage of the facilities.

§ 54.603 [Amended]

■ 3. Amend § 54.603 by revising the term ''Rural Health Care Corporation'' in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) to read ''Rural Health Care Division.''

■ 4. Amend § 54.605 by removing paragraph (c), redesignating paragraphs (d) and (e) as paragraphs (c) and (d), and revising paragraphs (a) and (b) to read as follows:

§ 54.605 Determining the urban rate.

(a) If a rural health care provider requests an eligible service to be provided over a distance that is less than or equal to the ''standard urban distance,'' as defined in paragraph (c) of this section, for the state in which it is located, the urban rate for that service shall be a rate no higher than the highest tariffed or publicly-available rate charged to a commercial customer for a functionally similar service in any city with a population of 50,000 or more in that state, calculated as if it were provided between two points within the city.

(b) If a rural health care provider requests an eligible service to be provided over a distance that is greater than the ''standard urban distance,'' as defined in paragraph (c) of this section, for the state in which it is located, the urban rate for that service shall be a rate no higher than the highest tariffed or publicly-available rate charged to a commercial customer for a functionally similar service provided over the standard urban distance in any city with a population of 50,000 or more in that state, calculated as if the service were provided between two points within the city.

* * * * *

■ 5. Revise § 54.609 to read as follows:

§ 54.609 Calculating support.

(a) Except with regard to services provided under § 54.621 and subject to the limitations set forth in this subpart, the amount of universal service support for an eligible service provided to a public or non-profit rural health care provider shall be the difference, if any,

between the urban rate and the rural rate charged for the service, as defined herein. In addition, all reasonable charges that are incurred by taking such services, such as state and federal taxes shall be eligible for universal service support. Charges for termination liability, penalty surcharges, and other charges not included in the cost of taking such service shall not be covered by the universal service support mechanisms. Rural health care providers may choose one of the following two support options.

(1) *Distance based support.* The Administrator shall consider the base rates for telecommunications services in rural areas to be reasonably comparable to the base rates charged for functionally similar telecommunications service in urban areas in that state, and, therefore, the Administrator shall not include these charges in calculating the support. The Administrator shall include, in the support calculation, all other charges specified, and all actual distance-based charges as follows:

(i) If the requested service distance is less than or equal to the SUD for the state, the distance-based charges for the rural health care provider are reasonably comparable to those in urban areas, so the health care provider will not receive distance-based support.

(ii) If the requested service distance is greater than the SUD for the state, but less than the maximum allowable distance, the distance-based charge actually incurred for that service can be no higher than the distance-based charges for a functionally similar service in any city in that state with a population of 50,000 or more over the SUD.

(iii) ''Distance-based charges'' are charges based on a unit of distance, such as mileage-based charges.

(iv) Except with regard to services provided under § 54.621, a telecommunications carrier that provides telecommunications service to a rural health care provider participating in an eligible health care consortium, and the consortium must establish the actual distance-based charges for the health care provider's portion of the shared telecommunications services.

(2) *Base rate support.* If a telecommunications carrier, health care provider, and/or consortium of health care providers reasonably determines that the base rates for telecommunications services in rural areas are not reasonably comparable to the base rates charged for functionally similar telecommunications service in urban areas in that state, the telecommunications carrier, health care provider, and/or consortium of health care providers may request that the Administrator perform a more comprehensive support calculation. The requester shall provide to the Administrator the information to establish both the urban and rural rates consistent with § 54.605 and § 54.607, and submit to the Administrator with Form 466 all of the documentation necessary to substantiate the request.

(3) *Base rate support-consortium.* Except with regard to services provided under § 54.621, a telecommunications carrier that provides telecommunications service to a rural health care provider participating in an eligible health care consortium, and the consortium must establish the applicable rural base rates for telecommunications service for the health care provider's portion of the shared telecommunications services, as well as the applicable urban base rates for the telecommunications service.

(b) Absent documentation justifying the amount of universal service support requested for health care providers participating in a consortium, the Administrator shall not allow telecommunications carriers to offset, or receive reimbursement for, the amount eligible for universal service support.

(c) The universal service support mechanisms shall provide support for intrastate telecommunications services, as set forth in § 54.101(a), provided to rural health care providers as well as interstate telecommunications services.

(d) *Satellite services.* (1) Rural public and non-profit health care providers may receive support for rural satellite services, even when another functionally similar terrestrial-based service is available in that rural area. Discounts for satellite services shall be capped at the amount the rural health care provider would have received if they purchased a functionally similar terrestrial-based alternative.

(2) Rural health care providers seeking discounts for satellite services shall provide to the Administrator with the Form 466 documentation of the urban and rural rates for the terrestrial-based alternatives.

(3) Where a rural health care provider seeks a more expensive satellite-based service when a less expensive terrestrial-based alternative is available, the rural health care provider shall be responsible for the additional cost.

■ 6. Amend § 54.613 by revising paragraph (a) to read as follows:

§ 54.613 Limitations on supported services for rural health care providers.

(a) Upon submitting a bona fide request to a telecommunications carrier, each eligible rural health care provider is entitled to receive the most cost-effective, commercially-available telecommunications service at a rate no higher than the highest urban rate, as defined in § 54.605, at a distance not to exceed the distance between the eligible health care provider's site and the farthest point on the jurisdictional boundary of the city in that state with the largest population.

* * * * *

■ 7. Revise § 54.619 to read as follows:

§ 54.619 Audits and recordkeeping.

(a) *Health care providers. Recordkeeping.* Health care providers shall maintain for their purchases of services supported under this subpart documentation for five years from the end of the funding year sufficient to establish compliance with all rules in this subpart. Documentation must include, among other things, records of allocations for consortia and entities that engage in eligible and ineligible activities, if applicable.

(b) *Production of records.* Health care providers shall produce such records at the request of any auditor appointed by the Administrator or any other state or federal agency with jurisdiction.

(c) *Random audits.* Health care providers shall be subject to random compliance audits to ensure that requesters are complying with the certification requirements set forth in § 54.615(c) and are otherwise eligible to receive universal service support and that rates charged comply with the statute and regulations.

(d) *Annual report.* The Administrator shall use the information obtained under paragraphs (a), (b) and (c) of this section to evaluate the effects of the regulations adopted in this subpart and shall report its findings to the Commission on the first business day in May of each year.

■ 8. Revise § 54.621 to read as follows:

§ 54.621 Access to advanced telecommunications and information services.

(a) Twenty-five percent of the monthly cost of eligible Internet access shall be eligible for universal support. Health care providers shall certify that the Internet access selected is the most cost-effective method for their health care needs as defined in § 54.615(c)(7), and that purchase of the Internet access is reasonably related to the health care needs of the rural health care provider.

(b) Each eligible health care provider that cannot obtain toll-free access to an Internet service provider shall be entitled to receive the lesser of the toll charges incurred for 30 hours of access

per month to an Internet service provider or $180 per month in toll charge credits for toll charges imposed for connecting to an Internet service provider.

■ 9. Amend § 54.625 by revising paragraph (a) to read as follows:

§ 54.625 Support for services beyond the maximum supported distance for rural health care providers.

(a) The maximum support distance is the distance from the health care provider to the farthest point on the jurisdictional boundary of the city in that state with the largest population, as calculated by the Administrator.

* * * * *

[FR Doc. 03–31683 Filed 12–23–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 98–67; FCC 00–56]

Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces the effective date of the amendments to the Commission's rules for governing telecommunications relay services (TRS) and related customer premises equipment for persons with disabilities that contained information collection requirements.

DATES: 47 CFR 64.604(b)(2), (c)(1), (c)(5)(i) and 64.605(f) published at 65 FR 38432, June 21, 2000, are effective June 29, 2000.

FOR FURTHER INFORMATION CONTACT: Cheryl King, Consumer & Governmental Affairs Bureau, Disability Rights Office, (202) 418–2517 (voice), (202) 418–0416 (TTY).

SUPPLEMENTARY INFORMATION: On March 6, 2000, the Commission released a *Report and Order*, published at 65 FR 38432, June 21, 2002, in CC Docket No. 98–67; FCC 00–56. The information collections contained in the *Report and Order* were approved by OMB on June 20, 2000. The OMB approval of the information collections contained in the *Report and Order* was announced in the **Federal Register** on June 29, 2000. *See* 65 FR 40093, June 29, 2000.

Pursuant to 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. Notwithstanding any other provisions of law, no persons 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. Questions concerning the OMB control numbers and expiration dates should be directed to Les Smith, Federal Communications Commission, (202) 418–0217. The OMB Control Number is 3060–0463.

Synopsis

In the *Report and Order*, the Commission amended its rules governing the delivery of TRS to expand the kinds of relay services available to consumers and to improve the quality of relay service. The Commission also amended its rules to better conform to the statutory mandate that TRS must be ''functionally equivalent'' to voice telecommunications service to the extent possible. Among other things, these rules are intended to improve the speed at which calls are answered and conversations relayed.

List of Subjects in 47 CFR Part 64

Individuals with disabilities, Telecommunications relay service.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–31767 Filed 12–23–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No.031028268–3321–02; I.D. 091603F]

RIN 0648–AR12

Atlantic Highly Migratory Species; Bluefin Tuna Season and Size Limit Adjustments

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

ACTION: Final rule.

SUMMARY: Under the framework provisions of the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP) governing the Atlantic bluefin tuna (BFT) fishery, NMFS amends the regulations regarding the opening date of the Purse seine category, closure dates of the Harpoon and General categories, and size tolerances of large medium BFT for the Purse seine and Harpoon categories. The intent of this final rule is to further achieve domestic management objectives under the HMS FMP and Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT) pursuant to the Atlantic Tunas Convention Act (ATCA).

DATES: This rule is effective on January 23, 2004, except for § 635.27(a)(1)(i)(C) which is effective December 24, 2003.

ADDRESSES: Copies of the supporting documents including the Environmental Assessment/Regulatory Impact Review/ Final Regulatory Flexibility Analysis (EA/RIR/FRFA) and the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP) may be obtained from Dianne Stephan, Highly Migratory Species Management Division, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. These documents are also available from the Highly Migratory Species Division Web site at *http://www.nmfs.noaa.gov/sfa/hmspg.html*.

FOR FURTHER INFORMATION CONTACT: Dianne Stephan at (978) 281–9397.

SUPPLEMENTARY INFORMATION: Atlantic tunas are managed under the dual authority of the Magnuson-Stevens Act and ATCA. ATCA authorizes the Secretary of Commerce (Secretary) to implement binding recommendations of ICCAT. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA).

Background information regarding these regulatory changes was provided in the preamble to the proposed rule (68 FR 63747, November 10, 2003), and is not repeated here. By this final rule, NMFS announces the new Purse seine start date of July 15; the new Harpoon category closure date of November 15 or when the quota is reached, whichever comes first; the General category closure date of January 31 or when the quota is reached, whichever comes first; and new large medium BFT tolerances for the Purse seine and Harpoon categories. The large medium tolerance limit for each vessel in the Purse seine category is 15 percent by weight of that vessel's

annual landings, and the large medium tolerance for the Harpoon category is two BFT per vessel per day.

Changes From the Proposed Rule

Several sections of regulatory text have been modified to be consistent with the change to the Purse seine category start date, specifically, § 635.28 (a)(2) and §§ 635.71(b)(10) and (b)(17). In addition, the final rule also includes a provision to delay the Purse seine category start date to no later than August 15 should it further assist in achieving the objective of the rule to reduce gear conflicts or overlap between fishing categories.

Comments and Responses

Comment 1 - NMFS received numerous comments in favor of a change in the Purse seine category start date from August 15 to July 15. Many commenters supported the July 15 Purse seine category start date for a variety of reasons including providing a greater length of time over which to spread Purse seine category landings, providing more time for purse seine vessels to catch their quota, and providing more opportunity to fish when the weather is better. In supporting the July 15 start date, some commenters stated that as the bulk of General category landings now occur later in the year than they had occurred when the August 15 purse seine start date was originally established, the date should be adjusted to July 15. Commenters stated that this change would be consistent with the original purpose of a purse seine start date that reduces overlap between fishing categories. One commenter also stated that currently the peak General category and Purse seine category landings coincide, which results in negative economic impacts for all in the fishery. This commenter noted that although a change to July 15 may negatively affect the Harpoon category, the proposed increase in allowance of two large mediums per vessel per day for the Harpoon category may mitigate these negative impacts by providing more of an opportunity for the Harpoon category to attain its quota by July 15, prior to the commencement of the Purse seine category fishing season.

Response - The final action establishes a start date for the Purse seine category of July 15. The intent of this action is to maximize positive economic impacts to the BFT fishery as a whole while minimizing negative impacts to the Harpoon category. Increasing the length of the season for the Purse seine category should help alleviate the overlap of large catches in the late summer and fall by allowing for the distribution of purse seine catches throughout more of the season, should improve market prices in the Purse seine and General categories, and would minimize gear conflict on the water. The increase of the Harpoon category large medium retention limit may mitigate impacts by improving the ability of the Harpoon category to land the annual quota, perhaps prior to the commencement of the Purse seine category season. In addition, the final rule includes a provision for delaying the start date to no later than August 15 if a delay would further reduce gear conflicts or overlap between the different categories. Any adjustment to the start date would be filed with the Office of the **Federal Register** but would not be filed less than 14 calendar days prior to July 15. Because there are only five vessels in the Purse seine category, NMFS will be able to provide actual notice to the affected fishermen.

Comment 2 - NMFS also received comments suggesting alternative start dates for the Purse seine category as well as other commercial fishing categories. Some commenters opposed to a July 15 Purse seine category start date supported the status quo August 15 date, and stated that the slower, late fall market could probably better withstand the fiscal impacts of large purse seine catches. One commenter preferred a start date for the Purse seine category later than August 15 and creation of an earlier start date than June 1 for the commercial handgear categories to reduce overlap. One commenter specifically requested an earlier season opening date of the General and Harpoon categories on May 1. A few commenters supported a purse seine start date earlier than July 15, and a number of commenters specifically requested that all categories start on the same date. One commenter requested that the purse seine season be open year-round.

Response - NMFS analyses for this action determined that with the status quo purse seine start date of August 15, the early fall market for the overall fishery suffers from reduced ex-vessel prices that are temporally associated with the height of Purse seine and General category landings. A July 15 start date is intended to shift purse seine landings to earlier in the season and improve ex-vessel prices during the early fall, which is when the General category harvests most of its quota. Alternative dates do not appear to meet the objectives of the rulemaking to assist overall fishery prices and avoid overlap between the Purse seine and General categories. A start date later than August 15 would shorten the season and could thereby negatively affect the ability of the Purse seine category to harvest its quota, which contradicts one objective of this final rule. A start date earlier than July 15 would allow for a longer period of time during which purse seine and harpoon landings would overlap and therefore could increase negative impacts to the Harpoon category, which are somewhat mitigated by the increase in the large medium tolerance for that category. Harmonizing all commercial fishery start dates to the same date would undermine the objective of this action to minimize gear conflicts on the water and to improve ex-vessel prices. Opening the start date for any fishery prior to June 1 would require adjustment of the fishing year, which must be accomplished through an FMP amendment. A year-round fishery for the Purse seine category was not considered as an alternative since it does not address the need to reduce gear conflicts identified in the original purpose for this action. However, as it is likely that market conditions and landing rates will vary among categories and from fishing year to fishing year the final rule includes a provision to provide some flexibility for adjusting the commencement of the Purse seine start date to no later than August 15.

Comment 3 - Several commenters opposed a July 15 start date because it was inconsistent with a current industry agreement regarding operations of spotter aircraft in the purse seine fishery. For this reason, one commenter supported a July 28 start date. The commenter noted that this fishing year was relatively calm regarding spotter plane activity and that the fishery would benefit from a permanent regulation regarding a July 28 start date for purse seine operations and their associated spotter aircraft.

Response - The 2003 fishing year was the first year for implementation of an industry agreement regarding the use of spotter planes throughout the industry. The July 28 start date for purse seine vessels and associated spotter aircraft established in the industry agreement is not an enforceable provision of NMFS regulations and could change based on revised industry arrangements. Consequently, it could be problematic to link season openings to actions not in NMFS control. NMFS recognizes the benefits of industry communication and cooperation on the issue of use of spotter planes in the fishery, and encourages the industry to continue to work together towards a constructive arrangement. The final rule includes a provision to provide some flexibility to the commencement of the Purse seine start date and any influence of spotter

planes on landings rates could be considered as part of the deliberations to delay the opening from July 15 to a more appropriate date but no later than August 15.

Comment 4 - Several comments were received regarding quota allocation to the Purse seine category, the impact of purse seine landings on the market, and timing of BFT market forces on ex-vessel prices in general. Several commenters stated that the purse seine fishery interfered with both the General and Harpoon category fisheries, that the Purse seine category should be eliminated altogether, and the quota redistributed among the other commercial categories with higher ex-vessel value landings. These comments noted that there has been ample opportunity for purse seine vessels to catch available quota, i.e., if they had chosen to fish off southern states later in the season, and that purse seine fishing operations this year tended to disrupt the biology and behavior of the fish as well as other traditional fishing patterns and agreements. A commenter stated that shifting the start date to avoid market gluts was not going to help as the volume of fish landed by purse seiners would flood the market regardless of when they were landed. Several commenters noted that adjustment of start and opening dates among the categories would not necessarily assist prices of ex-vessel landings as the markets in Japan were dominated by imports from other countries. In addition, they noted that Japan had business interests in farm raised BFT in pens around the world and could control the flow of tuna from these pens depending on the Japanese domestic market need. A few commenters also mentioned that there was now a strong U.S. domestic market for BFT and that controlling or even banning imports of BFT into the United States could provide stronger prices for U.S. domestic fishermen for BFT destined for internal domestic markets.

Response - One of the purposes of this action is to provide modest changes to the current timing of several commercial categories to assist in increasing economic yield in the fishery overall. To achieve this objective, NMFS analyzed means of decreasing the overlap of the General category and Purse seine category fisheries to improve market conditions and reduce conflicts as these two fishing categories are responsible for the greatest amount of landings in the BFT fishery. This action was intended to provide modest adjustments, pending development of an FMP amendment, to address allocation issues that have arisen. The final rule provides flexibility for fine tuning of the commencement of the Purse seine category between July 15 and August 15 to further assist in achieving the objective of reducing gear conflicts and overlap between fishing categories based on, among others, data from landings and market conditions. NMFS recently published a Notice of Intent to prepare an FMP amendment (68 FR 40907; July 9, 2003) which will address BFT allocation as well as other issues. Elimination of the Purse seine category would require an FMP amendment as well. Information from ICCAT's Bluefin Statistical Document Program indicates that Japan imports BFT from many countries and that the U.S. domestic market for BFT has grown over the past several years. Controlling this international flow of product to improve United States domestic prices is beyond the purview of this rulemaking and would involve international trade negotiations with careful consideration of consequences to existing trade treaties and agreements. While this action will not be able to address BFT imports, it will provide modest adjustments to alleviate overlap in sectors of the U.S. Atlantic BFT fisheries, which could contribute to improved ex-vessel prices and reduce gear conflicts on the water.

Comment 5 - Comments were generally in favor of the November 15 end date for the Harpoon category. Commenters supported implementation of the end date as a means of preserving the Harpoon category quota for the traditional fishery. A few comments were opposed to establishing an end date. One comment stated it was creating two different standards for categories within the fishery especially when NMFS was considering extending the General category season. A few commenters requested that the end date be established on November 1.

Response - The final action includes a November 15 end date for the Harpoon category. This action is intended to maintain the Harpoon category quota for the traditional Gulf of Maine fishery, which upholds the purpose of the 1980 action that established the Harpoon category (45 FR 40118; June 13, 1980). Unlike other categories, the original intent of this fishery and quota allocation was for a particular geographic sector of traditional harpoon fishermen. November 15 is the approximate date by which most or all BFT have migrated out of the Gulf of Maine area. By closing the fishery on November 15, fishermen in other areas will not be able to land BFT against the Harpoon category quota. However, use of a harpoon to harvest BFT will continue to be available to all fishermen under the General category when the General category season is open. NMFS did not consider a November 1 end date because BFT landings in New England have occurred in mid-November, and November 15 attempts to provide the traditional fishery with all available opportunities to harvest the quota while still avoiding investment in a fishery outside the New England area.

Comment 6 - NMFS received several comments in favor of extending the General category end date. Many commenters supported the temporal extension of the General category fishery to include a winter fishery off south Atlantic states, and noted the important economic contribution this fishery makes to the local economy. Several commenters noted that they had invested in this fishery by purchasing equipment and needed more certain annual access to the fishery as opposed to depending upon potential remaining late season quota. One commenter stated that the 2003 quota increase from ICCAT would provide for this action with minimal impact on the summer and fall New England General category fishery. Other commenters noted that this would address some of the concerns raised by the North Carolina Division of Marine Fisheries petition, such as providing more fair and equitable access to BFT when they are available off the south Atlantic coast. A number of commenters requested that the January 31 season end date be applicable for the 2003 fishing year, i.e., for January 2004.

Response - The final action includes a January 31 end date for the General category season. The intent of this action is to more broadly distribute General category fishing opportunities both temporally and geographically. Although there may be a small negative impact on General category fishermen in the northern areas of the fishery, NMFS agrees that the recent increase in the ICCAT quota as well as NMFS' continuing management of the fishery with annual specifications and inseason actions will minimize these impacts. In addition, northern area General category vessels could mitigate impacts by traveling south to participate in the winter fishery. This action addresses, in part, a petition for rulemaking submitted by the North Carolina Division of Marine Fisheries to provide a reasonable opportunity for southern fishermen to harvest BFT when they are available in the southern area. NMFS published a **Federal Register** notice requesting public comment on the petition (67 FR 69502; November 18, 2002), and received 28 comments which ranged from support to opposition.

Other aspects of the petition relate to changes in the BFT quota allocations, which would require an FMP amendment process with further analyses and input from the HMS Advisory Panel (AP) and the public. The AP generally supported a late season commercial General category fishery for southern Atlantic states, depending upon the details and impacts on other fishery participants. In particular, AP members were generally supportive of using some proportion of the additional BFT quota allocated by ICCAT in 2002 towards meeting the objectives of the petition. The AP will revisit BFT allocation issues at its next meeting scheduled for February 9 - 11, 2004.

Comment 7 - Several commenters were opposed to extending the General category season and recommended alternative General category closure dates. A few commenters stated that the fishery off North Carolina was a new fishery rather than a traditional fishery, and thus should not be considered in setting the General category season and no extension should be provided. Several commenters proposed an alternative end date for the General category season of November 30, and requested that the General category retention limits early in the season be increased in order to provide northern area fishermen with a greater opportunity to harvest the quota. Several comments stated concern that if the General category was open during December, there may not be enough quota for the extended fishery in January and thus preferred opening the General category for either December or January but not both. Other comments suggested providing for a distinct set-aside quota and time period for a North Carolina fishery.

Response - The intent of this action is to more broadly distribute General category fishing opportunities both temporally and geographically and provide for an increase in optimum yield for the fishery overall. At the time of development of the HMS FMP, the General category quota tended to be harvested prior to the migration of BFT to waters off the southern states. However, since that time, the fishery has changed and General category quota has been available later into the season. Unlike the Harpoon category quota, the General category quota was not established for use solely by a traditional New England fishery. The potential increase in gross revenues provided by a winter General category fishery could help maximize optimum yield for the BFT fishery overall. Reallocation of quota among time periods or establishing set-aside quotas for particular areas would require an FMP amendment and is beyond the scope of this rulemaking. These issues may be addressed in HMS FMP Amendment Two which is currently under development. A Notice of Intent to prepare this amendment was published in the **Federal Register** on July 9, 2003 (68 FR 40907).

Comment 8 - Comments were generally in favor of the increase in tolerance limit for the Harpoon category. Commenters stated that this fishery is selective, that it is fair and equitable to adjust the tolerance if doing so for the Purse seine category, and an increase in the tolerance limit would not result in an increase in dead discards. A few commenters opposed any tolerance of large medium BFT. One commenter noted that the decrease in availability of giant BFT and any concerns regarding additional mortality of large medium were insignificant when compared to mortality of small fish in the eastern Atlantic and Mediterranean.

Response - The final action increases the tolerance limit for large medium BFT retention in the Harpoon category to two fish per vessel per day. The intent of this action is to balance mortality of pre-spawning fish with the requirement to provide a reasonable opportunity for the Harpoon category to attain its annual quota while avoiding dead discards. Although NMFS stated at the proposed rule stage that logbooks were not expected to be implemented, it is clear that additional information about at-sea operations is needed in order to better evaluate the affect of tolerance limits on dead discards and overall mortality of pre-spawning BFT. NMFS will pursue collection of such information through the implementation of previously approved vessel logbook and/or observer programs. To avoid duplication, existing programs for other fisheries such as the Northeast Region Vessel Trip Report will be evaluated relative to developing HMS specific reporting mechanisms.

Comment 9 - NMFS received comments both in favor of and opposed to the proposed increase in tolerance limit for the Purse seine category. Some commenters were opposed to any increase in tolerance limit, while others opposed the proposed tolerance in favor of a higher one.

Many commenters who were in favor of the change in tolerance limits stated that purse seine vessels would not target smaller fish as a result of a tolerance limit increase. Some commenters also noted that the mortality of undersized fish in the purse seine fishery was negligible when compared with mortality of small fish in the east Atlantic or even mortality of small fish in the U.S. Angling category. Commenters stated that increasing tolerance was particularly relevant when one considered the new data regarding mixing rates between east and west Atlantic stocks, and the uncertainty of BFT size and age at maturity.

Some commenters opposed to an increase in tolerance limit stated that the preferred alternative (15 percent by weight) would result in purse seine vessels targeting smaller fish, and could result in an increase of dead discards. Many commenters requested a thorough study of the effect of any increase in tolerance limits on dead discards. A commenter stated that purse seine vessels already had many advantages over other fishing categories, and that perhaps larger mesh nets would reduce catch of undersized BFT. Another commenter noted that there is a higher mortality associated with release of undersized BFT from purse seine nets compared to those released alive off hook-and-line. This commenter could only support up to a 50–percent increase if observers were deployed on all vessels; otherwise both trip and annual limits should remain the same. At least one commenter specifically requested that a trip limit remain in place for the Purse seine category.

Several commenters suggested a higher tolerance limit than that proposed, and some suggested waiving the tolerance limit all together and proposed a 73–inch (185.4 cm) minimum size for the Purse seine category. A commenter stated that there is a large potential for discards and wasted mortality because of the preponderance of schools of mixed BFT sizes, and suggested that the tolerance be increased to 50 percent by weight as a form of mitigation. This commenter stated that approximately 315 more large medium BFT would be harvested at a 25 percent tolerance limit than a 15 percent tolerance limit, and that 315 more BFT would be biologically insignificant. Several commenters broadened this request to establish 73–inch as a minimum size for all commercial fishing categories. Several commenters emphasized the need for the United States to ensure all possible quota is utilized in order to support domestic needs at ICCAT negotiations. A number of commenters referred to the 25–percent tolerance limit provided in year 2003 exempted fishing permits (EFPs), and encouraged NMFS to continue with what they considered a successful approach.

Response - The final action includes an increase in tolerance for large

medium BFT in the Purse seine category of up to 15 percent of landings (by weight). The intent of this action is to balance mortality of large medium BFT while increasing the ability of the Purse seine category to catch the annual quota. NMFS has determined that only a modest increase in large medium tolerance is appropriate at this time, in light of the uncertainty of the effect of a greater tolerance limit on overall mortality of large mediums including dead discards, stock rebuilding, and dead discards of undersized BFT. NMFS estimates that an increase in the tolerance limit of up to 50 percent would result in an additional direct mortality of approximately 1,066 more large medium BFT over the current status quo direct mortality of 251 fish, i.e. over a four-fold increase.

Data from the 2003 season, which relaxed tolerance limits for the purse seine fishery to 25 percent under EFPs, show that purse seine vessels were able to increase landings over 2002 levels with the increased tolerance limit. Further evaluation of this data, in addition to socio-economic data to be provided from the 2003 EFP fishery, will assist NMFS with future management of this fishery sector, including compliance and enforcement of revised tolerance limits. NMFS will be collecting data on dead discards and other variables in this fishery through previously approved programs including vessel logbooks and/or observers. Additional data regarding discard rates and mortality of large medium BFT in the Purse Seine category will help to determine the biological impacts of adjusting the tolerance limits.

Comment 10 - One commenter requested that electronic comments via email be accepted in the future.

Response - NMFS has implemented pilot programs which accepted electronic comments for past rulemakings with some success. The agency intends to pursue the use of electronic media for public comment in the near future.

Comment 11 - One commenter noted that reciprocity should be established for commercial fishermen from other states to fish in North Carolina waters.

Response - The issue of fishing access in state waters by out of state fishermen is a matter of state jurisdiction and not under the purview of NMFS. However, NMFS notes that the State of North Carolina has provided reciprocity for commercial BFT fishermen from other states. In order to fish commercially for BFT in North Carolina, BFT commercial fishermen from other states are now able to obtain a ''license to sell'' which allows them to sell their catch in North Carolina. Out of state vessels are also allowed to fish within state waters with a permit from North Carolina Division of Marine Fisheries.

Comment 12 - A commenter suggested providing a ''mulligan'' or tolerance limit of some set number of undersized fish per vessel in all categories that would allow vessels to retain and land accidentally caught undersized fish and reduce discards. The commenter stated that this approach could also help reduce incentives to sell these undersized fish illegally, and that the Japanese market has a preference for these smaller sized fish and offers relatively higher prices per pound.

Response - Adjusting size limits or tolerance limits for reasons other than improving the ability of the Purse seine and Harpoon categories to harvest their respective quotas was beyond the objective for this action. A more comprehensive approach towards eliminating dead discards will be addressed in HMS Amendment Two.

Comment 13 - Comments were received regarding decreasing quotas for all species; eliminating the use of gill nets, seine nets, longlines, and harpoons; and including environmentalists on agency panels. One commenter noted that an ecosystem imbalance caused by a reduction in the number of herring available in New England waters has resulted in a decreased availability of BFT in New England. Many commenters opposed the recent closing of the BFT Angling category.

Response - These issues are outside the scope of the current rulemaking. NMFS has issued a notice of intent for preparation of an amendment to the HMS FMP (68 FR 40907; July 9, 2003) which could address many of these issues, as well as others, during the FMP amendment process. The Herring fishery is managed under the Herring Fishery Management Plan and is currently in the amendment process. The New England Fisheries Management Council is the responsible council for the Herring FMP amendment and has analyzed several alternatives for action that include considerations of the impact of herring on elements of the ecosystem such as predator- prey relationships. The BFT Angling category was closed on November 17 (68 FR 64990, November 18, 2003) because of recent data indicating an over-harvest of this category in 2002. NMFS is reviewing these data to determine if further action is necessary.

Classification

This final rule is published under the authority of the Magnuson-Stevens Act and ATCA. The AA has determined that the regulations contained in this final rule are necessary to implement the recommendations of ICCAT and to manage the domestic Atlantic HMS fisheries. NMFS has determined that these regulations are consistent with the Magnuson-Stevens Act, ATCA and ICCAT recommendations.

This action relieves a restriction by extending the BFT General category end date until January 31, thus providing this category with approximately 30 more days in the fishing season. The General category closed on December 10 because the General category had attained its quota. However, there is additional quota available in other categories that NMFS intends to transfer into the General category in January 2004, after updating and reviewing landings data. This action will re-open the General category to fishing through January 31 to allow for the harvest of the additional quota. Therefore, pursuant to 5 U.S.C. 553(d)(1), the 30–day delayed effectiveness period is not applicable to Section 635.27(a)(1)(i)(c), the General category end date provision.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) for the proposed rule and submitted it to the Chief Counsel for Advocacy of the Small Business Administration. No comments were received on the IRFA concerning the economic impact of this final rule. A summary of the FRFA is provided below.

The analysis for the FRFA examines the impacts of the alternatives for adjusting the Purse seine category start date, establishing a Harpoon category end date, adjusting the General category end date, and adjusting the retention limit for large medium BFT in the Harpoon and Purse seine category fisheries on small entities. The purpose of this final action is to ensure the BFT fishery is managed consistently with the objectives of the HMS FMP and its implementing regulations, applicable statutes including the Magnuson-Stevens Act and ATCA, and the 1998 ICCAT Rebuilding Plan for western Atlantic BFT.

The analysis for the FRFA assesses the impacts of the various alternatives on the vessels that participate in the BFT fisheries, all of which are considered small entities. This final action would affect vessels in three permit categories, namely the Purse seine, Harpoon, and General categories. The gross revenues for 2002, and number of vessels to date for 2003 for

each category are as follows: General category, $13.9 million, 6,797 vessels; Purse seine category, $3.0 million, 5 vessels; and the Harpoon category, $0.5 million, 59 vessels.

Three alternatives were analyzed for the adjustment of the Purse seine category start date, including the no action/status quo alternative of an August 15 start date, the same start date as all other categories - June 1, and the selected alternative of a July 15 start date. These alternatives were evaluated to determine their ability to improve optimum yield and ex-vessel prices for the Purse seine and General categories while minimizing negative impacts to other commercial categories, specifically the Harpoon category. Because of the various factors that affect ex-vessel prices for BFT (i.e., supply, quality, etc.), the exact effect of different Purse seine category season start dates on ex-vessel prices is unknown. NMFS estimated these impacts by assuming that the amount of product on the market was the primary factor affecting ex-vessel prices.

Under the no action alternative, both the General and Purse seine categories appear to be negatively affected by depressed ex-vessel prices which appears to result from a mid-season glut of BFT on the market. However, under this alternative the Harpoon category benefits with higher ex-vessel prices early in the season before the Purse seine category commences.

Another alternative, opening the Purse seine category on June 1, could shift Purse seine category landings to earlier in the year and result in positive impacts for the Purse seine and General categories by relieving the mid-season market glut and distributing landings more uniformly over the fishing year. However, the Harpoon category could suffer the most negative impacts under this alternative because of the overall net increase in early season landings resulting from the overlap with the Purse seine category fishery season that would increase by 76 days. This overlap would occur during the time period when the Harpoon category traditionally experiences the best ex-vessel prices and on average annually lands the bulk (87 percent) of its product.

The selected alternative of a July 15 start date appears to minimize the negative impacts on the Harpoon category by reducing by more than half the amount of overlap with the Purse seine category season relative to the June 1 start date alternative, while still reducing the mid-season market glut, which should positively impact Purse seine and General category ex-vessel prices. Under this alternative, increase in overlap with the Harpoon category would be reduced to 30 days and such overlap would occur during the time period when the Harpoon category averages approximately 26 percent of its gross revenues annually. Due to the large amount of landings, gross revenues and numbers of participants attributed to the Purse seine and General category commercial BFT sectors, this alternative is expected to provide the greatest positive impacts to the BFT fishery as a whole, even though the smaller Harpoon category may experience slightly negative economic impacts. Any negative impact to the Harpoon category could be partially mitigated by the increase in this final rule of the Harpoon category tolerance limit for large medium BFT to two fish per vessel per day, which would improve the ability of the Harpoon category to catch its annual quota. In addition, in response to comment, the final rule for this alternative includes a provision for delaying the start date to no later than August 15 if such a delay would further reduce gear conflicts or overlap between the different categories. Any adjustment to the start date would be filed with the Office of the **Federal Register** but would not be filed less than 14 calender days prior to July 15. Because there are only five vessels in the Purse seine category, NMFS will be able to provide actual notice to the affected fishermen.

Three alternatives were also considered for the Harpoon category end date. The no action/status quo alternative would maintain an open Harpoon category season year round, provided there is Harpoon category quota available. Alternative two (selected) would close the Harpoon category season on November 15, and alternative three would establish a flexible season end date based on the actual dates of the BFT fall migration.

The no action/status quo alternative is expected to result in negative impacts for the traditional northern Harpoon category fishery since BFT could be harvested under the Harpoon category quota in areas outside the New England area, thereby reducing the quota available to the traditional fishery. In addition, the status quo may encourage the development of, and investment in, a southern area Harpoon category fishery, which has not yet occurred.

Alternative two is designed to maintain the Harpoon category quota for the traditional New England fishery and impact only the Harpoon category vessels. This alternative is selected as it is expected to provide positive impacts for the traditional New England Harpoon category fishery since it would close the fishery near the time period when BFT migrate out of the New England area. Negative impacts to southern area fishermen interested in participating in the Harpoon category fishery under this alternative are expected to be negligible since there had been no BFT landings against the Harpoon category quota in such area prior to 2002, few vessels have participated in the Harpoon category fishery in the south Atlantic since that time, and there has been little investment in gear and equipment in a Harpoon category fishery outside of the New England area. Finally, vessel owners/operators that fish outside the traditional New England area that wish to use a harpoon as a primary gear type would still be allowed to do so under the General category permit, albeit under General category retention limits and restrictions.

The third alternative is also designed to affect only Harpoon category vessels and maintain the Harpoon category quota for the traditional New England fishery. Unlike the status quo and alternative two, it could provide additional positive impacts to the traditional New England Harpoon category fishery since it would more closely track the BFT fall migration, and could eliminate the landing of any BFT under the Harpoon category quota outside of the area of the traditional fishery. However it could be difficult to administer due to the difficulty in tracking the BFT migration and may lead to uncertainty for members within the Harpoon category regarding closure of the fishery. Alternative three also would have negligible impacts on southern area fishermen, for the same reasons noted above for alternative two.

The General category season is scheduled to end on December 31 of each fishing year or when the General category quota is harvested, whichever comes first. A winter fishery for large medium and giant BFT has existed in the south Atlantic since the early 1990s, and when quota is available, fish have been harvested under the General category. Two alternatives (in addition to the no action/status quo alternative) were considered that would both extend the General category season to provide southern Atlantic fishermen with more access to the General category BFT quota in the late fall and winter. Under the status quo the General category season would close on December 31 regardless of whether the full allocated quota has been attained or not. Southern area fishermen have been adversely affected this closure date as it occurs when BFT appear off southern states and commercial fishing opportunities

have been denied to them after December 31.

Alternative two (selected) would move the General category end date to January 31 of each fishing year. Overall economic impacts of this alternative to the General category BFT fishery as a whole would be neutral since the same overall amount of the General category quota would be landed and the value of the General category quota would not be changed. General category fishermen in the northern region may experience negative economic and social impacts, when compared to the status quo, since any unharvested quota as of December 31 would otherwise be rolled over to the following year. General category fishermen in the southern region would be positively affected by this alternative as it would allow greater utilization of existing investment in gear and equipment if quota was still available for harvest after December 31, and since BFT are usually available in the southern region during the end of the calender year due to the fall migration from the north.

Under alternative three, extending the General category end date to May 31, overall impacts would again be neutral but northern General category fishermen could be more negatively affected and southern region fishermen could be more positively affected, due to the BFT fall migration, and depending on the amount of quota that remains after the season would have usually been closed. Alternative two was the alternative selected since it minimizes negative impacts to northern area fishermen by providing a more limited southern fishery extension and provides positive impacts for southern area fishermen by allowing further utilization of gear and equipment previously invested in a southern area large medium and giant BFT fishery. Negative impacts on northern area fishermen could be slightly mitigated if they are willing to travel south late in the season, provided there is reciprocity among different states' permitting costs and out-of-state fishermen are allowed under a coastal state's regulations to participate in a BFT commercial fishery, regardless of whether it occurs in federal or state waters.

As discussed above, the Purse seine and Harpoon categories have recently experienced difficulties in landing the full annual quota provided for each of these categories with the result of decreased annual gross revenues. Each alternative considered would modify the tolerance limits for landing large medium BFT and was analyzed to determine the increased likelihood of harvesting the respective quotas in the designated time frames while balancing any ecological impacts of increased fishing mortality against the potential to reduce dead discards. As NMFS currently has insufficient information on discards, data will be collected through previously approved information collection programs (i.e., vessel logbooks and/or observers) to determine the effect of adjusting tolerance limits for large medium BFT in the Harpoon and Purse seine categories on mortality of pre-spawning fish and the ability of these categories to harvest allocated quotas.

Alternative one, the no action/status quo alternative, has had negative impacts with a resulting decrease in optimum yield for both the Purse seine and Harpoon categories since they have been unable to land and sell the full allotted quota. Alternatives two, three, and four, all related solely to the Purse seine category, were all designed to increase access to large medium BFT for the Purse seine category and to increase the possibility of full quota attainment while balancing the need to control overall mortality and increased pressure on the large medium size class of BFT. Alternative two removes the 10–percent annual tolerance limit and maintains the 15–percent trip limit which could increase landings and gross revenue for the Purse seine category. Alternative three (selected), which eliminates the trip limit and establishes the annual limit at 15 percent, would provide access to the same total amount of landings as alternative two, but may also increase net revenues by increasing flexibility in meeting the annual tolerance limit. Alternative four could provide the greatest increase in access by decreasing the minimum size to 73 inches (185 cm) for the Purse seine category; however, it was not selected because of the associated potential negative ecological impact of a relatively large increase in overall BFT mortality within the large medium size class of BFT.

Alternatives five and six, related solely to the Harpoon category, were designed to increase access to large medium BFT for the Harpoon category and, similar to considerations with the Purse seine category, balance the attainment of the quota allocation with concerns regarding an increase in mortality and negative ecological impacts. Alternative five would allow an increase in the daily retention limit for the Harpoon category from the status quo of one large medium BFT per day to two large medium BFT per day, and was selected since it is expected to provide an acceptable balance between positive economic effects and a modest increase in mortality of large medium BFT. Large medium BFT mortality is not expected to increase significantly under this alternative because of a harpooner's ability to visually determine the size class of BFT prior to throwing a harpoon. Alternative six would allow full access to the large medium size class by reducing the minimum size limit for the Harpoon category to 73 inches (185 cm), and would provide the most positive economic impacts. However, it was not chosen because of the potential negative ecological impact of a relatively large increase in mortality on large medium fish.

Finally, alternative seven, unlike all other alternatives, would eliminate the tolerance for large medium size class and raise the minimum size of BFT to 81 inches (206 cm) in both the Purse seine and Harpoon categories. This alternative was considered due to the potential positive ecological impacts that would enhance western Atlantic BFT stock rebuilding, but would likely have negative economic and social impacts and further impede full attainment of quota and optimum yield. By narrowing the universe of fish available for harvest to just the giant size class, it would be more difficult for these categories to harvest the allocated quotas, thus the original objective for this action would be contradicted.

This final rule does not duplicate, overlap, or conflict with any other Federal rules.

This rule does not contain any new information collection, reporting, recordkeeping or other compliance requirements. Logbook and observer data collection schemes were proposed and made final in the HMS Fishery Management Plan issued in 1999 and the Office of Management and Budget approved the information collections as part of that rulemaking process. Both the Purse Seine and Harpoon fisheries for BFT were included in the approved information collection requests for these programs. NMFS has faced resource constraints in implementing the approved information collections and has tried to reduce costs and avoid duplication by examining all possible avenues of accessing data on catch, effort and discards in these fisheries. In this final rule, NMFS balanced requirements to reduce dead discards against the requirements to limit mortality on pre-spawning fish and provide a reasonable opportunity for U.S. fishermen to harvest the quotas allocated to each category under the international rebuilding program for BFT and the HMS FMP allocation sector scheme. NMFS addressed this issue by adjusting the tolerance limits for

landing large medium BFT for both the Harpoon and Purse Seine categories. In developing this rule, it has become apparent that additional information on the size distribution of fish encountered/caught (as opposed to fish landed) is needed, and NMFS plans on obtaining this information through the previously approved logbook and observer programs.

NMFS prepared an EA for this final rule, and the AA has concluded that there would be no significant impact on the human environment if this final rule were implemented. The EA presents analyses of the anticipated impacts of these regulations and the alternatives considered. A copy of the EA and other analytical documents prepared for this final rule, are available from NMFS (see **ADDRESSES**).

This rule has been determined to be not significant for purposes of Executive Order 12866.

On September 7, 2000, NMFS reinitiated formal consultation for all HMS commercial fisheries under section 7 of the Endangered Species Act (ESA). A Biological Opinion (BiOp) issued June 14, 2001, concluded that continued operation of the Atlantic pelagic longline fishery is likely to jeopardize the continued existence of endangered and threatened sea turtle species under NMFS jurisdiction. NMFS is currently implementing the reasonable and prudent alternative required by the BiOp. This final rule would not have any additional impact on sea turtles as these actions do not affect the use of pelagic longline gear, would not likely increase or decrease pelagic longline effort, nor are they expected to shift effort into other fishing areas. No irreversible or irretrievable commitments of resources are expected from this final action that would have the effect of foreclosing the implementation of the requirements of the BiOp.

NMFS has determined that the final regulations would be implemented in a manner consistent to the maximum extent practicable with the enforceable policies of those Atlantic, Gulf of Mexico, and Caribbean coastal states that have approved coastal zone management programs. On November 10, 2003, the proposed regulations were submitted to the responsible state agencies for their review under Section 307 of the Coastal Zone Management Act. As of November 28, 2003, NMFS has received 3 responses, all concurring with NMFS' consistency determination. Because no responses were received from the other states, their concurrence is presumed.

The area in which this final action is planned has been identified as an Essential Fish Habitat (EFH) for species managed by the New England Fishery Management Council, the Mid-Atlantic Fishery Management Council, the South Atlantic Fishery Management Council, the Gulf of Mexico Fishery Management Council, the Caribbean Fishery Management Council, and the HMS Management Division of the Office of Sustainable Fisheries at NMFS. Based on the 1999 Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks, which analyzed the impacts of purse seine, harpoon, and rod and reel gear on EFH, this action is not anticipated to have any adverse impacts to EFH.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics, Treaties.

Dated:December 19, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 635 is amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

■ 2. In § 635.23, paragraphs (d) and (e)(1) are revised to read as follows:

§ 635.23 Retention limits for BFT.

* * * * *

(d) *Harpoon category.* Persons aboard a vessel permitted in the Atlantic Tunas Harpoon category may retain, possess, or land an unlimited number of giant BFT per day. An incidental catch of only two large medium BFT per vessel per day may be retained, possessed, or landed.

(e) * * *

(1) May retain, possess, land, or sell large medium BFT in amounts not exceeding 15 percent, by weight, of the total amount of giant BFT landed during that fishing year.

* * * * *

■ 3. In § 635.27, paragraphs (a)(1)(i)(C), (a)(4)(i), and (a)(5) are revised to read as follows:

§ 635.27 Quotas.

(a) * * *

(1) * * *

(i) * * *

(C) October 1 through January 31 - 10 percent.

* * * * *

(4) * * *

(i) The total amount of large medium and giant BFT that may be caught, retained, possessed, or landed by vessels for which Purse Seine category Atlantic Tunas permits have been issued is 18.6 percent of the overall U.S. BFT landings quota. The directed purse seine fishery for BFT commences on July 15 of each year unless NMFS takes action to delay the season start date. Based on cumulative and projected landings in other commercial fishing categories, and the potential for gear conflicts on the fishing grounds or market impacts due to oversupply, NMFS may delay the BFT purse seine season start date from July 15 to no later than August 15 by filing an adjustment with the Office of the **Federal Register** for publication. In no case shall such adjustment be filed less than 14 calendar days prior to July 15.

* * * * *

(5) *Harpoon category quota.* The total amount of large medium and giant BFT that may be caught, retained, possessed, landed, or sold by vessels for which Harpoon category Atlantic Tunas permits have been issued is 3.9 percent of the overall U.S. BFT quota. The Harpoon category fishery closes on November 15 each year.

* * * * *

■ 4. In § 635.28 paragraph (a)(2) is revised to read as follows:

§ 635.28 Closures.

(a) * * *

(2) From the commencement date of the directed BFT purse seine fishery, as provided under § 635.27(a)(4)(i), through December 31, the owner or operator of a vessel that has been allocated a portion of the Purse Seine category quota under § 635.27(a)(4) may fish for BFT. Such vessel may be used to fish for yellowfin, bigeye, albacore, or skipjack tuna at any time, however, landings of BFT taken incidental to fisheries targeting other Atlantic tunas or in any fishery in which BFT might be caught will be deducted from the individual vessel's quota for the following BFT fishing season. Upon reaching its individual vessel allocation of BFT, the vessel may not participate in a directed purse seine fishery for Atlantic tunas or in any fishery in which BFT might be caught for the remainder of the fishing year.

* * * * *

■ 5. In § 635.71 paragraphs (b)(10) and (b)(17) are revised to read as follows:

§ 635.71 Prohibitions.

* * * * *

(b) * * *

(10) Fish for or catch any Atlantic tunas in a directed fishery with purse seine nets if there is no remaining BFT allocation made under § 635.27 (a)(4).

* * * * *

(17) As a vessel with a Purse Seine category Atlantic tunas permit, catch, possess, retain, or land BFT in excess of its allocation of the Purse Seine category quota, or fish for BFT under that allocation prior to the commencement date of the directed BFT purse seine fishery, as specified in § 635.27(a)(4).

* * * * *

[FR Doc. 03–31758 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 021122284–2323–02; I.D. 121803C]

Fisheries of the Northeastern United States; Summer Flounder Fishery; Commercial Quota Transfer

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

ACTION: Commercial quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring 357,867 lb (162,326 kg) of commercial summer flounder quota to the Commonwealth of Virginia from its 2003 quota. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

DATES: DATES: Effective December 19, 2003, through December 31, 2003.

FOR FURTHER INFORMATION CONTACT: Jason Blackburn, Fishery Management Specialist, (978) 281–9326, FAX (978) 281–9135, *Jason.Blackburn@Noaa.gov*

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.100.

The initial total commercial quota for summer flounder for the 2003 calendar year was set equal to 13,980,028 lb (6,341,235 kg). The percent allocated to vessels landing summer flounder in Virginia is 21.31676 percent, and in North Carolina is 27.44584 percent. This resulted in an initial commercial quota for Virginia of 2,980,089 lb (1,351,746 kg), and for North Carolina of 3,836,936 (1,740,405 kg) (68 FR 60, January 2, 2003). The 2003 allocation for Virginia was further reduced to 2,968,429 lb (1,346,457 kg), and for North Carolina to 3,821,924 lb (1,733,596 kg), due to research set-aside (January 2, 2003). The 2003 allocation for Virginia was also adjusted downward due to an estimated overage of the 2002 quota of 76,024 lb (34,484 kg), as of October 31, 2002, so that the resulting adjusted 2003 commercial quota for Virginia was 2,904,065 lb (1,317,275 kg) as of January 2, 2003 (68 FR 60). However, NMFS later found that the estimate of a 76,024–lb (34,484–kg) overage as of October 31, 2002, was in error, and restored that amount to Virginia's 2003 quota for a revised total of 2,968,429 lb (1,346,457 kg) on March 3, 2003 (68 FR 9905). The North Carolina quota allocation was not affected by overages from 2002. Therefore, their quota allocation remained at 3,821,924 lb (1,733,596 kg) (68 FR 9905).

The final rule implementing Amendment 5 to the FMP that was published on December 17, 1993 (58 FR 65936), provided a mechanism for summer flounder quota to be transferred from one state to another. Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine summer flounder commercial quota under § 648.100(d). The Regional Administrator is required to consider the criteria set forth in § 648.100(d)(3) in the evaluation of requests for quota transfers or combinations.

North Carolina has agreed to transfer 357,867 lb (162,326 kg) of its 2003 commercial quota to Virginia. This transfer is prompted by a problem with shoaling in the Oregon Inlet, caused by the recent Hurricane Isabel, that is preventing some North Carolina fishing vessels from landing at their normal ports. Landing their catch in Virginia represents the next best alternative, but requires a transfer to account for an increase in Virginia landings that would have otherwise accrued against the North Carolina quota. The Regional Administrator has determined that the criteria set forth in § 648.100(d)(3) have been met. The revised quotas for calendar year 2003 are: Virginia, 3,326,296 lb (1,508,783 kg); and North Carolina, 3,464,057 lb (1,571,270 kg).

Classification

This action is taken under 50 CFR part 648 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 18, 2003.

Bruce C. Morehead,

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

[FR Doc. 03–31720 Filed 12–19–03; 2:32 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 68, No. 247
Wednesday, December 24, 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 890

RIN 3206–AI37

Federal Employees Health Benefits Program: Effective Dates

AGENCY: Office of Personnel Management.

ACTION: Notice of withdrawal of proposed rulemaking.

SUMMARY: The Office of Personnel Management (OPM) is withdrawing its proposal to revise the regulations on adopting January 1 as the effective date for all annual open season enrollment changes and new enrollments in the Federal Employees Health Benefits Program (FEHB) which was published August 31, 1998, FR Doc. 98–23335. The regulation would have changed the existing FEHB regulations concerning the effective date from the 1st day of the first pay period in the new calendar year. This regulation would have concurrently changed the effective date of open season changes in enrollment made by employees, annuitants, former spouses and individuals enrolled under the temporary continuation of coverage (TCC) provisions of FEHB law.

The proposed regulation would have standardized the effective date of most of these new enrollments or changes in enrollment and made it consistent with the beginning of health benefits offered by FEHB plans, which are based on the calendar year. The intent of the regulation was to make it easier for employing offices and health plan carriers to administer the Program and reduce the potential for errors in determining effective dates.

The comment period for the proposed regulation ended September 30, 1998. OPM received comments from agencies that their automated payroll systems were not functionally capable of pro-rating employees' premium shares on other than a pay period basis. January 1 typically falls in the middle of a bi-weekly pay period, the most prevalent pay period used by Federal agencies. Therefore, most agencies would be required to accurately allocate the pro rata premiums to employees' pay on a timely basis. Some agencies reported that they simply would be unable to pro-rate premiums from January 1 to the beginning of the first pay period in the calendar year. Since 1998, OPM has subsequently raised this issue with agencies with similar responses.

OPM is responsible for the Administration's new e-Payroll initiative, part of the President's Management Agenda. This initiative is designed to modernize the Government's payroll system. OPM has selected four payroll service providers to replace the current 22 providers for the Federal government's 1.8 million employees. Under the e-Payroll initiative plan, the four providers will begin government-wide processing in September 2004. Once these new systems are in place, we will reconsider the status of this proposed FEHB rulemaking.

FOR FURTHER INFORMATION CONTACT: Anne Easton on (202) 606–0004.

Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 03–31768 Filed 12–23–03; 8:45 am]

BILLING CODE 6325–50–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 55 and 81

[Docket No. 00–108–2]

RIN 0579–AB35

Chronic Wasting Disease Herd Certification Program and Interstate Movement of Captive Deer and Elk

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to establish a herd certification program to eliminate chronic wasting disease from captive cervids in the United States. Participating deer and elk herds would have to follow program requirements for animal identification, testing, herd management, and movement of animals into and from herds. After 5 years of enrollment with no evidence of chronic wasting disease, a herd would be granted ''certified'' status. Owners of herds could enroll in a State program that we have determined has requirements equivalent to the Federal program, or could enroll directly in the Federal program if no State program exists. We are also proposing to establish interstate movement requirements to prevent the interstate movement of deer and elk that pose a risk of spreading CWD. These actions are intended to eliminate CWD from the captive deer and elk herds in the United States.

DATES: We will consider all comments that we receive on or before February 23, 2004.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 00–108–2, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 00–108–2. If you use e-mail, address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 00–108–2'' on the subject line.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: Dr. Lynn Creekmore, Staff Veterinarian, VS, APHIS, 2150 Centre Avenue, Fort Collins, CO 80526, telephone (970) 494–7354.

SUPPLEMENTARY INFORMATION:

Background

Chronic wasting disease (CWD) is a transmissible spongiform encephalopathy (TSE) of cervids (members of Cervidae, the deer family) that as of November 2002 has been found only in wild and captive animals in North America and in captive animals in the Republic of Korea. First recognized as a clinical ''wasting'' syndrome in 1967, the disease is typified by chronic weight loss leading to death. There is no known relationship between CWD and any other TSE of animals or people. Species known to be susceptible to CWD include Rocky Mountain elk, mule deer, white-tailed deer, and black-tailed deer. Non-cervid ruminant species, including wild ruminants and domestic cattle, sheep, and goats, have been housed in wildlife facilities in direct or indirect contact with CWD-affected deer and elk, and as of November 2002 there has been no evidence of transmission of CWD to these other species. Additional studies to delineate the host range of CWD are underway.

In the United States, CWD has been confirmed in free-ranging deer and elk in Colorado, Illinois, Nebraska, New Mexico, South Dakota, Utah, Wisconsin, and Wyoming, and in 27 captive (farmed) elk herds in Colorado, Kansas, Minnesota, Montana, Nebraska, Oklahoma, South Dakota, and Wisconsin, and in 2 captive deer herds in Wisconsin. The disease was first detected in U.S. farmed elk in 1997.

Research is being conducted to develop live-animal diagnostic tests for CWD. Currently, definitive diagnosis is based on postmortem examination (necropsy) and testing of postmortem samples. On microscopic examination, lesions of CWD in the central nervous system resemble those of other TSE's. In addition, using a technique called immunohistochemistry, scientists test brain tissues for the presence of the protease-resistant prion protein.

The origin and mode of transmission of CWD is unknown. Animals born in captivity and those born in the wild have been affected with the disease. Based on epidemiology, transmission is thought to be lateral, or from animal to animal. Although maternal transmission may also occur, it appears to be a relatively uncommon form of transmission.

Surveillance for CWD in free-ranging deer and elk in Colorado and Wyoming has been ongoing since 1983 and has defined the endemic areas in those States. CWD was detected in 2000 and 2001 in free-ranging deer in western Nebraska. The source of the disease is believed to be natural spread from the Colorado and Wyoming endemic area. More intensive surveillance to better define the prevalence and distribution of the disease in free ranging deer in these States is underway. However, in 2002, CWD was detected in wild cervids in northwestern Colorado, southern New Mexico, southwestern South Dakota, and south central Wisconsin. Detection of disease in these unexpected areas has led to increased surveillance to better define the limits of the endemic area and to determine the nationwide distribution and prevalence of CWD in wild cervids. This surveillance effort is a two-pronged approach consisting of hunter-harvest cervid surveys conducted in many States, as well as surveillance targeting deer and elk exhibiting clinical signs suggestive of CWD throughout the entire country. Surveillance for CWD in captive elk began in 1997. Captive cervid surveillance has increased each year since 1997 and will be an integral part of the U.S. Department of Agriculture (USDA) program to eliminate CWD from captive cervids. Surveillance in both wild and captive animals has been a cooperative effort involving State agriculture and wildlife agencies, USDA, elk and deer producers, and hunters.

The presence of CWD in cervids causes significant economic and market losses to U.S. producers. Canada recently prohibited the importation of elk from Colorado and Wyoming and now requires that other cervids be accompanied by a certificate stating that CWD has not been diagnosed in the herd of origin. The Republic of Korea recently suspended the importation of deer and elk and their products from the United States and Canada. The domestic prices for elk and deer have also been severely affected by fear of CWD.

The Animal and Plant Health Inspection Service's (APHIS's) regulations in 9 CFR subchapter B govern cooperative programs to control and eradicate communicable diseases of livestock. In accordance with the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture has the authority to issue orders and promulgate regulations to prevent the introduction into the United States and the dissemination within the United States of any pest or disease of livestock, and to pay claims growing out of the destruction of animals. Animal health regulations administered by the Department under this authority include those specifically addressing control programs and indemnity payments for tuberculosis (part 50), brucellosis (part 51), pseudorabies (part 52), and scrapie (part 54), and regulations in part 53 regarding payment of claims for other diseases. We have already promulgated regulations to pay indemnity to the owners of CWD-positive captive herds who voluntarily depopulate their herds. These indemnity regulations, contained in 9 CFR part 55 and referred to below as the indemnity interim rule, were published in the **Federal Register** on February 8, 2002 (Docket No. 00–108–1, 67 FR 5925–5934).

While the indemnity program should contribute greatly to the eventual eradication of CWD in the United States, it will not achieve this goal unless it is supported by programs to actively identify herds infected with CWD, and to manage these herds in a way that will prevent further spread of CWD. To that purpose, we are proposing to create a CWD Herd Certification Program to help eliminate chronic wasting disease from the captive deer and elk herds in the United States. Deer and elk herd owners who choose to participate would have to follow program requirements for animal identification, testing, herd management, and movement of animals into and from herds. We are also proposing to establish interstate movement requirements to prevent the interstate movement of deer and elk that pose a risk of spreading CWD.

APHIS has established herd or flock certification programs in the past to monitor animals for disease and eventually certify a herd or flock as disease-free or low risk. Notably, we established the Scrapie Flock Certification Program, which is described in 9 CFR part 54, subpart B. The CWD Herd Certification Program that we are proposing in this document has many features in common with the scrapie program. Because both diseases are caused by TSE's and often have a long incubation period, both programs require closely monitoring animals over a period of years and restricting movements of animals into and from herds.

Proposed CWD Herd Certification Program

We are proposing to create a cooperative Federal-State-private sector program to contribute to the eradication of CWD from captive deer and elk herds in the United States.

Jurisdiction over captive deer and elk varies from State to State. The vast majority of captive deer and elk are domesticated or farmed; that is, they are raised for profit on private ranches or farms. A smaller number of captive deer and elk are maintained in zoos, other exhibitions, or research facilities.

Farmed captive deer and elk are raised either for sale for meat, for sale as breeding animals, for harvest of antler velvet, or for hunting on private game facilities. In some States, the regulatory authority over captive deer and elk resides with the State agricultural or animal health agency or the State wildlife management agency, and in some States the authority is shared between agricultural and wildlife management agencies.

We have designed a Federal program to monitor the health of deer and elk herds and eventually certify them as low risk for CWD. The CWD Herd Certification Program relies primarily on animal identification, regular surveillance of herds for evidence of CWD, testing for CWD of animals that die in the monitored herds or are sent for slaughter, and limiting new herd acquisitions to animals from herds that are also enrolled in the program. These activities, along with State-Federal cooperation in tracing the movements of CWD-positive animals and identifying animals and herds that are exposed to them, are the foundation of the CWD Herd Certification Program.

Several States already enroll deer and elk herd owners in programs based on these principles. We believe that it is better to build a Federal program that recognizes State activities than to replace them with a strictly Federal program. Therefore, our proposal would establish certain basic definitions and requirements that we believe are consistent among different State programs to effectively address CWD on a national level. We believe the States that have or are developing CWD programs can readily incorporate our proposed minimum criteria with few or no changes to State programs. Our proposal also includes a process for APHIS to approve State programs that meet these criteria as Approved State CWD Herd Certification Programs, and to ''grandfather'' all herds enrolled in those State programs into the CWD Herd Certification Program. (Note that we do not propose separate Federal and State programs; rather, the CWD Herd Certification Program includes, as a subset, the Approved State CWD Herd Certification Programs—those herds that did not apply directly to enroll in the CWD Herd Certification Program, but that instead were admitted to it based on their prior enrollment in a State program.)

By this means, State CWD programs would become consistent with Federal minimum criteria and with each other. At the herd level, activities and compliance would be based on State guidelines rather than Federal ones. For herd owners who are involved with Approved State CWD Herd Certification Programs, this means that the owners would continue to work with the State contacts and procedures that are familiar to them.

This proposal represents an attempt to apply current scientific and diagnostic information to the disease control and management practices of deer and elk production units. The science of CWD, like that of other TSE's, is rapidly evolving. As new information becomes available, the CWD Herd Certification Program will be updated. The current proposal is designed to have the necessary flexibility to respond to new developments.

The goal of the program is the eradication of CWD from captive deer and elk herds in the United States. Captive herds are those animals that are privately or publicly owned and held for economic or other purposes within a perimeter fence or confined area. This includes cervids that are ''farmed,'' ''ranched,'' ''game farmed,'' or owned by zoos and other public or private entities. The proposed CWD Herd Certification Program would not apply to animals being held for CWD research purposes by State or Federal agencies or universities.

The CWD Herd Certification Program is designed for captive black-tailed and mule deer (*Odocoileus hemionus*), white-tailed deer (*Odocoileus virginianus*), red deer (*Cervus elaphus*), and captive elk (*Cervus elaphus*) or elk-red deer hybrids. Except for red deer, all these species are known to be susceptible to CWD; red deer are included because of their extreme genetic similarity to elk. These deer and elk belong to the Family Cervidae, along with other types of deer, reindeer, sitka deer, and moose. Aside from research animals and animals in zoological collections, elk and white-tailed deer are the only captive cervid species in which CWD has been reported. However, CWD has been reported in wild mule deer, white-tailed deer, and elk. Should CWD be reported in other cervid species, this program may be used as a model for those industries to follow.

The CWD Herd Certification Program does not apply to free-ranging cervids under the management of Federal, State or Native American Tribal management authorities. Although it is not directly addressed by this proposal, the spread of CWD in free-ranging animals in its endemic area (Colorado, Wyoming and Nebraska) and its appearance elsewhere, such as in Wisconsin and New Mexico, is a major concern. USDA is working as closely as possible with appropriate State and Federal agencies to encourage management actions to address the presence of CWD in all cervids. USDA will continue to support surveillance for CWD in free-ranging cervids across the country.

Under this proposal, States would design and implement Approved State CWD Herd Certification Programs for their own captive deer and elk owners. If a State does not develop a program, cervid owners in that State could directly enroll in the CWD Herd Certification Program. If a State program meets minimum APHIS requirements to ensure that programs are effective and consistent, the Administrator of APHIS would designate the State program to be an Approved State CWD Herd Certification Program. States could make program standards at the herd level more stringent than the minimum criteria established by APHIS, and could make participation in the CWD Herd Certification Program mandatory if they chose.

Several States have already developed or are developing CWD certification programs. Existing State CWD programs and the deer and elk owners participating in them would be grandfathered into the Federal program if they meet the minimal requirements. The date these herds enrolled in a State program that APHIS subsequently determines qualifies as an Approved State CWD Herd Certification Program would be considered their enrollment date in the CWD Herd Certification Program.

Deer and elk owners in those States that do not have an Approved State CWD Herd Certification Program would be able to join the CWD Herd Certification Program by applying directly to APHIS through their veterinarian in charge [1] and complying with the minimum program requirements for enrolled herd owners in proposed § 55.23(b).

This proposal contains mandatory Federal requirements affecting interstate movement of deer and elk. APHIS would allow interstate movement of captive deer or elk only from herds participating in the program, and participation would have to be documented on the animal health certificate required to move animals interstate. Therefore, owners would

[1] A veterinarian in charge, as defined by current part 55, is ''the veterinary official of Veterinary Services, APHIS, who is assigned by the Administrator to supervise and perform official animal health work for APHIS in the State concerned.'' A list of veterinarians in charge may be obtained from the Animal and Plant Health Inspection Service, National Animal Health Programs Staff, 4700 River Road Unit 43, Riverdale, MD 20737–1235.

have to participate in the CWD Herd Certification Program if they wished to move their animals to another State.

Section by Section Explanation of Proposal

We are proposing to add a new subpart to 9 CFR part 55 that describes the CWD Herd Certification Program. We also propose to add a new 9 CFR part 81, ''Chronic Wasting Disease in Captive Deer and Elk,'' which would contain the mandatory requirements for moving deer and elk interstate. The next sections describe our proposed changes for parts 55 and 81.

Definitions (§ 55.1)

The interim indemnity rule established a ''Definitions'' section in part 55 and established several definitions that are used in both the indemnity program and in this proposed herd certification program. The following definitions from the interim indemnity rule are also important for the proposed certification rule.

CWD-positive animal. An animal that has had a diagnosis of CWD confirmed by means of an official CWD test.

CWD-positive herd. A herd in which a CWD positive animal resided at the time it was diagnosed and which has not been released from quarantine.

CWD-suspect animal. An animal for which an APHIS employee has determined that laboratory evidence or clinical signs suggest a diagnosis of CWD.

We propose to retain these definitions as they are; we are setting them out here only for information.

In addition, we are proposing to modify the definitions in part 55 of *CWD-exposed animal, herd,* and *herd plan,* as follows:

CWD-exposed animal. An animal that is part of a CWD-positive herd, or that has been exposed to a CWD-positive animal or contaminated premises within the previous 5 years.

The revision would substitute the standard of being ''exposed to a CWD-positive animal'' for language in the earlier definition that based the exposed classification on whether the animal was part of a herd within 5 years prior to that herd's designation as CWD-positive, or had been housed with or been in direct contact with a positive animal, or had been on a contaminated premises.

Herd. One or more animals that are (a) under common ownership or supervision and are grouped on one or more parts of any single premises (lot, farm, or ranch) or (b) all animals under common ownership or supervision on two or more premises which are geographically separated but on which animals have been interchanged or had direct or indirect contact with one another.

The definition of *herd* would be revised by changing its current statement that it applies to ''a group of animals'' to read ''one or more animals,'' since in some rare circumstances the owner of a single animal may wish to enroll in the CWD Herd Certification Program.

Herd plan. A written herd management agreement developed by a State representative with input from the herd owner, his or her veterinarian, and other affected parties. The State representative will then submit the herd plan to the Administrator, and the herd plan will not be valid until it has been reviewed and signed by the Administrator. A herd plan sets out the steps to be taken to eradicate CWD from a CWD-positive herd, to control the risk of CWD in a suspect herd, or to prevent introduction of CWD into another herd. A herd plan will require: Specified means of identification for each animal in the herd; regular examination of animals in the herd by a veterinarian for clinical signs of disease; reporting to a State or APHIS representative of any clinical signs of a central nervous system disease or chronic wasting condition in the herd; maintaining records of the acquisition and disposition of all animals entering or leaving the herd, including the date of acquisition or removal, name and address of the person from whom the animal was acquired or to whom it was disposed; and the cause of death, if the animal died while in the herd. A herd plan may also contain additional requirements to prevent or control the possible spread of CWD, depending on the particular circumstances of the herd and its premises, including but not limited to: depopulation of the herd, specifying the time for which a premises must not contain cervids after CWD-positive, -exposed, or -suspect animals are removed from the premises; fencing requirements; selective culling of animals; restrictions on sharing and movement of possibly contaminated livestock equipment; cleaning and disinfection requirements; or other requirements. A herd plan may be reviewed and revised at any time by any party signatory to it, in response to changes in the situation of the herd or premises or improvements in understanding of the nature of CWD epidemiology or techniques to prevent its spread. The revised herd plan must also be submitted to the Administrator for review and signature.

This revision would emphasize that a herd plan is developed primarily not by APHIS, but by a State representative and the herd owner, working in concert with the herd's veterinarian and any other affected parties. Under this definition, APHIS would retain the right to approve or disapprove herd plans. The revision also clarifies that when veterinarians examine animals in accordance with a herd plan they are looking for clinical signs of disease, including signs of chronic wasting conditions, and states that sometimes herd plan requirements may include depopulating the herd.

In addition to the definitions above that are already established, we propose to add the following new definitions to part 55 in support of the CWD Herd Certification program.

Commingled, commingling. Animals are commingled if they have direct contact with each other, have less than 30 feet of physical separation, or share equipment, pasture, or water sources/watershed, except for periods of less than 48 hours at sales or auctions when an APHIS employee or State representative has determined such contact presents minimal risk of CWD transmission. Animals are considered to have commingled if they have had such contact with a positive animal or contaminated premises within the last 5 years.

This definition is needed to address situations where a healthy animal, because it was commingled with a CWD-positive animal, was put at risk of contracting CWD. A buffer zone of 30 feet was chosen because in other APHIS disease control programs this distance has been shown to be effective in preventing aerosol transmission of infective agents from one animal to another. Because there is not yet a detailed model of how TSE's are transmitted, APHIS believes it is prudent to assume that they might spread short distances as aerosols, rather than only through more direct contact.

CWD-exposed herd. A herd in which a CWD-positive animal has resided within 5 years prior to that animal's diagnosis as CWD-positive, as determined by an APHIS employee or State representative.

This definition is needed because herds exposed to CWD should be restricted and monitored until sufficient evidence is available to confirm whether or not the exposure caused new cases of CWD in the herd. Because current evidence strongly suggests that a cervid would die from CWD no more than 5 years after acquiring the disease, we are not concerned about exposures that took

place more than 5 years before an animal is diagnosed with CWD.

CWD Herd Certification Program. The Chronic Wasting Disease Herd Certification Program established by this part.

CWD-suspect herd. A herd for which laboratory evidence or clinical signs suggest a diagnosis of CWD for an animal or animals within the herd, as determined by an APHIS employee or State representative, but for which laboratory results have been inconclusive or not yet conducted.

This definition is needed to designate herds that are a high risk because they may be determined CWD-positive in the near future, so that appropriate restrictions may be placed on the herd pending final confirmation of the herd's CWD status.

CWD-source herd. A herd that is identified through testing, tracebacks, and/or epidemiological evaluations to be the source of CWD-positive animals identified in other herds.

Deer. Mule deer (*Odocoileus hemionus*), black-tailed deer (*Odocoileus hemionus*), white-tailed deer (*Odocoileus virginianus*), red deer (*Cervus elaphus*), and hybrids of these species.

Elk. North American wapiti (*Cervus elaphus*) and wapiti x red deer hybrids.

Herd status. The status of a herd assigned under the CWD Herd Certification Program in accordance with proposed § 55.24, indicating a herd's relative risk for CWD. Herd status is based on the number of years of monitoring without evidence of the disease and any specific determinations that the herd has contained or has been exposed to a CWD-positive, -exposed or -suspect animal.

Official identification. Identification mark or device approved by APHIS for use in the CWD Herd Certification Program. Examples are listed in proposed § 55.25.

Trace back herd. A herd in which a CWD-positive animal formerly resided.

Trace forward herd. A herd that has received exposed animals from a CWD-positive herd within 5 years prior to the diagnosis of CWD in the positive herd or from the identified date of entry of CWD into the positive herd.

Administration (§ 55.21)

This proposed section states that the CWD Herd Certification Program is a cooperative effort between APHIS, State animal health agencies, and deer or elk owners. It explains that, under the program, APHIS coordinates with State animal health agencies to encourage deer and elk owners to certify their herds as free of CWD by remaining in continuous compliance with the CWD Herd Certification Program standards.

Participation (§ 55.22)

This proposed section describes the eligibility of captive deer or elk herd owners and State animal health agencies to participate in the CWD Herd Certification Program. Herds of any size, even a single animal, may participate in the program. This section states that any owner of a captive deer or elk herd (except for a CWD-positive herd, a CWD-exposed herd, and a CWD-suspect herd) may apply to enroll, and any State may apply to have its CWD program approved, by contacting the appropriate APHIS or State offices.[2] Before determining that the herd is eligible to join, APHIS or the State may contact the herd owner to obtain more information about the herd and its operations, if needed. APHIS or the State animal health agency will send each approved herd owner a notice of enrollment that includes the herd's enrollment date (in the case of herds already participating in State CWD programs, the enrollment date will be the first day that the herd participated in a State program that APHIS subsequently determines qualifies as an Approved State CWD Herd Certification Program). This proposed section also states that APHIS intends to maintain a list of herds participating in the CWD Herd Certification Program, and the certification status of each herd, available on an Internet Web site and by written request.

With regard to States applying to have a State program approved, this section states that the Administrator will approve or disapprove a State program in accordance with proposed § 55.23(a), discussed below. This section also says that in States with an Approved State CWD Herd Certification Program, program activities would be conducted in accordance with the guidelines of that program, as long as the State program meets certain minimum requirements of the subpart.

Responsibilities of States and Enrolled Herd Owners (§ 55.23)

This proposed section describes the minimum requirements State programs must meet in order to be approved by the Administrator. It also describes the responsibilities of herd owners who enroll in the CWD Herd Certification Program.

The Administrator would review a letter from the State describing its CWD control and deer and elk herd certification activities, and would also review relevant State statutes, regulations, and directives pertaining to animal health activities, and reports and publications of the State animal health agency. The Administrator would determine whether the State had sufficient authority and active programs to conduct traceback, surveillance, and testing activities needed to identify herds exposed to CWD, and to restrict the movement of all CWD-positive, CWD-suspect, and CWD-exposed animals. The Administrator would also look for effective State programs to require individual animal identification in participating deer or elk herds, and to require prompt reporting of suspected cases of CWD and test results for CWD to State or Federal authorities.

We also propose that the State program must have placed all known CWD-positive and CWD-exposed herds under movement restrictions, with movement of animals only for destruction or for research. States must remove herd movement restrictions placed on CWD-positive or CWD-exposed herds only after the herds complete a herd plan. States must also have programs to educate those engaged in the interstate movement of deer and elk regarding requirements of the State program. States would also have to sign a memorandum of understanding with APHIS that delineates the respective roles of each in the CWD Herd Certification Program implementation.

States would also have to designate at least one State animal health official to coordinate CWD Herd Certification Program activities in the State, and would have to agree to update the National CWD Database administered by APHIS with information about the CWD status of herds in the State and information about animals being traced across State lines.

Regarding the responsibilities of deer or elk herd owners who enroll in the CWD Herd Certification Program, proposed § 55.23(b) states that they must agree to maintain their herds in accordance with certain program conditions. These proposed conditions are:

- Each cervid on the premises in the herd must be officially identified using means of identification allowed by proposed § 55.25;
- The herd premises must have perimeter fencing adequate to prevent ingress or egress of cervids. This fencing must comply with any applicable State regulations;
- The owner must immediately report to an APHIS employee or State representative all deaths of deer or elk

[2] A list of these offices may be obtained from the Animal and Plant Health Inspection Service, National Animal Health Programs Staff, 4700 River Road Unit 43, Riverdale, MD 20737–1235.

aged 16 months or older, and must make the carcasses of such animals available for tissue sampling and testing. This includes animals killed on premises maintained for hunting. The owner also must allow test samples to be collected from any animals sent to slaughter that APHIS desires to test;

- The owner must maintain herd records including a complete inventory of animals that records the age and sex of each animal, the date of acquisition and source of each animal that was not born into the herd, the date of disposal and destination of any animal removed from the herd, and all individual animal identification numbers (from tags, tattoos, electronic implants, etc.) associated with each animal. Upon request, the owner must allow an APHIS employee or State representative access to the premises and herd to conduct a physical herd inventory with verification reconciling animals and identifications with the records maintained by the owner;
- If an owner wishes to maintain separate herds, he or she must maintain separate herd inventories, records, working facilities, water sources, equipment, and land use. No commingling of animals may occur. Movement of animals between herds must be recorded as if they were separately owned herds; and
- New animals may be introduced into the herd only from other herds enrolled in the CWD Herd Certification Program (including herds in Approved State CWD Herd Certification Programs). If animals are received from an enrolled herd with a lower program status, the receiving herd will revert to that lower program status. If animals are obtained from a herd not participating in the program, then the receiving herd will be required to start over in the program.

Herd Status and Movement of Animals Between Enrolled Herds (§ 55.24)

In this proposed section, the progress of a herd through the various stages of the program are described. When a herd is first enrolled in the CWD Herd Certification Program, it would be placed in First Year status. If the herd continues to meet the requirements of the program, each year, on the anniversary of the enrollment date the herd status would be upgraded by 1 year; *i.e.*, Second Year status, Third Year status, Fourth Year status, and Fifth Year status. One year from the date a herd is placed in Fifth Year status, the herd status would be changed to Certified, and the herd would remain in Certified status as long as it remained enrolled in the program (and provided no signs of CWD are detected). Once the herd has received Certified status, the requirements the herd must meet to remain in the program would be slightly reduced. Testing of all animals sent to slaughter and all animals killed on hunting premises would no longer be required, because 5 years of program participation would have documented a minimal herd risk that does not justify such expensive comprehensive testing, but other requirements of the program would remain in force.

This proposed section also describes how a herd could lose its herd status or have it temporarily suspended. If a herd is designated a CWD-positive herd or a CWD-exposed herd, it would immediately lose its program status, and the owner could only re-enroll after completing a herd plan. Owners of CWD-positive herds must make a business decision on whether it is worthwhile to complete a herd plan, which usually would require depopulation of the herd. If an owner completes a herd plan, he or she can at least use the same premises and equipment to raise elk in the future, even if the herd animals are depopulated. If the owner elects not to complete a herd plan, animals from the herd may not move interstate, and the owner may find it difficult to sell animals even within the State, due to buyer reluctance and State restrictions. If a herd is designated a CWD-suspect herd, a trace back herd, or a trace forward herd, it would immediately be placed in Suspended status pending an epidemiologic investigation by APHIS or a State animal health agency. This epidemiologic investigation could have three possible outcomes: It could determine that the investigated herd was not commingled with a CWD-positive animal; it could determine that the herd was commingled with a CWD-positive animal; or it could be unable to make a definite determination of exposure.

If the epidemiologic investigation determined that the herd was not commingled with a CWD-positive animal, the herd would be reinstated to its former program status, and the time spent in Suspended status would count toward its promotion to the next herd status level.

If the epidemiologic investigation determines that the herd was commingled with a CWD-positive animal, the herd would lose its program status and would be designated a CWD-exposed herd. The herd would not be eligible to reenroll in the CWD Herd Certification Program until it completed a herd plan.

If the epidemiological investigation was unable to make a determination regarding the exposure of the herd, because the necessary animal or animals were no longer available for testing (*i.e.*, a trace animal from a known positive herd died and was not tested) or for other reasons, the herd status would continue as Suspended unless and until a herd plan was developed for the herd. If a herd plan was developed, the herd would be reinstated into the CWD Herd Certification Program at the First Year status level, with a new enrollment date set at the date the herd entered into Suspended status. Treatment of these indeterminate status herds differs from treatment of Exposed herds in that indeterminate status herds can re-enter the program as soon as a herd plan is developed, while Exposed herds cannot re-enter until they have completed a herd plan and are no longer classified Exposed. The indeterminate herd would have to comply with the requirements of the herd plan as well as the requirements of the CWD Herd Certification Program, and the herd plan would require testing of all animals that die in the herd for any reason, regardless of the age of the animal, and could require movement restrictions for animals in the herd based on epidemiologic evidence regarding the risk posed by the animals in question.

Herds could also lose their program status if the Administrator determined that the herd owner failed to comply with the requirements of the program.

We propose to allow an appeals process for herd owners subject to cancellation of enrollment or loss or suspension of herd status. Herd owners could appeal any of these actions by writing to the Administrator within 10 days after being informed of the reasons for the proposed action. The appeal would have to include all of the facts and reasons upon which the herd owner relies to show that the reasons for the proposed action are incorrect or do not support the action. The Administrator would grant or deny the appeal in writing as promptly as circumstances permit, stating the reason for his or her decision. If there is a conflict as to any material fact, a hearing would be held to resolve the conflict. Rules of practice concerning the hearing would be adopted by the Administrator. However, cancellation of enrollment or loss or suspension of herd status would become effective pending final determination in the proceeding if the Administrator determines that such action is necessary to prevent the possible spread of CWD. This cancellation of enrollment or loss or suspension of herd status would continue in effect pending the completion of the proceeding, and any

judicial review thereof, unless otherwise ordered by the Administrator.

This proposed section also describes restrictions of the source of animals that could be added to an enrolled herd. A herd could add animals from herds with the same or an earlier enrollment date in the CWD Herd Certification Program with no negative impact on the certification status of the receiving herd.[3] If animals were acquired from a herd with a later date of enrollment, the receiving herd would revert to the program status of the sending herd. If a herd participating in the program acquired animals from a nonparticipating herd, the receiving herd would revert to First Year status with a new enrollment date of the date of acquisition of the animal.

Official Identification (§ 55.25)

This section proposes that each animal required to be identified under the CWD Herd Certification Program must have at least two forms of APHIS-approved identification, because a single form of identification can sometimes become detached or obscured (*e.g.*, eartags are sometimes torn loose on brush, or lost due to frostbite damage; tattoo inks sometimes fade, or are obliterated by scarring). Even though not required by most regulations, the use of two forms of animal ID has become common in animal industries, and we believe its program benefits outweigh the additional expense. The official identification would have to be an ear tattoo, tamper-resistant ear tag, electronic implant, or flank tattoo approved for this use by APHIS. The official identification would have to provide a unique identification number that is applied by the owner of the herd or his or her agent and is linked to that herd in the National CWD Database.

This concludes discussion of the changes proposed for part 55. The contents of proposed new part 81 are discussed below.

Definitions (§ 81.1) and Identification of Deer and Elk in Interstate Commerce (§ 81.2)

These proposed sections would be essentially the same as the definitions and identification requirements discussed above with regard to proposed §§ 55.1 and 55.25. The definition of *captive* proposed for part 81 differs slightly from the definition employed in part 55, because under part 81 it is necessary to restrict the interstate movement of animals that were captured from a free-ranging population for interstate movement and release. Such animals are not covered under the indemnity and certification programs of part 55. The definition of *chronic wasting disease* (CWD) proposed for part 81 also describes some clinical signs of CWD that are not needed in the similar definition in part 55, because part 81 requires issuance of certificates stating that animals do not exhibit clinical signs of CWD.

General Restrictions (§ 81.3)

This proposed section would institute the mandatory requirement that no captive deer or elk may move interstate unless it originated in a herd enrolled in the CWD Herd Certification Program and the herd remained in the program long enough to reach a specified status. To encourage early enrollment in the CWD Herd Certification Program and to support its goal of eventually eradicating CWD from captive deer and elk herds in the United States, we are proposing to establish a timetable that gradually increases the time a herd must be in the program in order to move animals interstate. Eventually, only animals from herds that have been enrolled in the program for over 5 years would be allowed to move interstate. If this proposed rule is adopted, immediately after it takes effect, a herd would need to achieve Second Year status before animals from the herd could be moved interstate. (Some herds would have this or greater program status immediately upon enrollment, due to the provisions to ''grandfather'' herds enrolled in existing State programs that was discussed above.) As of 27 months after the rule takes effect, a herd would need to achieve Third Year status before animals from the herd could be moved interstate. Twelve months later the herd would have to achieve Fourth Year status, then after 12 more months, Fifth Year status, for animals to be moved interstate. Finally, after 12 more months (approximately 5¼ years after the rule takes effect), the herd would have to achieve Certified status. Under this schedule, the longer a herd owner waits before enrolling in the CWD Herd Certification Program, the longer he or she would have to wait before moving animals interstate. This gradually increasing requirement also means that as time goes on, animals allowed to move interstate will have spent more and more time in the CWD Herd Certification Program, with a corresponding decrease in the risk that such animals could spread CWD.

We also propose that captive deer or elk moved interstate must be accompanied by a certificate that identifies its herd of origin, states that the herd is participating in the CWD Herd Certification Program and gives its program status, and states that it is not a CWD-positive, CWD-exposed, or CWD-suspect animal. One exception to this requirement is that deer or elk that are temporarily captured from free-ranging populations may be moved interstate for release (translocated) without enrollment in the CWD Herd Certification Program. Since the CWD Herd Certification Program is not designed for free-ranging populations, we propose that in such cases the free-ranging population must instead be documented to be free from CWD based on a CWD surveillance program that is approved by the State Government of the receiving State and by APHIS.

Issuance of Certificates (§ 81.4)

This proposed section describes the function and contents of the certificate that would be required by proposed § 81.3. Animal health certificates are used in this section in much the same way they are used in many other APHIS regulations: to document the origin, identity, and disease status of animals moving interstate. The certificate would have to show the herd of origin and official identification numbers of each animal to be moved. (Certificates issued for the translocation of free-ranging animals caught in one State and released in another would not need to record this information, since it does not exist for such cases.) The certificate would also have to show the number of animals covered by the certificate, the purpose for which the animals are to be moved, the points of origin and destination, the consignor, and the consignee. The certificate would have to include a statement by the issuing accredited, State, or Federal veterinarian that the animals were not exhibiting clinical signs associated with CWD at the time of examination. The certificate would also have to state that the animals are from a herd participating in the CWD Herd Certification Program, and give the herd's program status, or state that the animals are free-ranging animals that are being translocated from a herd that is documented to be free from CWD based on a CWD surveillance program.

This proposed section also includes some administrative details regarding how to attach secondary forms listing animal identification information to an official certificate. We propose that animal identification documents attached to certificates must be a legible copy of State or APHIS forms that requires individual identification of

[3] Note that in addition to this requirement, proposed § 81.3 contains restriction on the interstate movement of captive deer and elk.

animals, and must identify each animal to be moved with the certificate; but any information pertaining to other animals, and any unused space on the document for recording animal identification, must be crossed out in ink. We also propose that the following information must be typed or written in ink in the identification column on the original and each copy of the certificate and must be circled or boxed, also in ink, so that no additional information can be added: the name of the document; and either the serial number on the document or, if the document is not imprinted with a serial number, both the name of the person who issued the document and the date the document was issued. These proposed requirements would help us ensure the authenticity and reliability of animal identification documents, and help us trace the movement of animals when necessary.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

For this proposed rule, we have prepared an economic analysis. The economic analysis provides a cost-benefit analysis as required by Executive Order 12866, as well as an analysis of the potential economic effects of this proposed rule on small entities, as required under 5 U.S.C. 603. The economic analysis is summarized below. Much of the data regarding the cervid industry was provided by the two major industry associations, the North American Elk Breeders Association (NAEBA) and the North American Deer Farmers Association (NADFA). See the full analysis for the complete list of references used in this document. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*) the Secretary of Agriculture is authorized to regulate the movement in interstate commerce of any animal if the Secretary determines it necessary to prevent the introduction or dissemination of a livestock pest or disease; to hold, seize, quarantine, treat, destroy, dispose of, or take other remedial action with respect to such animals; to carry out operations and measures to detect, control, or eradicate diseases of livestock; and to cooperate with States or political subdivisions of States in programs to control livestock diseases.

Alternatives Considered

In assessing the need for this proposed rule, we identified three alternatives. One was to maintain the status quo, where State efforts are supported by Federal technical assistance and compensation programs. We rejected this alternative because it does not fully address disease risk, *i.e.*, the possibility of disease spread through interstate movement. The current patchwork of State regulations hinders movement of animals believed free of CWD and hence growth of the industry. Also, this alternative does not give herd owners in States that do not have certification programs the opportunity to participate in such programs if they so desire. The status quo alternative would have no cost effects for APHIS, but over time would impose additional costs on herd owners, who would face costs due to loss of animals from increased spread of CWD, loss of interstate and international markets, and possibly increased compliance costs for stricter State CWD programs as States react to CWD spread.

Another alternative was to simply prohibit the interstate movement of deer and elk altogether, without establishing a voluntary Federal herd certification program. This alternative would not significantly increase costs to APHIS, and would help reduce costs due to loss of animals caused by disease spread through interstate movement. However, this alternative does not afford producers the opportunity to seek the best-paying market for their animals in any State. Accordingly, this alternative was rejected.

The third alternative, the one that we chose, was the establishment of a voluntary Federal herd certification program with interstate movement on animals contingent on participation in that program. This alternative substantially reduces the risk of exporting CWD from one state to another—because only deer and elk that have been subject to certain minimum surveillance criteria can be moved interstate—but at the same time allows producers the opportunity to seek the best-paying market for their animals. The costs and benefits of this alternative are discussed below.

Summary of Economic Analysis

This proposed rule would establish a CWD Herd Certification Program for captive elk and deer, and prohibit the interstate movement of deer and elk that are not enrolled in the program. Herds that participate would have to follow program requirements for animal identification, testing, herd management, and movement of animals to and from herds. Herd owners would be able to enroll in an Approved State CWD Herd Certification Program that met minimum standards established by APHIS, or enroll directly in the Federal CWD Herd Certification Program if there is no State program in their location.

Currently, there are no Federal requirements for the interstate movement of deer and elk. However, 23 States have banned cervid introductions from other States, and at least 20 States have formal CWD certification programs for cervids in place, with requirements similar to the Federal requirements proposed in this rule. The proposed Federal program is designed to build on, rather than replace, existing State programs or State programs that are currently being developed. Herd owners in States that do not have an APHIS-approved program would be able to enroll in the Federal program.

This proposal is intended to help eliminate CWD from captive cervids in the United States. It would support an existing APHIS program that pays indemnities to owners of CWD-positive herds who voluntarily depopulate their herds.

The proposed rule would primarily affect deer and elk farms. In the United States there are an estimated 150,000 elk on 2,300 farms, and 550,000 deer on 11,000 farms. It is estimated that, without improved CWD control efforts, the disease could eventually infect almost all U.S. captive elk herds.

The proposed rule should have a positive economic effect on deer and elk farmers, both large and small, over the long term. In the shorter term, the economic effect on farmers will vary depending on the circumstances of each. Some farmers, especially those who already participate in State programs and who would take advantage of the increased access to out-of-State markets, would benefit immediately. Conversely, some farmers could experience a significant adverse effect, especially any farmers who cannot afford to pay the program's annual costs. However, given the available data, there is no basis to conclude that the proposed rule will have a significant negative economic impact on a substantial number of small entities.

The economic importance of the deer and elk farming industries notwithstanding, the rule's primary benefits would appear to lie in its ability to reduce the potential for the introduction or spread of CWD.

However, it is difficult to translate that reduced potential into a dollar benefit.

The Deer and Elk Industries and the Impact of CWD

The number of deer and elk in the United States that have died as a result of contracting CWD is unknown, largely because there is no way to track deaths among the free-ranging segment of the population. However, sampling has suggested infection rates ranging from less than 1 percent among wild white-tailed deer in Wisconsin to up to 15 percent among wild mule deer in northeastern Colorado. For farmed animals, the number of deaths to-date has been relatively low. It is estimated that fewer than 100 farmed elk and no farmed deer have died as a result of contracting CWD. The number of farmed elk that have died is equivalent to less than one-tenth of 1 percent of the current U.S. farmed elk population, estimated at 150,000. However, for every infected animal, far more have been exposed to the disease.

Deer and elk are farmed for breeding stock, velvet antler, meat, and sales to game parks and exhibits. Velvet antler, considered a medical or dietary aid, is produced primarily for Asian markets. Deer and elk meat is a low-fat, low-cholesterol product, and when it is derived from captive herds (as opposed to meat harvested directly by hunters from wild populations) it is marketed primarily to gourmet restaurants, for consumption by health-conscious dieters. The breeding stock market satisfies the need for replacement animals.

NAEBA estimates that there are about 150,000 elk on 2,300 U.S. farms. The number of elk per farm varies, from a high of ''500 plus'' (for commercial farms) to a low of about 10 (for hobby farms). The value of each elk held also varies, depending on the type of animal (*e.g.*, bull, heifer, calf), market conditions, and other factors. The average value of each elk is roughly estimated at $2,500, with the typical high end value at about $8,000. (The more valuable trophy animals hunted on game farms tend to be worth more than this average.) Based on the estimated average of $2,500 per animal, the value of all 150,000 elk on U.S. farms is estimated at $375 million (150,000 × $2,500). In 1999, gross receipts for the elk farming and velvet antler industry in North America totaled an estimated $150 million.

NADFA estimates that there are about 550,000 deer on U.S. farms. Based on NADFA's estimate of 50 deer per farm, on average, the number of deer farms in the United States would total 11,000. Assuming each farm has 2.1 employees, the average for deer farms in Indiana, employment on all of the estimated 11,000 deer farms would total 23,100. The number of deer per farm varies, from a high of about 3,000 (for commercial farms) to a low of about 5 (for hobby farms). The value of each deer also varies, depending on such factors as the type of animal (*e.g.*, wapiti, white-tailed, fallow) and market conditions. An earlier NADFA estimate put the average per animal value of all deer on member farms at $1,687, which would make the estimated value of all 550,000 deer on U.S. farms $927.9 million (550,000 × $1,687). As of January, 2002, capital investment (including land, fencing) in white-tailed deer farms totaled an estimated $2.5 billion.

Benefits of Proposed Rule

The proposed rule would benefit the national cervid industry, cervid product consumers, individual herd owners, and individual States. The effects on each are discussed below, and benefits for small businesses are directly addressed in the section ''Analysis of the Economic Effects on Small Entities.''

The proposed interstate movement restrictions that would allow only ''program'' deer and elk to be moved interstate would help to prevent the spread of CWD among both the farmed and wild populations. Participation in a certification program substantially reduces the risk of spreading CWD from one State to another, because only deer and elk that have been subject to certain minimum surveillance and other criteria could be moved interstate.

Preventing spread of CWD among deer and elk benefits entities and individuals that rely on those animals for their income, *e.g.*, deer and elk farms, State agencies that sell hunting licenses, employees of motels and restaurants in hunting areas. It benefits individuals that rely on those animals for recreation and food. (A study by a sociologist in Wisconsin found that when the disease seems contained there is little hunter effect. However, if the disease becomes widespread, data in his study suggest that hunters will abandon the sport. Also, hunters from counties in which CWD positive animals were found were more likely to skip the 2002 gun season than were hunters from non-CWD counties.) Preventing disease spread also offers the potential for other, more far reaching benefits. Although there is no known relationship between CWD and other spongiform encephalopathies of animals or humans, bovine spongiform encepalopathy (BSE) has had an immense negative impact upon European livestock systems. Action by USDA on CWD will demonstrate to our trading partners the seriousness with which we view the prevention and control of these types of diseases.

The outbreak of CWD in wildlife and farmed herds has motivated States to restrict the movement of elk and deer into States; and to start programs to control the disease within States. At this time, the various States do not follow a standard interstate movement policy, nor are there standards that would ensure equivalency between State CWD programs. This has resulted in a failure to maintain a nationwide marketing system under which healthy farmed elk and deer can be bought and sold throughout the United States. Producers of elk and deer are, therefore, generally limited to sales in their local marketing areas. The lack of a Federal CWD program has also limited U.S. producers' access to international markets for products such as antler velvet.

Based on the rate of increase in the number of infected herds in recent years, it is estimated that, without improved CWD control efforts, the disease could eventually infect almost all U.S. farmed elk herds. The elk industry is in its early stages, which requires owners to purchase and sell large numbers of animals for breeding stock as they develop superior lines. Such large movements of animals between herds exacerbates risks of disease spread. One herd in Colorado sold approximately 400 animals to many other herds in one year. In Canada, after CWD was discovered in 1996, movements of animals from one herd resulted in the infection of 38 other herds, which caused the Canadian government to buy and destroy 7,400 animals. While it is risky to extrapolate from limited data covering only a few years, the few herds studied in detail do suggest that CWD is easily spread through unrestricted commerce in elk, and could readily become established in most U.S. herds. Adoption of the proposed rule, therefore, could serve to protect substantial elk industry livestock assets, valued at an estimated $375 million.

For farmers with infected deer and elk, the losses can extend far beyond the direct loss of livestock. They can also incur costs for the disposal of the animal carcasses, as well as costs for cleaning and disinfecting their premises. In some areas, positive animals have to be disposed of through costly incineration or digestion, since even landfills require a negative test before accepting a carcass for disposal.

Perhaps most important of all, owners of infected herds may also face State-imposed quarantines and State-imposed restrictions on the subsequent agricultural use of their land, actions which many view as tantamount to closure.

Even farmers with animals that have not been infected or exposed to CWD are affected, as evidenced by recent action taken by the Republic of Korea. That country recently suspended all imports of deer and elk, and their products, from the United States, due to concern that there may be a link between CWD and other spongiform encephalopathies of animals or humans. The precise impact of Korea's suspension is unknown, because data that is compiled on U.S. exports does not provide the level of detail necessary to identify deer and elk and their products. However, New Zealand is a major competitor to U.S. producers in the area of deer antler exports to Korea, and in 2001 the value of New Zealand antler exports to Korea increased from NZ$34 million to NZ$37 million. In 1998 Canada, another major competitor, sold 100,000 kg of elk velvet, worth about CA$13 million, to the Republic of Korea; Canada's sales dropped by 80 percent the next year, after CWD was introduced into Korea from Saskatchewan.[4] To the extent that the proposed Federal certification program would provide the basis for equivalency between State programs, increased international sales are likely.

The rule's primary benefits are to help prevent the spread of and eradicate CWD; assist efficient domestic elk and deer marketing; maintain and enhance export markets of cervid products; and obviate the need for greater public and private expenditures related to CWD in the future. The introduction of an aggressive control program now, when the number of known infected herds is small, reduces the risk of higher future Federal eradication program costs, such as Canada faced in 1996 when they had no certification program and CWD infection in one herd quickly spread to 38 herds, causing 7,400 elk to be destroyed.

The proposed rule also demonstrates to our trading partners that the United States is able and willing to take early and aggressive action to protect the health of its animal and animal industries, making it easier for U.S. exporters to negotiate access to foreign markets.

[4] Elk Production: Economic and Production Information for Saskatchewan Producers, Saskatchewan Agriculture and Food, November 2000.

Costs of Proposed Rule

The proposed rule has cost implications for herd owners, individual States, and APHIS. The impact on each is discussed below, and cost effects for small businesses are directly addressed in the section ''Analysis of the Economic Effects on Small Entities.''

Cost for Herd Owners

Participation in a State, or Federal, certification program would require that herd owners employ certain minimum disease preventative measures established by APHIS. The cost to comply with these minimum requirements would vary among individual herd owners, depending on the circumstances of each. Many herd owners, especially the larger ones, are likely to already be in at least partial compliance with one or more of the requirements on a voluntary basis, since they constitute sound management practice. Perimeter fencing is a case in point. Most herd owners already have perimeter fencing already in place, if for no other reason than to keep animals from escaping.

The certification program would require that herd owners submit the carcasses of all dead deer and elk 16 months of age or older (including animals killed on hunting premises) to a lab for tissue sampling and testing. The rules would allow herd owners to collect and submit the animal's entire head themselves, or to hire an accredited veterinarian to remove and submit the required tissue samples. Collecting a sample and packing it for submission usually takes under an hour. Veterinarians would charge herd owners about $100 to collect each sample.

Participating herd owners would have to identify each animal uniquely, using two approved forms of identification, such as tattoos, ear tags, or electronic implants. Although many herd owners already identify their animals, only a few are likely to use two forms of identification. The cost of identifying an animal would vary, depending on the type of identification used and other factors, including any costs associated with ''rounding up'' the animals for installation of the identification. The rules would allow for the multiple use of the same form of identification, so, conceivably, each animal could have two ear tags, potentially the least costly form of identification. Ear tags themselves cost about $2 each. By comparison, veterinarians could be expected to charge herd owners at least about $25 to implant each microchip.

It is estimated that adoption of the program's minimum disease preventative measures would result in increased direct costs totaling about $1,600 annually for the ''average'' elk herd owner (*i.e.*, one with a herd of 50 elk), exclusive of any costs stemming from a CWD discovery within the herd. The annual cost of $1,600 includes $1,000 for the annual inventory, $100 for the maintenance of program records, $250 for tagging, and $200 for sample collection by a veterinarian, and $50 for ancillary costs. The annual inventory cost of $1,000 assumes veterinary fees to ''read'' tags ($500) and hired labor ($500). The sample collection cost of $200 assumes that 2 animals over 16 months of age die per year. It is expected that the cost of sample collection would be less of a burden for hunting premises than for production or breeding herds, because of the relatively high per-animal profit margin for hunting premises, and because these businesses are already organized to pass on fees (*e.g.*, for State-required tagging) to their customers. The price these premises charge to hunt an elk varies with the quality of the animal, and ranges from about $3,000 for a lesser-quality bull elk to about $10,000 for bull elk that score over 375 points (*i.e.*, an animal with an exceptional antler rack). Because these businesses generally schedule their hunts well in advance, it should be possible for them to schedule a veterinarian to collect samples at appropriate times without disrupting business or customer schedules. However, APHIS particularly solicits comments on this point, since we do not have detailed knowledge of hunting premises business operations.

Participating herds that are found to have CWD-positive or CWD-exposed animals would immediately lose their program status, and could re-enroll only after completing a herd plan. (A herd plan is a written herd management agreement, developed by APHIS with input from the herd owner, State representatives, and other affected parties, that sets forth the steps to be taken to eradicate CWD from a positive herd.) It is estimated that, in about 90 percent of herd plans, herd owners would agree to depopulate their herds, for which APHIS would pay eligible owners indemnities of up to $3,000 per animal. Two likely consequences for a positive herd are State-imposed quarantines that can last several years, and State-imposed restrictions on the repopulation of cervids on the same premises. Most herd owners would consider these actions as tantamount to closure. Fortunately for herd owners,

herd infection is rare. Only 27 farmed elk herds and 2 farmed deer herds have been found positive, representing only 1 percent of all elk farms and much less than 1 percent of all deer farms. We estimate that 20 currently-infected elk herds will be detected over the next two years if this rule is adopted (if this rule is not adopted, there will be less herd monitoring and fewer detections).

Finally, the proposed certification program would establish herd status, based on the number of years of enrollment in the program with no evidence of disease. Herd status would affect the movement of animals, since additions from a herd with a later enrollment date would cause the acquiring herd to revert to the status of the herd from which the deer and elk were acquired. Herd status, therefore, would tend to make animals from lower status herds less valuable than those from higher status herds, due to the reduced marketability of the former. This would be an issue for new (or short-term) participants in a certification program. Because they would have little or no previous surveillance history, their herds would be accorded lower status, an action that would likely cause a decline in the market value of their animals. This effect will decline over time as herds accumulate years in the program. Also, the ''grandfather'' provision for Approved State CWD programs means that in many cases the time herds spent in a State program, prior to adoption of this rule, will count toward their program status. Herd owners who choose not to participate in a certification program could also face a loss in animal value, since participating herds would be less likely to acquire animals from nonparticipating herds, due to penalties.

Cost for States

If this rule is adopted, we expect that all States which permit cervid farming would participate by developing approved State CWD programs under the regulations. Many of these States would likely make participation mandatory for all in-State herd owners.

States that do establish a certification program would incur the costs of setting up and administering that program, including costs for: the development of legislative/regulatory authority, surveillance and monitoring, disease research, and education and outreach to farmers. As a point of reference in this regard, it has been conservatively estimated that such costs for establishing and maintaining a CWD program for farmed elk would amount to $47,000 per State per year.

In addition, States may also incur costs stemming from a possible disease discovery, such as costs for: the maintenance of quarantines, diagnostic testing, disposition of positive/exposed herds, and carcass disposal. The costs associated with a discovery of the disease can vary significantly, depending on the number of animals in an affected herd, the herd plan developed to deal with the disease, the type of carcass disposal, and other factors. Based on the experience of 5 of the 7 States with farmed elk that have tested positive for CWD, the cost of responding to a disease finding is estimated at $20,285 per herd, on average.

APHIS assists the States in their CWD eradication efforts by conducting testing, surveillance, and other activities that the States would otherwise have to fund themselves. Through fiscal year 2002, $17.3 million of CCC funding was transferred to APHIS for CWD eradication activities. In addition, $0.8 million of APHIS contingency funds were used for CWD eradication efforts over the last 4 fiscal years.

Cost for APHIS

The direct costs APHIS would incur from this proposed rule are the costs of approving and monitoring CWD programs established by States, and the costs associated with establishing and administering a Federal program for herd owners who wish to participate but who are not located in States with programs. Both costs should be relatively insignificant increases, since APHIS already works closely with States on their CWD programs, and direct enrollment of herds into a Federal program is expected to be needed in no more than a few States with only a few cervid herds in each. APHIS may also incur some costs to the extent that it assists in the design and implementation of State programs that are established (or modified) in response to the proposed rule.

APHIS' liability for indemnities could also be affected, if the newly-established State programs result in more positive finds than would otherwise be the case. To date, APHIS has paid out $12.5 million for CWD indemnities.

Analysis of the Economic Effects on Small Entities

The Regulatory Flexibility Act requires that agencies consider the economic effects of rules on small entities. This proposed rule would primarily affect deer and elk farms, because they are most likely to be affected by the program's requirements and the interstate movement restrictions.

We do not have details about the size of the 2,300 elk farms and 11,000 deer farms in the United States. However, it is reasonable to assume that most are small in size, under the U.S. Small Business Administration's (SBA) standards. This assumption is based on composite data for providers of the same and similar services. In 1997, there were 10,045 U.S. farms in NAICS 11299, a classification comprised solely of establishments primarily engaged in raising certain animals (including deer and elk but excluding cattle, hogs and pigs, poultry, sheep and goats, animal aquaculture, apiculture, horses and other equines, and fur-bearing animals). For all 10,045 farms, the per farm average gross receipts in 1997 was $105,624, well below the SBA's small entity threshold of $750,000 for farms in that NAICS category.

To the extent that the proposed rule prevents the spread of—and perhaps eliminates altogether—CWD in farmed deer and elk herds in the United States, small herd owners should benefit over the long term. The proposed rule would also provide herd owners with increased access to potentially better-paying out-of-State markets. By establishing equivalency between State programs, and replacing the current patchwork of State regulations, the rule would reduce the cost of complying with multiple sets of requirements and facilitate the safe movement of animals between States. Even herd owners who sell their animals in-State only stand to benefit, since the program reduces their disease risk when importing animals from other States.

The benefits, however, do not come without a price. As indicated above, it is estimated that the direct cost to satisfy the program's prescribed minimum disease preventative measures would total about $1,600 annually for the average elk herd owner (*i.e.*, one with a herd of 50 elk), exclusive of any costs stemming from a CWD discovery within the herd. However, the annual cost does not appear to be particularly burdensome, since it is equivalent to less than 2 percent of the 1997 per farm average gross receipts for all U.S. farms in NAICS 11299 ($1,600/$105,624). Those herd owners who have the option and elect not to participate would avoid the program's annual costs but they would see the value of their animals discounted in the marketplace, since ''non-program'' animals would likely carry a stigma of inferiority. As discussed below, the discount is likely to exceed the program's annual cost for

most herd owners, making participation mandatory from a practical economic standpoint for those who are not required by their respective State to participate.

According to NAEBA, all herd owners sell breeding quality animals, and it is not unusual for the average elk herd owner to sell 10 or more breeding quality animals per year, generally in the range of between $2,500 and $8,000 per animal. NAEBA estimates that, with a Federal certification program in place, non-program breeding quality animals could be sold in-State for breeding purposes, but only at a discount of about 50 percent from their value as program animals. By electing to participate, therefore, the average elk herd owner would more than offset the $1,600 in added program costs with the sale of just 1 high value, or 2 low value, breeding animals per year. From an economic standpoint, therefore, most ''elective'' herd owners would be better off participating in the program than not participating.

The previous discussion assumes, of course, that the herd owners wished to continue in the cervid business. It is possible that the investment returns experienced by some herd owners are already so low that paying the added costs to join the program would not make economic sense. These herd owners, therefore, would effectively be forced out of the cervid business by the proposed rule. The number of such herd owners is unknown but it is likely to be small, given that the added costs are equivalent to less than 2 percent of 1997 average annual gross receipts for farms in NAICS 11299, a category that includes deer and elk farms.

The presence of CWD in a herd is more likely to be detected if the herd is a participating herd, given the increased surveillance. For herd owners who are found to have positive animals, the negative impact of State-imposed quarantines and State-imposed restrictions on the repopulation of cervids on the same premises would likely more than offset the benefits of any indemnity payments. Indeed, it is very likely that most would elect to cease cervid production altogether. Fortunately for herd owners, the likelihood of a herd becoming infected has been rare, as only 27 farmed elk herds and 2 farmed deer herds have been found positive to-date, representing only 1 percent of all elk farms and much less than 1 percent of all deer farms in the United States at the present time. It is estimated that additional elk herds will be detected over the next 2 years (with the proposed rule in effect), after which a drop off in detection will occur. This drop off will be the result of reduced movement of infected animals between herds due to the program's operations.

All in all, the proposed rule can be expected to have a positive economic effect on deer and elk farmers, both large and small, over the long term. In the shorter term, the economic effect on farmers will vary depending on the circumstances of each. Some farmers, especially those who already participate in State programs and who would take advantage of the increased access to out-of-State markets, could benefit immediately. Conversely, a small number of farmers could experience a significant adverse impact, especially any farmers whose revenue is so small they cannot afford to pay the program's annual costs.

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

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. 00–108–2. Please send a copy of your comments to: (1) Docket No. 00–108–2, Regulatory Analysis and Development, PPD, APHIS, station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

This proposed rule would require several information collection activities, including written requests by State Governments and herd owners to participate in the program, herd owner responses to requests from APHIS or States for information about animals in their herds, the development of written herd plans and the maintenance of herd records, identification of cervids with ear-tags or other devices, issuance and use of certificates to move cervids interstate, and the creation of a memorandum of understanding between APHIS and each participating State.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as 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).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 2.664 hours per response.

Respondents: Herd owners, personnel employed by herd owners, State animal health authorities, accredited veterinarians.

Estimated annual number of respondents: 5,000.

Estimated annual number of responses per respondent: 30.

Estimated annual number of responses: 150,000.

Estimated total annual burden on respondents: 399,602 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects

9 CFR Part 55

Animal diseases, Cervids, Chronic wasting disease, Deer, Elk, Indemnity payments.

9 CFR Part 81

Animal diseases, Cervids, Deer, Elk, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we propose to amend 9 CFR chapter I as follows:

PART 55—CONTROL OF CHRONIC WASTING DISEASE

1. The authority citation for part 55 would be revised to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

2. Section 55.1 would be amended as follows:

a. In the definition of *herd,* by removing the words ''A group of animals'' and adding in their place the words ''One or more animals''.

b. By revising the definitions of *CWD-exposed animal* and *herd plan* to read as set forth below.

c. By adding definitions for *commingled, commingling, CWD-exposed herd, CWD herd certification program, CWD-suspect herd, CWD-source herd, deer, elk, herd status, official identification, trace back herd,* and *trace forward herd.* in alphabetical order, to read as set forth below.

§ 55.1 Definitions.

* * * * *

CWD Herd Certification Program. The Chronic Wasting Disease Herd Certification Program established by this part. This program includes both herds that directly enroll in the CWD Herd Certification Program and herds that are included based on their participation in Approved State CWD Herd Certification Programs.

* * * * *

Commingled, commingling. Animals are commingled if they have direct contact with each other, have less than 30 feet of physical separation, or share equipment, pasture, or water sources/watershed, except for periods of less than 48 hours at sales or auctions when an APHIS employee or State representative has determined such contact presents minimal risk of CWD transmission. Animals are considered to have commingled if they have had such contact with a positive animal or contaminated premises within the last 5 years.

* * * * *

CWD-exposed animal. An animal that is part of a CWD-positive herd, or that has been exposed to a CWD-positive animal or contaminated premises within the previous 5 years.

CWD-exposed herd. A herd in which a CWD-positive animal has resided within 5 years prior to that animal's diagnosis as CWD-positive, as determined by an APHIS employee or State representative.

* * * * *

CWD-source herd. A herd that is identified through testing, tracebacks, and/or epidemiological evaluations to be the source of CWD-positive animals identified in other herds.

CWD-suspect herd. A herd for which laboratory evidence or clinical signs suggest a diagnosis of CWD, as determined by an APHIS employee or State representative, but for which laboratory results have been inconclusive or not yet conducted.

Deer. Mule deer (*Odocoileus hemionus*), black-tailed deer (*Odocoileus hemionus*), white-tailed deer (*Odocoileus virginianus*), red deer (*Cervus elaphus*), and hybrids of these species.

* * * * *

Elk. North American wapiti (*Cervus elaphus*) and wapiti x red deer hybrids.

* * * * *

Herd plan. A written herd management agreement developed by a State representative with input from the herd owner, his or her veterinarian, and other affected parties. The State representative will then submit the herd plan to the Administrator, and the herd plan will not be valid until it has been reviewed and signed by the Administrator. A herd plan sets out the steps to be taken to eradicate CWD from a CWD-positive herd, to control the risk of CWD in a suspect herd, or to prevent introduction of CWD into another herd. A herd plan will require: specified means of identification for each animal in the herd; regular examination of animals in the herd by a veterinarian for clinical signs of disease; reporting to a State or APHIS representative of any clinical signs of a central nervous system disease or chronic wasting condition in the herd; maintaining records of the acquisition and disposition of all animals entering or leaving the herd, including the date of acquisition or removal, name and address of the person from whom the animal was acquired or to whom it was disposed; and the cause of death, if the animal died while in the herd. A herd plan may also contain additional requirements to prevent or control the possible spread of CWD, depending on the particular circumstances of the herd and its premises, including but not limited to: depopulation of the herd, specifying the time for which a premises must not contain cervids after CWD-positive, -exposed, or -suspect animals are removed from the premises; fencing requirements; selective culling of animals; restrictions on sharing and movement of possibly contaminated livestock equipment; cleaning and disinfection requirements; or other requirements. A herd plan may be reviewed and revised at any time by any party signatory to it, in response to changes in the situation of the herd or premises or improvements in understanding of the nature of CWD epidemiology or techniques to prevent its spread. The revised herd plan must also be submitted to the Administrator for review and signature.

Herd status. The status of a herd assigned under the CWD Herd Certification Program in accordance with § 55.24 of this part, indicating a herd's relative risk for CWD. Herd status is based on the number of years of monitoring without evidence of the disease and any specific determinations that the herd has contained or has been exposed to a CWD-positive, -exposed or -suspect animal.

* * * * *

Official identification. Identification mark or device approved by APHIS for use in the CWD Herd Certification Program. Examples are listed in § 55.25.

* * * * *

Trace back herd. A herd in which a CWD-positive animal formerly resided.

Trace forward herd. A herd that has received exposed animals from a CWD-positive herd within 5 years prior to the diagnosis of CWD in the positive herd or from the identified date of entry of CWD into the positive herd.

* * * * *

3. In part 55, a new subpart B would be added to read as follows:

Subpart B—Chronic Wasting Disease Herd Certification Program

Sec.

55.21 Administration.
55.22 Participation and enrollment.
55.23 Responsibilities of States and enrolled herd owners.
55.24 Herd status.
55.25 Official identification.

§ 55.21 Administration.

(a) The CWD Herd Certification Program is a cooperative effort between APHIS, State animal health agencies, and deer and elk owners. APHIS coordinates with State animal health agencies to encourage deer and elk

owners to certify their herds as free of CWD by being in continuous compliance with the CWD Herd Certification Program standards.

§ 55.22 Participation and enrollment.

(a) *Participation by owners.* Any owner of a captive deer or elk herd (except for CWD-positive herds, CWD-exposed herds, and CWD-suspect herds) may apply to enroll in the CWD Herd Certification Program by sending a written request to the State animal health agency, or to the veterinarian in charge if no Approved State CWD Herd Certification Program exists in the herd's State. APHIS or the State will determine the herd's eligibility, and if needed will require the owner to submit more details about the herd animals and operations. After determining that the herd is eligible to participate in accordance with this paragraph, APHIS or the State animal health agency will send the herd owner a notice of enrollment that includes the herd's enrollment date. A notice containing a current list of herds participating in the CWD Herd Certification Program and the certification status of each herd may be obtained from the APHIS Internet Web site at *http://www.aphis.usda.gov/vs/nahps/cwd/,* or by writing to the Animal and Plant Health Inspection Service, National Animal Health Programs Staff, VS, APHIS, 4700 River Road, Unit 43, Riverdale, MD 20737–1235.

(1) *Enrollment date.* The enrollment date for any herd that joins the CWD Herd Certification Program after the effective date of this rule will be the date the herd is approved for participation. For herds already participating in State CWD programs, the enrollment date will be the first day that the herd participated in a State program that APHIS subsequently determines qualifies as an Approved State CWD Herd Certification Program in accordance with § 55.23(a) of this part.

(2) [Reserved]

(b) *Participation by States.* Any State that operates a State program to certify the CWD status of deer or elk may request the Administrator to designate the State program as an Approved State CWD Herd Certification Program. The Administrator will approve or disapprove a State program in accordance with § 55.23(a) of this subpart. In States with an Approved State CWD Herd Certification Program, program activities will be conducted in accordance with the guidelines of that program as long as the State program meets the minium requirements of this part. A notice containing a current list of Approved State CWD Herd Certification Programs may be obtained from the APHIS Internet Web site at *http://www.aphis.usda.gov/vs/nahps/cwd/,* or by writing to the Animal and Plant Health Inspection Service, National Animal Health Programs Staff, VS, APHIS, 4700 River Road, Unit 43, Riverdale, MD 20737–1235.

§ 55.23 Responsibilities of States and enrolled herd owners.

(a) *Approval of State programs and responsibilities of States.* In reviewing a State program's eligibility to be designated an Approved State CWD Herd Certification Program, the Administrator will evaluate a written statement from the State animal health agency that describes State CWD control and deer and elk herd certification activities and that cites relevant State statutes, regulations, and directives pertaining to animal health activities and reports and publications of the State animal health agency. In determining whether the State program qualifies, the Administrator will determine whether the State:

(1) Has the authority, based on State law or regulation, to restrict the intrastate movement of all CWD-positive, CWD-suspect, and CWD-exposed animals.

(2) Has the authority, based on State law or regulation, to require the prompt reporting of any animal suspected of having CWD and test results for any animals tested for CWD to State or Federal animal health authorities.

(3) Has, in cooperation with APHIS personnel, drafted and signed a memorandum of understanding with APHIS that delineates the respective roles of the State and APHIS in CWD Herd Certification Program implementation.

(4) Has placed all known CWD-positive and CWD-exposed herds under movement restrictions, with movement of animals only for destruction or for research. CWD-positive and CWD-suspect animals may be moved only for transport to an approved research facility or for purposes of destruction.

(5) Has effectively implemented policies to:

(i) Promptly investigate all animals reported as CWD-suspect animals;

(ii) Designate herds as CWD-positive, CWD-exposed, or CWD-suspect and promptly restrict movement of animals from the herd after an APHIS employee or State representative determines that the herd contains or has contained a CWD-positive animal;

(iii) Remove herd movement restrictions only after completion of a herd plan agreed upon by both the State representative and APHIS;

(iv) Conduct an epidemiologic investigation of CWD-positive, CWD-exposed, and CWD-suspect herds that includes the designation of suspect and exposed animals and that identifies animals to be traced;

(v) Conduct tracebacks of CWD-positive animals and traceouts of CWD-exposed animals and report any out-of-State traces to the appropriate State promptly after receipt of notification of a CWD-positive animal; and

(vi) Conduct tracebacks based on slaughter sampling promptly after receipt of notification of a CWD-positive animal at slaughter.

(6) Effectively monitors and enforces State quarantines and State reporting laws and regulations for CWD.

(7) Has designated at least one APHIS or State animal health official to coordinate CWD Herd Certification Program activities in the State.

(8) Has programs to educate those engaged in the interstate movement of deer and elk regarding the identification and recordkeeping requirements of this part.

(9) Requires, based on State law or regulation, and effectively enforces official identification of all animals in herds participating in the CWD Herd Certification Program;

(10) Maintains in the National CWD Database administered by APHIS, or in a State database approved by the Administrator as compatible with the National CWD Database, the State's:

(i) Premises information and assigned premises numbers;

(ii) Individual animal information on all deer and elk in herds participating in the CWD Herd Certification Program in the State;

(iii) Individual animal information on all out-of-State deer and elk to be traced; and

(iv) Accurate herd status data.

(11) Requires that tissues from all CWD-positive or CWD-suspect animals be submitted to a laboratory authorized by the Administrator to conduct official CWD tests and requires complete destruction of the carcasses of CWD-positive and CWD-suspect animals.

(b) *Responsibilities of enrolled herd owners.* Herd owners who enroll in the CWD Herd Certification Program agree to maintain their herds in accordance with the following conditions:

(1) Each animal in the herd must be officially identified using means of identification allowed by § 55.25 of this subpart;

(2) The herd premises must have perimeter fencing adequate to prevent ingress or egress of cervids. This fencing

must comply with any applicable State regulations;

(3) The owner must immediately report to an APHIS employee or State representative all deaths of deer and elk in the herd aged 16 months or older, and must make the carcasses of such animals available for tissue sampling and testing. This includes animals killed on premises maintained for hunting. The owner also must allow test samples to be collected from all animals sent to slaughter;

(4) The owner must maintain herd records including a complete inventory of animals that records the age and sex of each animal, the date of acquisition and source of each animal that was not born into the herd, the date of disposal and destination of any animal removed from the herd, and all individual identification numbers (from tags, tattoos, electronic implants, etc.) associated with each animal. Upon request, the owner must allow an APHIS employee or State representative access to the premises and herd to conduct a physical herd inventory with verification reconciling animals and identifications with the records maintained by the owner;

(5) If an owner wishes to maintain separate herds, he or she must maintain separate herd inventories, records, working facilities, water sources, equipment, and land use. No commingling of animals may occur. Movement of animals between herds must be recorded as if they were separately owned herds;

(6) New animals may be introduced into the herd only from other herds enrolled in the CWD Herd Certification Program. If animals are received from an enrolled herd with a lower program status, the receiving herd will revert to that lower program status. If animals are obtained from a herd not participating in the program, then the receiving herd will be required to start over in the program.

§ 55.24 Herd status.

(a) When a herd is first enrolled in the CWD Herd Certification Program, it will be placed in First Year status. If the herd continues to meet the requirements of the CWD Herd Certification Program, each year, on the anniversary of the enrollment date the herd status will be upgraded by 1 year; *i.e.*, Second Year status, Third Year status, Fourth Year status, and Fifth Year status. One year from the date a herd is placed in Fifth Year status, the herd status will be changed to Certified, and the herd will remain in Certified status as long as it is enrolled in the program, provided its status is not lost or suspended in accordance with this section. Once the herd has received Certified status, slaughter surveillance and surveillance of animals killed in shooter operations will no longer be required, but other requirements of the program will remain in force.

(b) *Loss or suspension of herd status.* (1) If a herd is designated a CWD-positive herd or a CWD-exposed herd, it will immediately lose its program status and may only reenroll after completing a herd plan. When reenrolled, the herd will enter at a First Year status level, with a new enrollment date reflecting the date the herd completed the herd plan.

(2) If a herd is designated a CWD-suspect herd, a trace back herd, or a trace forward herd, it will immediately be placed in Suspended status pending an epidemiologic investigation by APHIS or a State animal health agency. If the epidemiologic investigation determines that the herd was not commingled with a CWD-positive animal, the herd will be reinstated to its former program status, and the time spent in Suspended status will count toward its promotion to the next herd status level.

(i) If the epidemiologic investigation determines that the herd was commingled with a CWD-positive animal, the herd will lose its program status and will be designated a CWD-exposed herd.

(ii) If the epidemiological investigation is unable to make a determination regarding the exposure of the herd, because the necessary animal or animals are no longer available for testing (*i.e.* a trace animal from a known positive herd died and was not tested) or for other reasons, the herd status will continue as Suspended unless and until a herd plan is developed for the herd. If a herd plan is developed, the herd will be reinstated into the CWD Herd Certification Program at the First Year status level, with a new enrollment date set at the date the herd entered into Suspended status. The herd must comply with the requirements of the herd plan as well as the requirements of the CWD Herd Certification Program, and the herd plan will require testing of all animals that die in the herd for any reason, regardless of the age of the animal, and may require movement restrictions for animals in the herd based on epidemiologic evidence regarding the risk posed by the animals in question.

(c) The Administrator may cancel the enrollment of an enrolled herd by giving written notice to the herd owner. In the event of such cancellation, the herd owner may not reapply to enroll in the CWD Herd Certification Program for 5 years from the effective date of the cancellation. The Administrator may cancel enrollment after determining that the herd owner failed to comply with any requirements of this section. Before enrollment is canceled, an APHIS representative will inform the herd owner of the reasons for the proposed cancellation.

(1) Herd owners may appeal cancellation of enrollment or loss or suspension of herd status by writing to the Administrator within 10 days after being informed of the reasons for the proposed action. The appeal must include all of the facts and reasons upon which the herd owner relies to show that the reasons for the proposed action are incorrect or do not support the action. The Administrator will grant or deny the appeal in writing as promptly as circumstances permit, stating the reason for his or her decision. If there is a conflict as to any material fact, a hearing will be held to resolve the conflict. Rules of practice concerning the hearing will be adopted by the Administrator. However, cancellation of enrollment or loss or suspension of herd status shall become effective pending final determination in the proceeding if the Administrator determines that such action is necessary to prevent the possible spread of CWD. Such action shall become effective upon oral or written notification, whichever is earlier, to the herd owner. In the event of oral notification, written confirmation shall be given as promptly as circumstances allow. This cancellation of enrollment or loss or suspension of herd status shall continue in effect pending the completion of the proceeding, and any judicial review thereof, unless otherwise ordered by the Administrator.

(2) [Reserved]

(d) A herd may add animals from herds with the same or an earlier enrollment date in the CWD Herd Certification Program with no negative impact on the certification status of the receiving herd.[1] If animals are acquired from a herd with a later date of enrollment, the receiving herd reverts to the program status of the sending herd. If a herd participating in the CWD Herd Certification Program acquires animals from a nonparticipating herd, the receiving reverts to First Year status with a new enrollment date of the date of acquisition of the animal.

[1] Note that in addition to this requirement, § 81.3 of this chapter restricts the interstate movement of captive deer and elk based on their status in the CWD Herd Certification Program.

§ 55.25 Official identification.

(a) Each animal required to be identified by this subpart must have at least two forms of identification. The official identification must be approved for this use by APHIS, and must be an electronic implant, flank tattoo, ear tattoo, or tamper-resistant ear tag. The official identification must provide a unique identification number that is applied by the owner of the herd or his or her agent and must be linked to that herd in the National CWD Database.

4. A new part 81 would be added to read as follows:

PART 81—CHRONIC WASTING DISEASE IN DEER AND ELK

Sec.

81.1 Definitions.
81.2 Identification of deer and elk in interstate commerce.
81.3 General restrictions.
81.4 Issuance of certificates.

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

§ 81.1 Definitions.

Animal. Any captive deer or elk.

Animal and Plant Health Inspection Service (APHIS). The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

APHIS employee. Any individual employed by the Animal and Plant Health Inspection Service who is authorized by the Administrator to do any work or perform any duty in connection with the control and eradication of disease.

Captive. Animals that are privately or publicly maintained or held for economic or other purposes within a perimeter fence or confined area, or that were captured from a free-ranging population for interstate movement and release. Animals that are held for research purposes by State or Federal agencies or universities are not included.

Chronic wasting disease (CWD). A transmissible spongiform encephalopathy of cervids. Clinical signs in affected animals include, but are not limited to, loss of body condition, behavioral changes, excessive salivation, increased drinking and urination, depression, and eventual death.

CWD-exposed animal. An animal that is part of a CWD-positive herd, or that has been exposed to a CWD-positive animal or contaminated premises within the previous 5 years.

CWD Herd Certification Program. The Chronic Wasting Disease Herd Certification Program established in part 55 of this chapter.

CWD-positive animal. An animal that has had a diagnosis of CWD confirmed by means of an official CWD test.

CWD-suspect animal. An animal for which an APHIS employee has determined that laboratory evidence or clinical signs suggest a diagnosis of CWD.

Deer. Mule deer (*Odocoileus hemionus*), black-tailed deer (*Odocoileus hemionus*), white-tailed deer (*Odocoileus virginianus*), red deer (*Cervus elaphus*), and hybrids of these species.

Elk. North American wapiti (*Cervus elaphus*) and wapiti x red deer hybrids.

§ 81.2 Identification of deer and elk in interstate commerce.

(a) Each animal required to be identified by this part must have at least two forms of identification, except for free-ranging animals captured for interstate movement and release in accordance with § 81.3(a)(2), which must have at least one form of identification. The form of identification must be an electronic implant, flank tattoo, ear tattoo, or tamper-resistant ear tag approved for this use by APHIS. The identification must provide a unique identification number that is applied by the owner of the herd or his or her agent and is linked to that herd in the National CWD Database.

§ 81.3 General restrictions.

(a) No captive deer or captive elk may be moved interstate unless it:

(1) Is moved from a herd that is:

(i) Enrolled in the CWD Herd Certification Program and:

(A) If the movement occurs between [effective date of final rule] and [date 27 months after effective date of final rule], the herd has achieved at least Second Year status in accordance with § 55.24 of this chapter;

(B) If the movement occurs between [date 27 months after effective date of final rule] and [date 39 months after effective date of final rule], the herd has achieved at least Third Year status in accordance with § 55.24 of this chapter;

(C) If the movement occurs between [date 39 months after effective date of final rule] and [date 51 months after effective date of final rule], the herd has achieved at least Fourth Year status in accordance with § 55.24 of this chapter;

(D) If the movement occurs between [date 51 months after effective date of final rule] and [date 63 months after effective date of final rule], the herd has achieved at least Fifth Year status in accordance with § 55.24 of this chapter;

(E) If the movement occurs after [date 63 months after effective date of final rule], the herd has achieved Certified status in accordance with § 55.24 of this chapter; and,

(ii) The herd is accompanied by a certificate issued in accordance with § 81.4 of this part that identifies its herd of origin and its CWD Herd Certification Program status, and states that it is not a CWD-positive, CWD-exposed, or CWD-suspect animal; or

(2) The captive deer or captive elk has at least one form of official identification and was captured for interstate movement and release from a free-ranging population that a certificate accompanying the animals documents to be free from CWD based on a CWD surveillance program that is approved by the State Government of the receiving State and by APHIS.

§ 81.4 Issuance of certificates.

(a) A certificate must show the official identification numbers of each animal to be moved. A certificate must also show the number of animals covered by the certificate; the purpose for which the animals are to be moved; the points of origin and destination; the consignor; and the consignee. The certificate must include a statement by the issuing accredited veterinarian, State veterinarian, or Federal veterinarian that the animals were not exhibiting clinical signs associated with CWD at the time of examination, that the animals are from a herd participating in the CWD Herd Certification Program, and giving the herd's program status.

(b) *Animal identification documents attached to certificates.* As an alternative to typing or writing individual animal identification on a certificate, another document may be used to provide this information, but only under the following conditions:

(1) The document must be a State form or APHIS form that requires individual identification of animals;

(2) A legible copy of the document must be stapled to the original and each copy of the certificate;

(3) Each copy of the document must identify each animal to be moved with the certificate, but any information pertaining to other animals, and any unused space on the document for recording animal identification, must be crossed out in ink; and

(4) The following information must be typed or written in ink in the identification column on the original and each copy of the certificate and must be circled or boxed, also in ink, so that no additional information can be added:

(i) The name of the document; and

(ii) Either the serial number on the document or, if the document is not imprinted with a serial number, both

the name of the person who issued the document and the date the document was issued.

Done in Washington, DC, this 17th day of December, 2003.

Bill Hawks,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 03–31543 Filed 12–23–03; 8:45 am]

BILLING CODE 3410–34–P

FEDERAL RESERVE SYSTEM

12 CFR Part 222

FEDERAL TRADE COMMISSION

16 CFR Part 602

[Regulation V; Docket No. R–1175]

RIN 3084–AA94 Project No. P044804

Effective Dates for the Fair and Accurate Credit Transactions Act of 2003

AGENCIES: Board of Governors of the Federal Reserve System (Board) and Federal Trade Commission (FTC).

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The recently enacted Fair and Accurate Credit Transactions Act of 2003 (FACT Act or the Act) requires the Board and the FTC (the Agencies) jointly to adopt rules establishing the effective dates for provisions of the Act that do not contain specific effective dates. The Agencies are taking two related actions to comply with this requirement. In this action, the Agencies are proposing rules that would establish a schedule of effective dates for many of the provisions of the FACT Act for which the Act itself does not specifically provide an effective date. In the second action, published elsewhere in today's **Federal Register**, the Agencies are jointly adopting interim final rules that establish December 31, 2003, as the effective date for provisions of the Act that determine the relationship between the Fair Credit Reporting Act (FCRA) and state laws and provisions that authorize rulemakings and other implementing action by various agencies.

DATES: Comments must be submitted on or before January 12, 2004.

ADDRESSES: Because the Agencies will jointly review all of the comments submitted, interested parties may send comments to either of the Agencies and need not send comments (or copies) to both of the Agencies. Because paper mail in the Washington area and at the Agencies is subject to delay, please consider submitting your comments by e-mail. Commenters are encouraged to use the title ''Proposed Effective Dates for the FACT Act'' to facilitate the organization and distribution of comments among the Agencies. Interested parties are invited to submit written comments to:

Board of Governors of the Federal Reserve System: Comments should refer to Docket No. R–1175 and may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551. Please consider submitting your comments by e-mail to *regs.comments@federalreserve.gov,* or faxing them to the Office of the Secretary at (202) 452–3819 or (202) 452–3102. Members of the public may inspect comments in Room MP–500 between 9 a.m. and 5 p.m. on weekdays pursuant to section 261.12, except as provided in section 261.14, of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

Federal Trade Commission: Comments should refer to ''Proposed Effective Dates for the FACT Act, Project No. P044804.'' Comments filed in paper form should be mailed or delivered to: Federal Trade Commission/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) should be sent to: *FACTAdates@ftc.gov.* If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled ''Confidential.'' [1] Regardless of the form in which they are filed, the Commission will consider all timely comments, and will make the comments available (with confidential material redacted) for public inspection and copying at the Commission's principal office and on the Commission Web site at *www.ftc.gov.* As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site.

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must also be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

FOR FURTHER INFORMATION CONTACT:

Board: Thomas E. Scanlon, Counsel, Legal Division, (202) 452–3594; David A. Stein, Counsel, Minh-Duc T. Le, Ky Tran-Trong, Senior Attorneys, Krista P. DeLargy, Attorney, Division of Consumer and Community Affairs, (202) 452–3667 or (202) 452–2412; for users of Telecommunications Device for the Deaf (''TDD'') only, contact (202) 263–4869.

FTC: Christopher Keller or Katherine Armstrong, Attorneys, Division of Financial Practices, (202) 326–3224.

SUPPLEMENTARY INFORMATION:

Background and Discussion

Congress enacted the FACT Act, which the President signed into law on December 4, 2003. Pub. L. 108–159, 117 Stat. 1952. In general, the Act amends the FCRA to enhance the ability of consumers to combat identity theft, to increase the accuracy of consumer reports, and to allow consumers to exercise greater control regarding the type and amount of marketing solicitations they receive. The FACT Act also restricts the use and disclosure of sensitive medical information that is contained in a consumer report. To bolster efforts to improve financial literacy among consumers, title V of the Act (entitled the ''Financial Literacy and Education Improvement Act'') creates a new Financial Literacy and Education Commission empowered to take appropriate actions to improve the financial literacy and education programs, grants, and materials of the Federal government. Lastly, to promote increasingly efficient national credit markets, the FACT Act establishes uniform national standards in key areas of regulation regarding consumer report information.

The Act includes effective dates for many of its sections that vary to take account of the need for rulemaking, implementation efforts by industry, and other policy concerns. Section 3 of the FACT Act requires the Agencies to prescribe joint regulations establishing an effective date for each provision of the Act for which the Act itself does not specifically provide an effective date. The FACT Act requires that the Agencies jointly adopt final rules establishing the effective dates within two months of the date of enactment of the Act. Thus, by law, the Agencies must complete these rulemaking efforts by February 4, 2004. The Act also provides that each of these effective dates must be ''as early as possible, while allowing a reasonable time for the implementation'' of that provision, but

in no case later than ten months after the date of issuance of the Agencies' joint final rules establishing the effective dates for the Act (117 Stat. 1953).

In this action, the Agencies are proposing rules that would establish a schedule of effective dates for certain provisions of the FACT Act for which the Act itself does not specifically provide an effective date. In a separate notice published in conjunction with this action, the Agencies are jointly adopting interim final regulations to establish effective dates for provisions of the FACT Act that relate to state laws and to implementing authority for the agencies. The Agencies seek comment on the issues associated with the schedule of effective dates set forth in both the proposed and interim final joint regulations.

Schedule of Effective Dates

The FACT Act contains a number of provisions that clarify or address rights and requirements under the FCRA that are self-effectuating but that do not contain a specific effective date. These provisions are: section 156 (statute of limitations); sections 312(d) (furnisher liability exception), (e) (liability and enforcement), and (f) (rule of construction); section 313(a) (action concerning complaints); section 611 (communications for employee investigations); and section 811 (clerical amendments). Section 111 (amendment to definitions) contains definitions that are self-effectuating but that do not contain specific effective dates. The Agencies propose to establish March 31, 2004, as the effective date for each of the provisions of the Act listed above. With respect to each of these provisions, the Agencies consider that the ''reasonable time to implement'' standard of section 3 of the Act permits an early effective date because these provisions do not require significant changes to business procedures. Each of these provisions furnishes important benefits to consumers and affected businesses. March 31, 2004, is therefore an appropriate date that balances the statutory mandate to effectuate provisions of the Act ''as early as possible'' and the Agencies'' desire to obtain and consider comment prior to implementation.

The FACT Act contains a number of other provisions without effective dates that would require changes in systems, disclosure forms or practices, or implementing regulations to be administered effectively. The Agencies propose December 1, 2004, as the effective date for these provisions. This will allow industry and the various agencies a reasonable time to establish systems and rules to implement these sections effectively. These sections are listed in the proposed rules.

As explained in the preamble to the Interim Final Rules published concurrently with this Notice (and set forth in section (1)(B) of the applicable interim final rule), the Agencies note that with respect to any provision of the Act that provides for a rulemaking proceeding or other agency action, the proposed rules establishing effective dates do not affect the substantive provisions of the FACT Act implemented by agency rule. The substantive provisions of the Act become effective as provided in the Act, as provided in the Agencies' joint effective date rules, or as provided by the substantive rules promulgated by the various agencies, as appropriate.

Request for Comments

The Agencies invite comment on the proposal. In particular, the Agencies seek comment on whether the proposed schedule of effective dates would allow affected entities a reasonable period of time to comply with or act on the newly-enacted provision(s). The Agencies also invite comment on whether a different effective date is appropriate for any provision. In addition, the Agencies seek comment on whether it is necessary to establish an effective date for any provision not listed (or specifically listed) on the proposed schedule.

Regulatory Analysis

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Agencies have reviewed the proposed joint rules. (The Board has done so under authority delegated to the Board by the Office of Management and Budget.) The proposed joint rules contain no collections of information pursuant to the Paperwork Reduction Act.

Regulatory Flexibility Act

In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), the Agencies must publish an initial regulatory flexibility analysis with the joint proposed rules.

The joint proposed rules, if adopted, would establish effective dates for several provisions of the FACT Act. Prior to the enactment of the FACT Act, the FCRA imposed various duties on parties that furnish information to consumer reporting agencies, on parties that use consumer reports, and on consumer reporting agencies themselves. The FACT Act modifies and extends some of these existing duties and imposes new duties on these respective parties. The schedule of effective dates proposed by the Agencies would make the newly-enacted statutory provisions applicable with respect to these parties. The Agencies seek comment on the extent to which the proposed time periods for compliance may affect the scope or nature of the burdens that affected parties are likely to face in complying with the applicable provisions of the FACT Act, if at all. A description of the reasons for the Agencies' decisions and a statement of the objectives of, and legal basis for, the joint interim final and proposed regulations, respectively, are set forth in the supplementary information provided above. The types of entities, if any, to be affected by these rules is also described above, although the agencies do not presently have a basis for estimating the number of small entities to which these rules will apply. Because the rules merely establish effective dates, the rules themselves impose no reporting, recordkeeping or other requirements, which would arise either from obligations imposed by the statute itself or as a result of rulemakings or other implementing actions that may be taken by agencies under the statute. Nonetheless, the Agencies specifically seek comment on the likely burden the joint proposed rule would have on small entities, such as small creditors that furnish information to consumer reporting agencies or use consumer reports, and how the Agencies' proposed rules might minimize this burden, to the extent consistent with the requirements and intent of the FACT Act.

Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. 16 CFR 1.26(b)(5).

Solicitation of Comments on Use of Plain Language

Section 722(a) of the Gramm-Leach-Bliley Act requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000.[2] In light of this requirement, the Board has sought to present the proposed rule in a simple

[2] Pub. L. 106–102, 113 Stat. 1338 (1999), codified at 12 U.S.C. 4809.

and straightforward manner. The Board invites your comments on how to make the rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

List of Subjects

12 CFR Part 222

Banks, banking, Holding companies, state member banks.

16 CFR Part 602

Consumer reports, Consumer reporting agencies, Credit, Trade practices.

12 CFR Chapter II—Federal Reserve System

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 222 as follows:

PART 222—FAIR CREDIT REPORTING (REGULATION V)

1.The authority citation for 12 CFR part 222 continues to read as follows:

Authority: 15 U.S.C. 1681a; Sec.3, Pub. L. 108–159, 117 Stat. 1953.

2. In § 222.1, paragraphs (c)(2) and (c)(3) are added to read as follows:

Subpart A—General Provisions

§ 222.1 Purpose, scope, and effective dates.

* * * * *

(c) Effective dates. * * *

(2) *Provisions effective March 31, 2004.*

(i) Section 111, concerning the definitions;

(ii) Section 156, concerning the statute of limitations;

(iii) Sections 312(d), (e), and (f), concerning the furnisher liability exception, liability and enforcement, and rule of construction, respectively;

(iv) Section 313(a), concerning action regarding complaints;

(v) Section 611, concerning communications for employee investigations; and

(vi) Section 811, concerning clerical amendments.

(3) *Provisions effective December 1, 2004.*

(i) Section 112, concerning fraud alerts and active duty alerts;

(ii) Section 114, concerning procedures for the identification of possible instances of identity theft;

(iii) Section 115, concerning truncation of the social security number in a consumer report;

(iv) Section 151(a)(1), concerning the summary of rights of identity theft victims;

(v) Section 152, concerning blocking of information resulting from identity theft;

(vi) Section 153, concerning the coordination of identity theft complaint investigations;

(vii) Section 154, concerning the prevention of repollution of consumer reports;

(viii) Section 155, concerning notice by debt collectors with respect to fraudulent information;

(ix) Section 211(a) and (c), concerning free consumer reports;

(x) Section 212(a)–(d), concerning the disclosure of credit scores;

(xi) Section 213(c), concerning enhanced disclosure of the means available to opt out of prescreened lists;

(xii) Section 214(a), concerning affiliate sharing;

(xiii) Section 216, concerning the disposal of consumer report information and records;

(xiv) Section 217(a), concerning the duty to provide notice to a consumer;

(xv) Section 311(a), concerning the risk-based pricing notice;

(xvi) Section 312(a)–(c), concerning procedures to enhance the accuracy and integrity of information furnished to consumer reporting agencies;

(xvii) Section 314, concerning improved disclosure of the results of reinvestigation;

(xviii) Section 315, concerning reconciling addresses;

(xix) Section 316, concerning notice of dispute through reseller; and

(xx) Section 317, concerning the duty to conduct a reasonable reinvestigation.

16 CFR Chapter 1—Federal Trade Commission

Authority and Issuance

For the reasons set forth in the preamble, the FTC proposes to amend 16 CFR part 602 as follows:

PART 602—FAIR CREDIT REPORTING

1. The authority citation for 16 CFR part 602 continues to read as follows:

Authority: 15 U.S.C. 1681a; Sec. 3, Pub. L. 108–159, 117 Stat. 1953.

2. In § 602.1, paragraphs (c)(2) and (c)(3) are added to read as follows:

Subpart A—General Provisions

§ 602.1 Purpose, scope, and effective dates.

* * * * *

(c) *Effective dates.* * * *

(2) *Provisions effective March 31, 2004.*

(i) Section 111, concerning the definitions;

(ii) Section 156, concerning the statute of limitations;

(iii) Sections 312(d), (e), and (f), concerning the furnisher liability exception, liability and enforcement, and rule of construction, respectively;

(iv) Section 313(a), concerning action regarding complaints;

(v) Section 611, concerning communications for employee investigations; and

(vi) Section 811, concerning clerical amendments.

(3) *Provisions effective December 1, 2004.*

(i) Section 112, concerning fraud alerts and active duty alerts;

(ii) Section 114, concerning procedures for the identification of possible instances of identity theft;

(iii) Section 115, concerning truncation of the social security number in a consumer report;

(iv) Section 151(a)(1), concerning the summary of rights of identity theft victims;

(v) Section 152, concerning blocking of information resulting from identity theft;

(vi) Section 153, concerning the coordination of identity theft complaint investigations;

(vii) Section 154, concerning the prevention of repollution of consumer reports;

(viii) Section 155, concerning notice by debt collectors with respect to fraudulent information;

(ix) Section 211(a) and (c), concerning free consumer reports;

(x) Section 212(a)–(d), concerning the disclosure of credit scores;

(xi) Section 213(c), concerning enhanced disclosure of the means available to opt out of prescreened lists;

(xii) Section 214(a), concerning affiliate sharing;

(xiii) Section 216, concerning the disposal of consumer report information and records;

(xiv) Section 217(a), concerning the duty to provide notice to a consumer;

(xv) Section 311(a), concerning the risk-based pricing notice;

(xvi) Section 312(a)–(c), concerning procedures to enhance the accuracy and integrity of information furnished to consumer reporting agencies;

(xvii) Section 314, concerning improved disclosure of the results of reinvestigation;

(xviii) Section 315, concerning reconciling addresses;

(xix) Section 316, concerning notice of dispute through reseller; and

(xx) Section 317, concerning the duty to conduct a reasonable reinvestigation.

By order of the Board of Governors of the Federal Reserve System, December 16, 2003.

Jennifer J. Johnson,

Secretary of the Board.

Dated: December 15, 2003.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 03–31360 Filed 12–23–03; 8:45 am]

BILLING CODE 6210–01–P, 6750–01–P,

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–148–AD]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146 Series 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 all BAE Systems (Operations) Limited Model BAe 146 series airplanes. This proposal would require repetitive general visual inspections of the inside of the condenser regenerative air ducts, air cycle machine turbine outlet, and the jet pump ducts on each air conditioning pack to detect oil and/or oil breakdown products leaking from the engine(s) or auxiliary power unit (APU). This proposal would also require further inspections and replacement of any affected engine, APU, or component with a serviceable part, if necessary. This action is necessary to prevent impairment of the operational skills and abilities of the flight crew caused by oil or oil breakdown products in the cabin air, which could result in reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 23, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–148–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–148–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 British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

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

SUPPLEMENTARY INFORMATION:

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–148–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–148–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, notified the FAA that an unsafe condition may exist on all BAE Systems (Operations) Limited Model BAe 146 series airplanes. The CAA advises that flight crews have reported four incidents in which they experienced various levels of impaired performance when flying the affected airplane models. The root cause of the impairment has not been identified; however, circumstantial evidence indicates that a possible cause is an agent or agents released from oil and/or oil breakdown products that leak from the engine(s) or auxiliary power unit (APU) and contaminate the environmental control system (ECS), and are possibly released into the cabin air. Oil or oil breakdown products in the cabin air, if not corrected, could result in possible impairment of the operational skills and abilities of the flight crew, and possible reduced controllability of the airplane.

Explanation of Relevant Service Information

BAE Systems (Operations) Limited has issued Service Bulletin ISB.21–150, Revision 2, dated October 24, 2002, which describes procedures for repetitive general visual inspections of the inside of the condenser regenerative air ducts, air cycle machine turbine outlet, and the jet pump ducts on each air conditioning pack to detect oil and/or oil breakdown products leaking from the engine(s) or APU and contaminating the ECS and cabin air supply. This

service bulletin also describes procedures for detailed inspections and replacement of any affected engine, APU, or component of the engine or APU with serviceable parts if oil contamination is found or if a cabin air quality problem is suspected of being associated with oil contamination of the air supply. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. The CAA classified this service bulletin as mandatory and issued British airworthiness directive 002–03–2001, dated March 21, 2001, to ensure the continued airworthiness of these airplanes in the United Kingdom.

FAA's Conclusions

This airplane model is manufactured in the United Kingdom and is 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, the CAA has kept us informed of the situation described above. We have examined the findings of the CAA, 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 actions specified in the service bulletin described previously, except as discussed below.

Difference Between Proposed Rule and Referenced Service Bulletin

Operators should note that although the service bulletin specifies to complete and return an inspection reporting sheet to the manufacturer, this proposed AD does not include such a requirement.

Interim Action

We consider this proposed AD interim action. If final action is later identified, we may consider further rulemaking then.

Cost Impact

The FAA estimates that 20 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per airplane to accomplish the proposed general visual inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $2,600, or $130 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.

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:

BAE Systems (Operations) Limited (formerly British Aerospace Regional Aircraft): Docket 2001–NM–148–AD.

Applicability: All Model BAe 146 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent impairment of the operational skills and abilities of the flight crew caused by oil or oil breakdown products in the cabin air, which could result in reduced controllability of the airplane, accomplish the following:

Service Bulletin Reference

(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 BAE Systems (Operations) Limited Service Bulletin ISB.21–150, Revision 2, dated October 24, 2002.

(2) Inspections and corrective actions accomplished before the effective date of this AD per BAE Systems (Operations) Limited Service Bulletin ISB.21–150, dated March 20, 2001; or BAE Systems (Operations) Limited Service Bulletin ISB.21–150, Revision 1, dated January 29, 2002; are acceptable for compliance with the corresponding actions required by this AD.

Initial Inspection

(b) Within 500 flight cycles after the effective date of this AD: Perform a general visual inspection of the inside of both the condenser regenerative air ducts, air cycle machine turbine outlet, and the jet pump ducts on each air conditioning pack for the presence of oil contamination, per the service bulletin.

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

Repetitive Inspections

(c) If no oil contamination is found during the inspection required by paragraph (b) of this AD: Repeat the inspection at intervals not to exceed 500 flight cycles in accordance with the service bulletin.

Detailed Inspection and Replacement

(d) If any oil contamination is found during the inspection required by paragraph (b) of this AD: Before further flight, perform a

detailed inspection of any affected engine, APU, or component of the engine(s) or APU to determine the cause of the oil contamination per the service bulletin.

(1) If the cause of the oil contamination is found: Except as provided by paragraph (f) of this AD, before further flight, remove any affected engine, APU, or component and replace it with a serviceable part in accordance the service bulletin. Repeat the general visual inspection required by paragraph (b) of this AD at intervals not to exceed 500 flight cycles in accordance with the service bulletin.

(2) If the cause of the oil contamination is not found, repeat the inspection required by paragraph (b) of this AD at intervals not to exceed 50 flight cycles in accordance with the service bulletin.

Note 2: 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.''

Inspection and Repair Following Air Quality Problems

(e) If any cabin air quality problem, whether intermittent or persistent, is reported that is suspected of being associated with oil contamination of the air supply from the environmental control system packs: Before further flight, perform the detailed inspection and any necessary corrective action required by paragraph (d) of this AD in accordance with the service bulletin.

Continued Operation Without Replacement

(f) Airplanes may be operated without accomplishing the replacement(s) required by paragraph (d)(1) of this AD under the conditions described in paragraphs 2.E.(1), 2.E.(2), and 2.E.(3) of the service bulletin, and in accordance with the provisions and limitations specified in the operator's Master Minimum Equipment List (MMEL). Repeat the inspection required by paragraph (b) of this AD at intervals not to exceed 500 flight cycles in accordance with the service bulletin.

Parts Installation

(g) As of the effective date of this AD, no person may install on any airplane an engine, APU, or component that has been removed per paragraph (d)(1) of this AD, unless it has been cleaned in accordance with paragraph 2.H. of the service bulletin.

No Reporting Requirements

(h) Although the service bulletin referenced in this AD specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

Alternative Methods of Compliance

(i) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 3: The subject of this AD is addressed in British airworthiness directive 002–03–2001, dated March 21, 2001.

Issued in Renton, Washington, on December 12, 2003.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–31441 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 20 and 301

[REG–139845–02]

RIN 1545–BB12

Gross Estate; Election to Value on Alternate Valuation Date

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the election under section 2032 to value a decedent's gross estate on the alternate valuation date. The proposed regulations reflect a change to the law made by the Deficit Reduction Act of 1984. The proposed regulations affect estates that are required to file Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

DATES: Written or electronic comments and requests for a public hearing must be received by March 23, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–139845–02), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–139845–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit electronic comments directly to the IRS Internet site at: *http://www.irs.gov/regs.*

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Theresa Melchiorre, (202) 622–7830; concerning submissions of comments or to request a hearing, Treena Garrett, (202) 622–3401 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

As a general rule, section 2031 provides that the value of a decedent's gross estate is to be determined as of the date of the decedent's death. Section 2032 provides that the executor may elect to value the property on an alternate valuation date. Prior to the enactment of the Deficit Reduction Act of 1984, Public Law 98–369 (98 Stat. 494), section 2032(c) and § 20.2032–1(b) of the Estate Tax Regulations required the election to be made on a timely filed estate tax return, including extensions of time to file actually granted. The Deficit Reduction Act amended section 2032, effective for estates of decedents dying after July 18, 1984, by redesignating section 2032(c) as section 2032(d) and amending section 2032(d) to provide that the election may be made on the estate tax return, whether it is filed timely or late, as long as the return is filed no more than 1 year after the due date, including extensions. Temporary Regulation § 301.9100–6T(b), issued on September 5, 1984, reflects this change to the law and provides a transition rule for estates of decedents dying before July 19, 1984. The temporary regulation, however, also provides that once a return that fails to make the election is filed, the election may not be made on a subsequent return unless the subsequent return is filed by the due date (including extensions) of the original return. This limitation is not found in §§ 301.9100–1 and 301.9100–3 of the Procedure and Administration Regulations that apply to all requests for an extension of time to make an election submitted to the IRS on or after December 31, 1997.

The Deficit Reduction Act of 1984 also added new section 2032(c) that provides that, in the case of estates of decedents dying after July 18, 1984, the election to use the alternate valuation method may be made only if the election results in a reduction in both the value of the gross estate and the actual estate tax liability. The Tax Reform Act of 1986, Public Law 99–514 (100 Stat. 2085), amended section 2032(c)(2) to provide that the election may be made only if the election results in a decrease both in the value of the gross estate and in the sum of the estate tax and generation-skipping transfer tax liability (reduced by credits allowable against these taxes).

Explanation of Provisions

These proposed regulations will amend § 20.2032–1(b) to reflect the change made to section 2032 by the Deficit Reduction Act of 1984. In addition, the proposed regulations, when finalized, will remove temporary regulation § 301.9100–6T(b) of the Procedure and Administration Regulations so that estates that fail to

make the alternate valuation election on the last estate tax return filed before the due date or the first return filed after the due date will be able to request an extension of time to make the election under the provisions of §§ 301.9100–1 and 301.9100–3. However, in view of the statutory 1 year limitation imposed under section 2032(d)(2), no request for an extension of time will be granted if the request is submitted to the IRS more than 1 year after the due date of the return (including extensions of time to file actually granted). The proposed regulations also provide guidance on making a protective election under section 2032.

Special Analyses

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

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Theresa Melchiorre, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

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

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 20 and 301 are proposed to be amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

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

Par. 2. Section 20.2032–1(b) is revised to read as follows:

§ 20.2032–1 Alternate valuation.

* * * * *

(b) *Method and effect of election*—(1) *In general.* The election to use the alternate valuation method is made on the return of tax imposed by section 2001. For purposes of this paragraph (b), the term *return of tax imposed by section 2001* means the last estate tax return filed by the executor on or before the due date of the return (including extensions of time to file actually granted) or, if a timely return is not filed, the first estate tax return filed by the executor after the due date, provided the return is filed no later than 1 year after the due date (including extensions of time to file actually granted). Once the election is made, it is irrevocable, provided that an election may be revoked on a subsequent return filed on or before the due date of the return (including extensions of time to file actually granted). The election may be made only if it will decrease both the value of the gross estate and the sum (reduced by allowable credits) of the estate tax and the generation-skipping transfer tax with respect to the property includible in the decedent's gross estate. If the election is made, the alternate valuation method applies to all property included in the gross estate and cannot be applied to only a portion of the property.

(2) *Protective election.* If, based on the return of tax as filed, use of the alternate valuation method would not result in a decrease in both the value of the gross estate and the sum (reduced by allowable credits) of the estate tax and the generation-skipping transfer tax liability of the estate, a protective election may be made to use the alternate valuation method if it is subsequently determined that such a decrease would occur. A protective election made on the return of tax imposed by section 2001 is irrevocable, provided that it may be revoked on a subsequent return filed on or before the due date of the return (including extensions of time to file actually granted). Absent such revocation, if it is later determined that use of the alternate valuation method would result in a decrease in both the value of the gross estate and in the sum (reduced by allowable credits) of the estate tax and generation-skipping transfer tax liability of the estate, the protective election becomes effective and cannot thereafter be revoked.

(3) *Requests for extension of time to make the election.* A request for an extension of time to make the election pursuant to §§ 301.9100–1 and 301.9100–3 of this chapter will not be granted unless the request is submitted to the Internal Revenue Service no later than 1 year after the due date of the return (including extensions of time to file actually granted).

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

Par. 3. The authority citation for part 301 continues to read in part as follows:

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

§ 301.9100–6T [Amended]

Par. 4. Section 301.9100–6T is amended by:

1. Removing the language ''paragraph (b)(2)'' from paragraph (a)(2) introductory text, and adding the language ''paragraph (a)(2)'' in its place.

2. Removing paragraph (b).

3. Redesignating paragraphs (c) through (s) as paragraphs (b) through (r), respectively.

4. Removing the language ''paragraph (c)(2)'' from the last sentence in newly designated paragraph (b)(2) and adding the language ''paragraph (b)(2)'' in its place.

5. Removing the language ''paragraph (l)'' from the second, fourth and last sentences in newly designated paragraph (k) and adding the language ''paragraph (k)'' in its place.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 03–31615 Filed 12–23–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[CGD09–03–284]

RIN 2115–AA01

Special Anchorage Area; Madeline Island, WI

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to enlarge the existing special anchorage area in Madeline, Wisconsin. This action is being taken at the request of the La Pointe Yacht Club, which, due to low water levels, has lost usable anchorage space. This proposed rule would make additional space available within the special anchorage area.

DATES: Comments must be received March 23, 2004.

ADDRESSES: You may mail comments to Commander (map), Ninth Coast Guard District, 1240 E. Ninth Street, Cleveland, Ohio 44199–2060, or deliver them to room 2069 at the same address between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays. The telephone number is (216) 902–6056.

Commander, Ninth Coast Guard District Marine Safety Office maintains the public docket for this rulemaking. Comments, and documents indicated in this preamble, will become part of this docket and will be available for inspection or copying at room 2069, Ninth Coast Guard District, between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Commander Michael Gardiner, Chief, Marine Safety Analysis and Policy Branch, Ninth Coast Guard District Marine Safety Office, at (216) 902–6056.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD09–03–284), indicate the specific section of this document to which each comment applies, and give the reason for each comment.

Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to Chief, Marine Safety Analysis and Policy Branch, Ninth Coast Guard District Marine Safety Office at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background Information

On April 1, 2003, the La Pointe Yacht Club, Inc. requested that the Coast Guard initiate a rulemaking to increase the size of the Madeline Island, Wisconsin special anchorage area as described in 33 CFR 110.77b. The Commander of the Ninth Coast Guard District is publishing this notice of proposed rulemaking to request comments on the proposed enlargement of this special anchorage area.

The request to increase the size of this special anchorage area is based on four factors. First, the number of boats using the anchorage has increased resulting in a crowding of boats, causing some to anchor outside the anchorage area boundaries. Second, several years of low water have caused boats to move outside the current anchorage area boundaries to find safe depths. Third, boats with drafts deeper then 3 feet cannot safely use the current defined area. Finally, the existing seaward boundary intersects the inside of the fairway leading into the Madeline Island Marina basin.

Discussion of Proposed Rule

The proposed rule would change the boundaries to the following: all water within a line connecting the points starting at 46°46′44.8″ N, 090°47′14.0″ W; then south south-westerly to 46°46′35.5″ N, 090°47′17.0″ W; then south south-easterly to 46°46′27″ N, 090°47′12.8″ W; then east south-easterly to 46°46′22.6″ N, 090°46′58.8″ W; then following the shoreline back to the starting point. These coordinates are based upon North American Datum 1983 (NAD 83). This would extend the anchorage area boundary approximately 300 feet further at the outer most point.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule only slightly increases the special anchorage area. Normal vessel traffic would not transit this area due to the shallow depths. In addition, vessel traffic can safely pass around this special anchorage area.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Ninth Coast Guard District Marine Safety Office, at 1240 East Ninth Street, Cleveland, Ohio, 44199.

Collection of Information

This proposed rule would call for no new collection of information under the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(f), of the Instruction, from further environmental documentation.

List of Subjects in 33 CFR Part 110

Anchorage grounds.

For the reason set out in the preamble, the Coast Guard proposes to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471; 1221 through 1236, 2030, 2035, and 2071; 33 CFR 1.05–1(g). Department of Homeland Security Delegation No. 0170.1.

2. Revise § 110.77b to read as follows:

§ 110.77b Madeline Island, Wisconsin

All waters off of La Pointe Harbor, Madeline Island, Wisconsin, encompassed by a line connecting the following points, beginning at 46°46′44.8″ N, 090°47′14.0″ W; then south south-westerly to 46°46′35.5″ N, 090°47′17.0″ W; then south south-easterly to 46°46′27″ N, 090°47′12.8″ W; then east south-easterly to 46°46′22.6″ N, 090°46′58.8″ W; then following the shoreline back to the starting point (NAD 83).

Dated: December 15, 2003.

Ronald F. Silva,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 03–31728 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 30, 31, 33, 35 and 40

[Docket ID No. OA–2002–0001; FRL–7602.2]

RIN 2020–AA39

Public Hearings on Participation by Disadvantaged Business Enterprises in Procurement Under Environmental Protection Agency (EPA) Financial Assistance Agreements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; public hearings.

SUMMARY: This document announces the date and location of a Tribal hearing wherein EPA will take comments on its proposed rule for ''Participation by Disadvantaged Business Enterprises in Procurement under Environmental Protection Agency (EPA) Financial Assistance Agreements,'' published on July 24, 2003, at 68 FR 43824. This Tribal hearing will be held during the 180 day public comment period for the proposed rule, which ends on January 20, 2004. EPA will publish information concerning additional public hearings and Tribal hearings during the comment period when that information becomes available.

DATES: The Tribal hearing addressed by this **Federal Register** Proposal is scheduled as follows: January 8, 2004, 9 a.m. to 4 p.m., Billings, Montana.

ADDRESSES: The hearing will be held at the following location: The Northern Hotel, 19 North Broadway, Billings, Montana 59101.

FOR FURTHER INFORMATION CONTACT: Kimberly Patrick, Attorney Advisor, at (202) 564–5386, or David Sutton, Deputy Director at (202) 564–4444, Office of Small and Disadvantaged Business Utilization, U.S. Environmental Protection Agency, Mail Code 1230A, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: EPA published its proposed rule for Participation by Disadvantaged Business Enterprises in Procurement under Environmental Protection Agency (EPA) Financial Assistance Agreements on July 24, 2003, at 68 FR 43824. EPA has

established an official public docket for this action under Docket ID No. OA–2002–0001. The proposed rule and supporting materials are 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 is (202) 566–1752. An electronic version of public docket is available through EPA's electronic public docket and comment systems, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' and then key in docket identification number OA–2002–0001. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

Dated: December 18, 2003.

Thomas J. Gibson,

Chief of Staff.

[FR Doc. 03–31708 Filed 12–23–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 02–60; FCC 03–288]

Rural Health Care Support Mechanism

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Commission seeks comment on modifications to the definition of ''rural area'' for the rural health care support mechanism, whether additional modifications to our rules are appropriate to facilitate the provision of support to mobile rural health clinics for satellite services, and additional outreach efforts and measures to streamline further the application process.

DATES: Comments are due on or before February 23, 2004. Reply comments are due on or before April 7, 2004. Written comments on the proposed information collection(s) must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before February 23, 2004.

ADDRESSES: All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act (PRA) comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov,* and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503, or via the Internet to *Kim_A._Johnson@omb.eop.gov* or by fax to 202–395–5167. Parties should also send three paper copies of their filings to Sheryl Todd, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 Twelfth Street, SW., Room 5–B540, Washington, DC 20554. *See* Supplemental Information for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Shannon Lipp, Attorney, (202) 418–7400 or Regina Brown, Attorney, (202) 418–7400, Wireline Competition Bureau, Telecommunications Access Policy Division. For additional information concerning the information collection(s) contained in this document, contact Judith B. Herman at 202–418–0214, or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking in WC Docket No. 02–60 released on November 17, 2003. A companion Report and Order and Order on Reconsideration was also released in WC Docket No. 02–60 on November 17, 2003. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC 20554.

This Further Notice of Proposed Rulemaking (FNPRM) contains proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed information collections contained in this proceeding.

Paperwork Reduction Act

The FNPRM contained proposed information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection(s) contained in this FNPRM, as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. Public and agency comments on the proposed information collections discussed in this FNPRM are due on or before February 23, 2004. PRA comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Control Number: 3060–0804.

Title: Universal Service—Health Care Providers Universal Service Program.

Form No.: FCC Forms 465, 466, 466–A, and 467.

Type of Review: Proposed revised collection.

Respondents: Business or other for-profit; not for profit institutions.

Title	Number of respondents	Frequency of response	Total annual burden
1. FCC Form 465—Description of Service Requested and Certification	1,600	1.5	96,000
2. FCC Form 466—Funding Request And Certification	1,600	2	192,000
3. FCC Form 466–A—Internet Toll Charge Discount Request	5	1	200
4. FCC Form 467—Connection Certification	1,600	1	81,000

Title	Number of respondents	Frequency of response	Total annual burden
Total Annual Burden: Total Annual Costs: $0	.....	.....	369,200

Needs and Uses: In the FNPRM, we seek comment on ways to streamline further the application process and expand outreach efforts. In the companion *Report and Order,* we note that USAC has implemented many steps to streamline the application process and has increased its outreach efforts, since the *NPRM,* 67 FR 34653, May 15, 2002, was released in 2002. Among other things, USAC has implemented on-line application filing and has arranged for electronic forms to be filled automatically with the previous year's information for repeat on-line filers. Nevertheless, we seek comment on what additional steps the Universal Service Administrative Commission (USAC) could take to ease further the burdens associated with the application process. For example, what would be the advantages and disadvantages of implementing multi-year applications, so that beneficiaries would not need to apply every funding year? We also seek comment on whether there are additional outreach efforts that USAC could take to inform eligible applicants of the benefits of the program. For instance, should USAC conduct focus groups among rural health care providers to develop ideas on how to identify providers that operate only on a part-time basis? Should USAC contact service providers in rural areas to solicit suggestions for potential eligible users in the area? All rural health care providers applying for discounts on eligible telecommunications and information services must currently file FCC Forms 465, 466, 466–A, and 467. The purpose of these forms is for rural health care providers to certify their eligibility, describe program needs so that service providers are able to bid on the services, indicate that they have selected the most cost-effective methods, apply for discounts, and inform the program's administrator that they have begun to receive or stopped receiving services for which support was allocated.

I. Further Notice of Proposed Rulemaking

A. Definition of ''rural area''

1. In this FNPRM, we seek comment on modifications to the definition of ''rural area'' for the rural health care universal service support mechanism. Currently, an area qualifies as rural if it is located in a non-metropolitan county as defined by the Office of Management and Budget or is specifically identified in the Goldsmith Modification to 1990 Census data published by the Office of Rural Health Care Policy (ORHP). In response to the NPRM, several commenters state that ORHP no longer utilizes the definition adopted by the Commission in 1997 and that there will be no Goldsmith Modification to the most recent 2000 Census data. Several commenters suggest that the Commission adopt the rural designation system currently utilized by ORHP, the Rural Urban Commuting Area (RUCA) system. Others propose to define rural as non-urbanized areas, as specified by the Census Bureau. Finally, some commenters assert that if the Commission adopts a new definition of rural, it should grandfather existing areas that currently qualify as rural, if they would no longer qualify under the new definition.

2. We seek comment on whether we should adopt a new definition of rural area for the rural health care program, and, if so, what that new definition should be. We seek comment on whether there are any definitions for rural areas used by other government agencies or medical organizations that would be appropriate for the rural health care program. In addition to describing any proposed new definitions, we ask commenters to address the specific proposals that have already been raised in the record. Commenters are encouraged to describe the effects of any new definition to the program, *e.g.* how many existing rural areas would become non-rural and vice versa. We also seek comment on whether there are reasons we should or should not use the same definition of ''rural'' for both the rural health care and schools and libraries support mechanisms.

B. Support for Satellite Services for Mobile Rural Health Clinics

3. We also seek comment on whether additional modifications to our rules are appropriate to facilitate the provision of support to mobile rural health clinics for satellite services. Satellite services may be used by mobile rural health clinics that operate in vans or boats to deliver telemedical services via satellite to residents in rural areas. For example, one non-profit entity is launching the first mobile telemammography van to diagnose breast cancer in women in four rural tribal lands in North and South Dakota early next year. This van will conduct mammograms and deliver results to rural American Indian women while they wait. The van's clinician will send the mammogram via satellite, which is contained in sixty-four megabytes of data, to doctors at the University of Colorado, who will diagnose any abnormalities and email the van with the patient's results. The van will serve approximately 12,000 women among the four tribes, at a rate of ten to twelve women a day. The van will be stationed at each reservation for approximately two weeks at a time and will travel approximately 200–300 days a year, depending on travel time and maintenance and repairs to the van. Satellite service for the van will cost approximately $10,000 a month.

4. In the companion *Report and Order,* we conclude that support for satellite services should be capped at the amount a provider would receive if it received functionally-similar terrestrial-based services. We seek comment on whether it is appropriate to apply this rule to mobile rural health care providers, which by their very nature, are unlikely to be able to utilize terrestrially-based services effectively. In particular, due to the mobile nature of a telemedical unit and the large volume of data it will likely send, would a satellite connection be the most cost-effective method of providing service, even if a terrestrial alternative is available? Should a terrestrial alternative be deemed available and ''functionally similar,'' if by its nature it is tied to a fixed location? We seek comment on how mobile health care providers should make a cost-effective determination for satellite services and whether they should consider the installation and disconnection charges that would be incurred if the mobile rural health clinic were to order a wireline connection at each docking location. Commenters should also discuss whether mobile rural health clinics should be required to service a specific number of locations before satellite services are deemed cost-effective.

5. In the event we conclude that the cap on the provision of support for satellite services where terrestrial service is available should not apply in

these circumstances, how should support be provided (*i.e.*, how should discounts be calculated) for satellite services? Commenters are encouraged to discuss whether rural satellite services for mobile rural health clinics should be compared to urban terrestrial services and under what circumstances. We note that two other commenters in this proceeding proposed to provide support for satellite services for mobile health care providers. Commenters should discuss these commenters' proposals. We also ask commenters to estimate the amount of support a mobile rural health clinic would likely receive and the number of mobile units that would likely be eligible. The non-profit entity associated with the telemammography van states that distance-based charges will not apply to satellite services in the continental United States. We seek comment on whether other similarly situated mobile rural health clinics would be subject to distance-based charges using satellite services and, if so, how the revised Maximum Allowable Distance (MAD) would impact support levels.

6. We seek comment on how we should determine whether a mobile health clinic serves rural areas. In particular, should that determination depend on the principal place of business of the provider (such as its mailing address), or should it depend on where the mobile health clinic actually provides service? We also seek comment on whether support for a mobile rural health clinic should be prorated if it also serves non-rural locations.

C. Administrative Matters

7. In addition, we seek comment on ways to streamline further the application process and expand outreach efforts. In the companion *Report and Order,* we note that USAC has implemented many steps to streamline the application process and has increased its outreach efforts, since the *NPRM* was released in 2002. Among other things, USAC has implemented on-line application filing and has arranged for electronic forms to be filled automatically with the previous year's information for repeat on-line filers. Nevertheless, we seek comment on what additional steps USAC could take to ease further the burdens associated with the application process. For example, what would be the advantages and disadvantages of implementing multi-year applications, so that beneficiaries would not need to apply every funding year? We also seek comment on whether there are additional outreach efforts that USAC could take to inform eligible applicants of the benefits of the program. For instance, should USAC conduct focus groups among rural health care providers to develop ideas on how to identify providers that operate only on a part-time basis? Should USAC contact service providers in rural areas to solicit suggestions for potential eligible users in the area?

II. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

8. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *FNPRM.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadline for comments on the FNPRM. The Commission will send a copy of this FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the FNPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

1. Need for, and Objectives of, the Proposed Rules

9. The Commission is required by section 254 of the Act to promulgate rules to implement the universal service provisions of section 254. On May 8, 1997, the Commission adopted rules that reformed its system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition. Among other things, the Commission adopted a mechanism to provide discounted telecommunications services to public or non-profit health care providers that serve persons in rural areas. Over the last few years, important changes in the rural health community prompt us to review the rural health care universal service support mechanism.

10. In this FNPRM, we seek comment on whether and how to modify the definition of rural area as utilized in the rural health care support mechanism. We also seek comment on whether additional modifications to our rules are appropriate to facilitate the provision of support to mobile rural health clinics for satellite services. Lastly, we seek comments on ways to streamline further the application process and expand outreach efforts.

2. Legal Basis

11. This FNPRM is adopted pursuant to sections 1, 4(i), (4j), 201–205, 251, 252, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), (j), 201–205, 251, 252, and 303.

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

12. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities. Under the Small Business Act, a ''small business concern'' is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).

13. We have described in detail, *supra*, in the FRFA, the categories of entities that may be directly affected by any rules or proposals adopted in our efforts to reform the universal service rural health care support mechanism. For this IRFA, we hereby incorporate those entity descriptions by reference.

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

14. The FNPRM seeks comment on potential changes to the definition of ''rural area'' for the rural health care support mechanism. This potential change will not impact reporting or recordkeeping requirements, however, it could impact the overall pool of eligible applicants. The FNPRM also seeks comment on whether additional support should be provided to mobile rural health clinics that utilize satellite services. If changes are adopted, mobile rural health clinics, including small rural health clinics, could potentially be required to submit additional information regarding their mobile services, if they choose to seek discounts. Lastly, the FNPRM seeks comment on ways to streamline further the application process. If the application process is streamlined further, this would eliminate some of the paperwork associated with the application process.

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

15. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach impacting small business, which may include the following four alternatives (among others): (1) The establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.

16. In this *FNPRM,* we seek comment on a new definition of rural area. If a new definition is adopted, this could change the size of the overall pool of eligible applicants for universal service support for rural health care providers. We also seek comment on whether to provide additional support to mobile rural health clinics that utilize satellite services. In seeking to minimize the burdens imposed on small entities where doing so does not compromise the goals of the universal service mechanism, we invite comment on definitions and proposals for additional support for mobile rural health clinics that might be made less burdensome for small entities. In addition, we seek comment on ways to streamline further the application process and expand outreach efforts. If the application process is streamlined further, this could ease the burden on small entities associated with the application process. Additionally, outreach efforts would better inform such businesses about the benefits of the rural health care program and potentially increase small business participation in the program.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

17. None.

B. Initial Paperwork Reduction Act of 1995 Analysis

18. This *FNPRM* contained proposed information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this FNPRM, as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. Public and agency comments are due February 23, 2004. It will be submitted to the Office of Management and Budget (OMB) for review under the PRA. PRA comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Comment Filing Procedures

19. We invite comment on the issues and questions set forth in the *FNPRM* and Initial Regulatory Flexibility Analysis contained herein. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before February 23, 2004, and reply comments on or before April 7, 2004. All filings should refer to WC Docket No. 02–60. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.

20. 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.

21. 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, 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, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission.

22. 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.

III. Ordering Clauses

23. Pursuant to the authority contained in sections 1, 4(i), 4(j), 201–205, 214, 254, and 403 of the Communications Act of 1934, as amended, this *Further Notice of Proposed Rulemaking* is adopted.

24. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Further Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 54

Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–31684 Filed 12–23–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3869; MB Docket No. 03–244, RM–10825]

Radio Broadcasting Services; New Market, AR and Tullahoma, TN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, 47 CFR 73.202(b). The Commission requests comment on a petition filed by Tennesse Valley Radio, Inc., licensee of Station WUSX(FM), Channel 227C1, Tullahoma, Tennessee. Petitioner proposes to delete Channel 227C1 at Tullahoma, to allot Channel 227C2 at New Market, Alabama, and to modify the license of Station WUSX(FM) accordingly. Channel 227C2 can be allotted to New Market in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.2 km (3.2 miles) northeast of New Market. The coordinates for Channel 227C2 at New Market are 34–51–48 North Latitude and 86–25–40 West Longitude. *See* Supplementary Information *infra*.

DATES: Comments must be filed on or before January 30, 2004, and reply comments on or before February 17, 2004.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the counsel for the petitioner as follows: Mark N. Lipp, J. Thomas Nolan, Vinson & Elkins, L.L.P., 1455 Pennsylvania Avenue, NW., Suite 600, Washington, DC 20004–1008.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Media Bureau (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 03–244, adopted December 3, 2003 and released December 8, 2003. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893.

The 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

Radio, Radio 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.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by adding New Market, Channel 227C2.

3. Section 73.202(b), the Table of FM Allotments under Tennessee, is amended by removing Tullahoma, Channel 227C.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 03–31635 Filed 12–23–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3873;MB Docket No. 03–6; RM–10595]

Radio Broadcasting Services; Garysburg and Roanoke Rapids, NC

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: This document dismisses a Petition for Rulemaking filed by MainQuad Communications, Inc. proposing to reallot Channel 272A from Roanoke Rapids, North Carolina, to Garysburg, North Carolina, as the community's second local aural transmission service, and modify the license for Station WPTM(FM) to reflect the change of community. *See Notice of Proposed Rule Making,* 68 FR 5861 (February 5, 2003). Petition is dismissed because MainQuad Communications, Inc. failed to file comments expressing interest in pursuing the change of community.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 03–6, adopted December 3, 2003 and released December 8, 2003. The full text of this document is available for public inspection and copying during regular business hours at 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*.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 03–31766 Filed 12–23–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[I.D. 121603A]

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits (EFPs)

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

ACTION: Notification of a proposal for EFPs to conduct experimental fishing; request for comments.

SUMMARY: NMFS announces that the Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NOAA Fisheries (Assistant Regional Administrator), has determined that an application for EFPs contains all of the required information and warrants further consideration. The Assistant

Regional Administrator is considering the impacts of the activities to be authorized under the EFPs with respect to the Northeast (NE) Multispecies Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue EFPs. Therefore, NMFS announces that the Assistant Regional Administrator proposes to issue EFPs in response to an application submitted by the Cape Cod Commercial Hook Fisherman's Association (CCCHFA), in collaboration with Massachusetts Division of Marine Fisheries (DMF), and Research, Environmental and Management Support (REMSA). These EFPs would allow up to 17 vessels to fish for haddock using longline gear or jig gear in NE multispecies year-round Georges Bank (GB) Closed Area I (CA I) during the months of January, February, and May through September 2004. The purpose of this study is to evaluate the best spatial and temporal location for a directed haddock hook-gear fishery in GB CA I, while having minimal impact to GB cod. This information could then be used by the New England Fishery Management Council and NMFS to determine the feasibility of establishing a Special Access Program for traditional haddock hook-and-line fishery in CA I.

DATES: Comments on this action must be received at the appropriate address or fax number (see **ADDRESSES**) on or before January 8, 2004.

ADDRESSES: Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, NE Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on Haddock EFP Proposal.'' Comments may also be sent via fax to (978) 281–9135. Comments will not be accepted if submitted via e-mail or the Internet.

Copies of the Environmental Assessment (EA) are available from the NE Regional Office at the same address.

FOR FURTHER INFORMATION CONTACT: Heather Sagar, Fishery Management Specialist, phone: 978–281–9341, fax: 978–281–9135, e-mail: *heather.sagar@noaa.gov*

SUPPLEMENTARY INFORMATION:

Background

Three year-round closed areas were established in 1994 under Amendment 5 to the FMP to provide protection to concentrations of regulated NE multispecies, particularly cod, haddock, and yellowtail flounder. These closure areas, CA I, CA II, and the Nantucket Lightship Closure Area, have proven to be effective in improving the stock status of several species, including GB haddock.

In their EFP application, the applicants state that cod are less available than haddock in certain portions of CA I, and propose to support this observation with scientific data, potentially enabling the GB haddock resource to be utilized without impacting the management program that protects GB cod. This request builds upon data collected by the same applicant under an approved EFP that began October 1, 2003, which will continue through December 31, 2003. Preliminary results from the initial study demonstrate the viability of utilizing hook-and-line gear to reduce bycatch of cod in a portion of CA I.

Proposed EFP

The proposed study would occur in a specified area within the northern portion of CA I (north of loran-C line 13660). The experiment would occur during the months of January, February, and May through September 2004, during which 20 1-day trips would occur monthly, for a total of 140 1-day trips for the study. Fishing would be prohibited during the months of March and April to protect spawning haddock in this area. Vessels would not be exempt from days-at-sea. Participating vessels would be prohibited from fishing in areas outside of CA I during an experimental fishing trip. This study would follow normal fishing practices. A total allowable catch (TAC) of 16 mt for GB cod and 285 mt for GB haddock (divided into seasonal TACs specified below) would be established for the experimental fishery. The experimental fishery would be closed down if either the total TAC or the seasonal TAC is exceeded. This study would be divided into three seasonal periods, with individual hard TACs established for each season as follows:

MONTH	DAYS	HADDOCK	COD
Seasonal Period I			
January	20	81 mt (179,468 lb)	4.6 mt (10,076 lb)
February	20		
March	0	0	0
April	0	0	0
Seasonal Period II			
May	20	102 mt (224,355 lb)	5.7 mt (12,595 lb)
June	20		
July	10		
Seasonal Period III			
July	10	102 mt (224,335 lb)	5.7 mt (12,595 lb)
August	20		
September	20		

All fish landed would be subject to the minimum fish size. Although the applicant would be exempt from the haddock trip limits, they would not be exempt from the cod trip limit requirements.

REMSA scientific staff would be present on board each participating vessel, equating to 100-percent scientific data collector coverage for this experimental fishery. The EFPs would contain a provision that the Regional Administrator has the authority to discontinue the proposed experimental fishery on at any time, e.g., the Regional Administrator would terminate the EFP should the individual season TACs, or the overall TACs of 16 mt for GB cod

and 285 mt for GB haddock, be exceeded.

A draft EA has been prepared that analyzes the impacts of the proposed experimental fishery on the human environment. This draft EA concludes that the activities proposed to be conducted under the requested EFPs are consistent with the goals and objectives of the FMP, would not be detrimental to the well-being of any stocks of fish harvested, and would have no significant environmental impacts. The draft EA also concludes that the proposed experimental fishery would not be detrimental to Essential Fish Habitat, marine mammals, or protected species.

EFPs would be issued to up to 17 vessels exempting them from the CA I, the haddock trip limit, and the 3,600-hook-limit restrictions of the FMP.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 17, 2003.

Bruce C. Morehead,

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

[FR Doc. 03–31612 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 68, No. 247

Wednesday, December 24, 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

Animal and Plant Health Inspection Service

[Docket No. 03–114–1]

Notice of Request for Extension of Approval of an Information Collection

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection in support of the export of animals and animal products from the United States.

DATES: We will consider all comments that we receive on or before February 23, 2004.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 03–114–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–114–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 03–114–1'' on the subject line.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS dockets, are available on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: For information on the regulations regarding the export of animals and animal products from the United States, contact Dr. Roger Perkins, Senior Staff Veterinarian, Technical Trade Services, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737; (301) 734–8364. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

SUPPLEMENTARY INFORMATION:

Title: U.S. Origin Health Certificate.

OMB Number: 0579–0020.

Type of Request: Extension of approval of an information collection.

Abstract: The export of agricultural commodities, including animals and animal products, is a major business in the United States and contributes to a favorable balance of trade. As part of its mission, the U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS), Veterinary Services (VS) maintains information regarding the import health requirements of other countries for animals and animal products exported from the United States.

Most countries require a certification that our animals are free from specific diseases and show no clinical evidence of disease. This certification must carry the USDA seal and be endorsed by an APHIS, APHIS accredited, or State veterinarian. VS Form 17–140, U.S. Origin Health Certificate, is used to meet this requirement.

We are asking the Office of Management and Budget (OMB) to approve our use of this form for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.5004548 hours per response.

Respondents: APHIS accredited and State veterinarians; animal owners; and exporters. Estimated annual number of respondents : 3,000.

Estimated annual number of responses per respondent: 15.0223.

Estimated annual number of responses: 45,067.

Estimated total annual burden on respondents: 22,554 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 18th day of December, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 03–31657 Filed 12–23–03; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Food Stamp Program—Food Stamp Application for Meal Services (Form FNS–252–2) and New Addendum for Corporations (Form FNS–252–C)

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: USDA's Food and Nutrition Service (FNS) has revised its Food Stamp Program Application for Meal Services, Form FNS–252–2. The form was revised to make it easier to read and to simplify information collected from meal services during the application process. In addition, FNS has developed a new, abbreviated addendum to the revised retailer application for corporations (chain stores). We are soliciting public comments on the content, format and design of the revised Form FNS–252–2 and the new Form FNS–252–C. We will begin using both forms when the new Store Tracking and Redemption Subsystem (STARS II) is in operation, approximately the fourth quarter of 2004.

DATES: Written comments must be submitted on or before February 23, 2004.

ADDRESSES: 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 has 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; (d) ways to minimize the burden of the collection of information of those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments are invited on the content, format and design of the revised Form FNS–252–2, Food Stamp Program Application for Meal Services, and the addendum for corporations, Form FNS–252–C. Comments should be sent to Karen Walker, Chief, Retailer Management Branch, Benefit Redemption Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 404, Alexandria, VA 22302; FAX number (703) 305–1863; E-mail: *BRDHQ-WEB@fns.usda.gov.* All submitted comments should refer to the title of this notice and/or the OMB approval number.

FOR FURTHER INFORMATION CONTACT: The public can download copies of the revised Form FNS–252–2 or Form FNS–252–C from the FNS public Web site at *http://www.fns.usda.gov/fsp/retailers.* Readers may also request copies of these forms, or make requests for additional information, by contacting Karen Walker at (703) 305–2418 or via e-mail at *BRDHQ-WEB@fns.usda.gov.* Requests submitted over e-mail should refer to the title of this notice and/or the OMB approval number in the subject line.

SUPPLEMENTARY INFORMATION:

Title: Food Stamp Program: Food Stamp Program Application for Meal Services, Form FNS–252–2, and the new addendum to the revised retailer application for corporations, Form FNS–252–C.

OMB Number: 0584–0008.

Expiration Date: May 31, 2004.

Type of Request: Revision of a currently approved collection.

Abstract: Section 9 of the Food Stamp Act of 1977, as amended (7 U.S.C. 2018) requires retail food stores to submit applications to FNS for approval prior to participating in the Food Stamp Program. This includes meal services and corporations. FNS field offices review applications to ensure that the firm is eligible and then authorize or deny a firm to accept and redeem Food Stamp Program benefits.

Revised Meal Service Application (Form FNS–252–2)

We know many applicant meal services have submitted incomplete or erroneous applications to field offices. This may be attributed to the ambiguity of the current meal service application and the technical language used. It is our belief that a simpler Form FNS–252–2 will result in fewer mistakes upfront and will reduce the time it takes for a field office to process it. Meal services will also benefit from a simplified application because they will better understand what information is being asked of them initially, and it is more likely a meal service will submit a complete application the first time.

To begin the revision process for the meal service application, a workgroup of FNS regional and field office staff were charged with identifying areas where the current Form FNS–252–2 could be improved to reduce and streamline information collected on the application. While the revised Form FNS–252–2 has more pages than the current meal service application, it is a significant improvement over the current application in many ways. First, the language on the revised meal service application is clearer. We have provided applicants with a detailed explanation of the eligibility requirements for different types of meal services, specified which documentation is required for each type and asked better targeted questions. Secondly, we have increased the font size to aid in the readability of the form. Third, the form supports the President's E–GOV efforts and conforms to the requirements of the Government Paperwork Elimination Act (GPEA) (Pub. L. 105–277, 44 U.S.C. 3504) by making the form compatible with current technology; it can easily be converted into an online application. A few questions have also been added to enable us to better determine the business integrity of the applicant.

Addendum to Revised Retailer Application for Chain Stores (Form FNS–252–C)

Form FNS–252–C is a shortened version of the revised retailer application, Form FNS–252, which was described in the 60-day notice published in the **Federal Register** on January 2, 2003 at 68 FR 79. All chain stores that participate in the Food Stamp Program will benefit from using Form FNS–252–C because it eliminates the need for each store to complete its own application. Instead, the corporation only completes one retailer application (Form FNS–252) for all of its chain stores and an abbreviated Form FNS–252–C for each store. The retailer application, Form FNS–252, will collect information that is universal to all of the chain's stores while the addendum, Form FNS–252–C, will collect information that is unique to each store such as the location and telephone number. This is a tremendous timesaving, especially to large corporations as it takes an average of 27 minutes to complete one Form FNS–252 as compared to 5 minutes to complete one Form FNS–252–C.

STARS I is in the process of being upgraded to STARS II to meet the growing needs of the field offices. The FNS contractor who is developing STARS II has developed a screen in STARS II for the new Form FNS–252–C that corporations can access online and enter information on each store under the corporation. With the online version, the information provided on Form FNS–252–C can be uploaded directly into STARS II. As such, corporations can easily enter

information for new stores or make updates on current stores on an as needed basis. In addition, we have developed a hard copy version of Form FNS–252–C for corporations that choose to submit a paper version to FNS. If a corporation submits a hard copy of Form FNS–252–C to the field office, field office staff will enter the data manually into STARS II.

Burden Estimates: As noted above, we will evaluate the revised Form FNS–252–2 and Form FNS–252–C on the appropriateness and clarity of the form's content, format and design. Before making final changes to these forms, we will consider feedback from the public. If the results of the evaluation are positive, we will finalize the revised Form FNS–252–2 and the addendum to the revised retailer application, Form FNS–252–C. We will begin using both forms when the new STARS II system is operational, approximately the fourth quarter of 2004. We will continue to use the current Form FNS–252–2 until we are ready to use the revised meal service application.

Reauthorization figures have not been calculated into the burden estimates for meal services and corporations because it is extremely rare that a meal service or corporation is asked to complete a new application at the time of reauthorization. Like traditional retail food stores, meal services and corporations are reauthorized at least once every five years. During the reauthorization process of these firms, however, information on the application is confirmed over the telephone or through some other means. Updates are then made by field office staff in the STARS database. Both meal services and corporations are routinely exempt from a visit prior to authorization and during reauthorization.

The burden associated with the revised Form FNS–252–2 has been determined from information available in the current STARS database on initial authorizations for meal services. We have used end-of-year Fiscal Year (FY) 2002 data as the base number for current estimates. Because of current economic conditions, we believe this number will increase or remain constant for the present year. We will use 219 as the base number for all newly authorized meal services. We have further increased this number by 3% (7) to account for meal service applications that are processed by field offices but are not authorized. As such, we expect to receive and process 226 initial meal service applications in the upcoming year.

The hourly burden rate per response for the current Form FNS–252–2, as approved by OMB, is 12 minutes. We estimate the burden rate per response for the revised meal service application to be an average of 11 minutes (.18 hour)—a reduction of one minute per response from the current meal service application. Hourly burden time per response varies and includes the time to review instructions, search existing data resources, gather and copy records, complete and review the application and submit the form and documentation to FNS. We estimate the burden rate per response for the addendum to the revised retailer application, Form FNS–252–C, to be an average of 5 minutes (.08 hour). According to end-of-year FY 2002 data, chain stores accounted for 12.8 percent of all authorized stores (146,423), but only 4 percent were new authorizations (750).

The estimated burden computation is provided below:

New Authorizations 226; Reauthorizations NA; Total Responses = 226. We estimate the annual burden hours to be 41 hours for the revised Form FNS–252–2. The computation is provided below:

FNS–252–2:

Affected Public: Meal service providers.

Estimated Number of Respondents: 226.

Estimated Annual Number of Responses Per Respondent: 1.

Estimated Total Annual Responses: 226.

Estimated Time Per Response: .18 hours.

Estimate of Burden: (226 × .18) = 41 hours.

We estimate the annual burden hours to be 60 hours for the addendum to the revised retailer application, Form FNS–252–C. The computation is provided below:

Addendum to Revised Retailer Application, Form FNS–252–C:

Affected Public: Retail food stores under a corporation.

Estimated Number of Respondents: 750.

Estimated Annual Number of Responses Per Respondent: 1.

Estimated Total Annual Responses: 750.

Estimated Time Per Response: .08 hours.

Estimate of Burden: (750 × .08) = 60 hours.

Estimated Total Annual Burden: (60 + 41) = 101 hours.

Dated: December 2, 2003.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 03–31685 Filed 12–23–03; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Bridger-Teton National Forest, Big Piney Ranger District, Wyoming. Cottonwood II Vegetation Treatment

AGENCY: Forest Service, USDA.

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

SUMMARY: The analysis area of 41,420 acres is located in the North and South Cottonwood Creek watershed on the Big Piney Ranger District of the Bridger-Teton National Forest. It is approximately 25 miles north of Big Piney, Wyoming on the east slope of the Wyoming Range. All lands within the analysis area are National Forest System lands, within Sublette and Lincoln Counties, Wyoming The legal description includes portions of: T32N, R115W; T32N, R116W; T33N, R114W; T33N, R115W; T34N, R115W.

DATES: Comments concerning the scope of the analysis must be received by February 3, 2004. The Draft Environmental Impact Statement (Draft EIS) is expected to be available to the public in September 2004 and the Final Environmental Impact Statement (Final EIS) is expected to be available to the public in January 2005.

ADDRESSES: Send written comments to: District Ranger, Big Piney Ranger District, P.O. Box 218, Big Piney, Wyoming, 83113. For further information, e-mail correspondence to *mailroom_r4_bridger_teton@fs.fed.us* and on the subject line put only ''Cottonwood Vegetation Treatment.''

FOR FURTHER INFORMATION CONTACT: District Ranger, Big Piney Ranger District, P.O. Box 218, Big Piney, Wyoming 83113 or phone (307) 276–3375.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of this proposal is to improve Forest resource conditions in the North and South Cottonwood Creek drainage, bringing them closer to desired conditions. Attaining the Desiring Future Conditions for each Forest resource will help restore healthy ecosystem functioning and support sustainable resource use.

Alternative 1—Proposed Action

This proposal was developed in response to public issues identified during initial scoping, changes in resource demand since the Cottonwood Plain Implementation Study, and recently identified resource issues. This proposal is also designed to improve

Forest resource conditions as identified in the Cottonwood Plan Implementation Study.

Possible Alternatives

Alternative 2—No Action Alternative

Analysis of this alternative is required under National Environmental Policy Act (NEPA) regulations. The No Action Alternative also serves as a baseline of information for comparison of other alternatives. Though this alternative does not respond to the purpose and need for action, it does address some issues.

Responsible Official

Greg Clark, District Forest Ranger, Big Piney Ranger District, P.O. Box 218, Big Piney, Wyoming 83113.

Nature of Decision To Be Made

This decision will be whether or not the implement specific vegetation management projects and associated road and trail head improvements, as allowed in the Bridger-Teton National Forest Plan and Cottonwood Plan Implementation Study. The decision will include any mitigation measures needed in addition to those prescribed in the Forest Plan.

Scoping Process

The Forest Service is seeking information, comments, and assistance from individuals, organizations, Tribal governments, and Federal, state, and local agencies interested in or affected by this project. Comments that were submitted during the May 14, 1999 scoping effort and during field trips of the project area will be used to prepare the Draft EIS, as will comments submitted through this public scoping request. Public participation will be solicited by notifying in person and/or by mail, known interested and affected publics. News releases will be used to give the public general notice. Public participation activities will include requests for written comments. The first formal opportunity to comment is to respond to this Notice of Intent, which initiates the scoping process (40 CFR 1501.7). Scoping includes: (1) Identifying potential issues, (2) narrowing the potential issues and identifying significant issues from those issues that have been covered by prior environmental review, (3) exploring alternatives in addition to the No Action Alternative, and (4) identifying potential environmental effects of the Proposed Action and alternatives.

Preliminary Issues

The Forest Service has identified the following potential issues. In addition, through the May 1999 scoping effort, issues have been refined. Your input is especially valuable here. It will help us determine which of these issues merit detailed analysis. It will also help identify additional issues related to the Proposed Action that may not be listed here.

Issue 1—Amount and/or types of vegetation treatments under the Proposed Action and the effects on old growth and mature vegetation for lynx, security cover for elk and other habitat, as well as Colorado cutthroat trout habitat.

Issue 2—Forest health, specifically the high proportion of older age-class conifer stands and declining tree growht, drawf mistletoe infection levels in lodgepole pine, and high fuel loadings from dead and down material.

Issue 3—Amount of aspen treatments.

Comment Requested

This Notice of Intent initiates the scoping process, which guides the development of the Draft EIS.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

The Draft EIS is scheduled to be filed with the Environmental Protection Agency (EPA) in late August 2004 and to be available for public comment in September 2004. At that time, the EPA will publish a Notice of Availability for the Draft EIS in the **Federal Register**. The comment period on the Draft EIS will be 45 days from the date the EPA publishes the Notice of Availability in the **Federal Register**. The Forest Service believes, at this early stage, it is importance to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of Draft EISs must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions (Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978)). Also, environmental objections that could be raised at the Draft EIS stage, but that are not raised until after completion of the Final EIS, may be waived or dismissed by the courts [*City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 19800]. Because of these court rulings, it is very important that those interested in this Proposed Action participate by the close of the 45-day comment period on the Draft EIS. This ensures that substantive comments and objections are made available to the Forest Service at a time when the Forest Service can meaningfully consider them and respond to them in the Final EIS. To assist the Forest Service in identifying and considering issues and concerns on the Proposed Action, comments on the Draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the Draft EIS. Comments may also address the adequacy of the Draft EIS or the merits of the alternatives formulated and discussed in the Draft EIS. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points. Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

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

Dated: December 17, 2003.

Gregory W. Clark,

District Forest Ranger.

[FR Doc. 03–31660 Filed 12–23–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Eastern Washington Cascades Provincial Advisory Committee and the Yakima Provincial Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Eastern Washington Cascades Provincial Advisory Committee and the Yakima Provincial Advisory Committee will meet on Wednesday, January 14, 2004, at the Okanogan and Wenatchee National Forests Headquarters Office, 215 Melody Lane, Wenatchee, Washington. The meeting will begin at 9 a.m. and continue until 3 p.m. During this meeting we will discuss public comments on the Forest Plan revision, recreation management issues, and new developments in implementation of the Northwest Forest Plan. All Eastern Washington Cascades and Yakima Province Advisory Committee meetings are open to the public. Interested citizens are welcome to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Paul Hart, Designated Federal Official, USDA, Wenatchee National

Forest, 215 Melody Lane, Wenatchee, Washington 98801, 509–662–4335.

Dated: December 17, 2003.

Paul Hart,

Designated Federal Official, Okanogan and Wenatchee National Forests.

[FR Doc. 03–31661 Filed 12–23–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Resource Advisory Committee Meeting

AGENCY: Lassen Resource Advisory Committee, Susanville, California, USDA Forest Service.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committees Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Lassen National Forest's Lassen County Resource Advisory Committee will meet Thursday, January 8, 2004, in Susanville, California for business meetings. The meetings are open to the public.

SUPPLEMENTARY INFORMATION: The meeting begins at 9 a.m. at the Forest Supervisor's Office, 2550 Riverside Drive, Susanville, CA 96130. The meeting objectives are for RAC members and the public to hear project presentations from proponents. Agenda topics will include: Presentations of four proposed projects, continuation of selection of projects, develop February meeting agenda and meeting calendar for 2004. Time will be set aside for public comments at the end of the meeting.

FOR FURTHER INFORMATION CONTACT: Robert Andrews, Eagle Lake District Ranger and Designated Federal Officer, at (530) 257–4188; or RAC Coordinator, Heidi Perry, at (530) 252–6604.

Edward C. Cole,

Forest Supervisor.

[FR Doc. 03–31636 Filed 12–23–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Mineral County Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Lolo National Forest's Mineral County Resource Advisory Committee will meet on January 6, 2004 at 6 p.m. until 7 p.m. in Superior, Montana for a business meeting. The meeting is open to the public.

DATES: January 6, 2004.

ADDRESSES: The meeting will be held at the Mineral County Courthouse, 300 River Street, Superior, MT 59872.

FOR FURTHER INFORMATION CONTACT: Robert Harper, Designated Forest Official (DFO), District Ranger, Lolo National Forest, at (406) 822–4233.

SUPPLEMENTARY INFORMATION: Agenda topics for this meeting include nominations and election of a new Committee Chairperson, review of Project Funding Criteria agreed to last year, and discussion or review about new project proposals, as authorized under title II of Public Law 106–393. If the meeting location is changed, notice will be posted in local newspapers, including the Mineral Independent and the Missoulian.

Dated: December 12, 2003.

Deborah L.R. Austin,

Designated Federal Official.

[FR Doc. 03–31637 Filed 12–23–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Oregon Province Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Southwest Oregon Province Advisory Committee will meet on January 21, 2004 in Brookings, Oregon in the Best Western Beachfront Inn at 16008 Boat Basin Road. The meeting will begin at 9 a.m. and continue until 4 p.m. Agenda items to be covered include: (1) Development of Work Plan; (2) Public Forum; (3) Update on BLM Resource Management Plan revision process; (4) District and Forest Fire Plans; and (5) Future Agenda Items.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Jim Hays, Province Advisory Committee Coordinator, USDA Forest Service, Prospect Ranger District, 47201 Highway 62, Prospect, Oregon 97536, phone (541) 560–3432.

Dated: December 17, 2003.

Scott D. Conroy,

Designated Federal Official.

[FR Doc. 03–31658 Filed 12–23–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 46–2003]

Pepsi-Cola Manufacturing International, Ltd.—Subzone 61J; Application for Expansion of Scope of Manufacturing Authority; Extension of Comment Period

The comment period for the application submitted by the Puerto Rico Exports Development Corporation (68 FR 54888, 9–19–2003), grantee of FTZ 61, on behalf of Pepsi-Cola Manufacturing International, Ltd. (PCMIL), operator of FTZ 61J, requesting an expansion of the scope of manufacturing authority to include additional finished products and manufacturing capacity under FTZ procedures at the PCMIL soft drink and juice beverage concentrate manufacturing plant in Cidra, Puerto Rico, has been extended to from the closing date of December 19, 2003, to January 23, 2004, to allow interested parties additional time in which to comment on the proposal.

Comments in writing are invited during this period. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the following addresses:

1. Submissions via Express/Package Delivery Services: Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Franklin Court Building—Suite 4100W, 1099 14th Street, NW., Washington, DC 20005; or,

2. Submissions via the U.S. Postal Service: Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, FCB–4100W, 1401 Constitution Avenue, NW., Washington, DC 20230.

Material submitted will be available for inspection at address No. 1 noted above.

Dated: December 16, 2003.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 03–31765 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Open Meeting

The Sensors and Instrumentation Technical Advisory Committee will meet on January 27, 2004, 9:30 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

1. Introductions and opening remarks by the Chairman.
2. Report on compliance training initiative and Export Management System proposal.
3. Report on close of 2003 Wassenaar Arrangement deliberations.
4. Review of regulation update process.
5. Remarks on Bureau of Industry and Security initiatives.
6. Presentation of papers and comments by the public.

The meeting will be open to the public and a limited number of seats will be available. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Ms. Lee Ann Carpenter, BIS/EA, MS: 1099D, U.S. Department of Commerce, 14th St. & Constitution Ave., NW., Washington, DC 20230.

For more information contact Lee Ann Carpenter on (202) 482–2583.

Dated: December 19, 2003.

Lee Ann Carpenter,

Committee Liaison Officer.

[FR Doc. 03–31717 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

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

ACTION: Notice of initiation of antidumping and countervailing duty administrative reviews.

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

EFFECTIVE DATE: December 24, 2003.

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

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b)(2002), for administrative reviews of various antidumping and countervailing duty orders and findings with November anniversary dates.

Initiation of Reviews

In accordance with section 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than November 30, 2004.

	Period to be reviewed
Antidumping Duty Proceedings	
Mexico: Circular Welded Non-alloy Steel Pipe, A–201–805	11/1/02–10/31/03
Hylsa, S.A. de C.V.	
Niples Del Norte, S.A. de C.V.	
Netherlands: Certain Hot-Rolled Carbon Steel Flat Products, A–421–807	11/1/02–10/31/03
Corus Staal BV	
Republic of Korea: Circular Welded Non-Alloy Steel Pipe, A–580–809	11/1/02–10/31/03
Hyundai Hysco (formerly Hyundai Steel Pipe Company)	
Husteel Co., Ltd. (formerly Shinho Steel Co., Ltd.)	
SeaH Steel Corporation, Ltd.	
Romania: Certain Hot-Rolled Carbon Steel Flat Products, A–485–806	11/1/02–10/31/03
Ispat Sidex	
Thailand: Certain Hot-Rolled Carbon Steel Flat Products, A–549–817	11/1/02–10/31/03
Nakornthai Strip Mill Public Co., Ltd.	
Sahaviriya Steel Industries Public Co., Ltd.	
Siam Strip Mill Public Co., Ltd.	
The People's Republic of China: Fresh Garlic*, A–570–831	11/1/02–10/31/03

	Period to be reviewed
Clipper Manufacturing Ltd. Jinxiang Dong Yun Freezing Storage Co., Ltd. Fook Huat Tong Kee Pte., Ltd. (FHTK) H&T Trading Company Huaiyang Hongda Dehydrated Vegetable Company Jinxiang Hongyu Freezing and Storing Co., Ltd. Jinan Yipin Corporation, Ltd. Linshu Dading Private Agricultural Products Co., Ltd. Linyi Sanshan Import & Export Trading Co., Ltd. Shandong Heze International Trade and Developing Co. Shanghai Ever Rich Trade Company Sunny Import & Export Limited Taian Ziyang Food Co., Ltd. Tancheng County Dexing Foods Co., Ltd. Jining Trans-High Trading Co., Ltd. Xiangcheng Yisheng Foodstuffs Co. Zhengzhou Harmoni Spice Co., Ltd. * If one of the above-named companies does not qualify for a separate rate, all other exporters of fresh garlic from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.	
Countervailing Duty Proceedings	
None.	
Suspension Agreements	
None.	

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

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

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

Dated: December 18, 2003.

Holly A. Kuga,

Acting Deputy Assistant Secretary, Group II for Import Administration.

[FR Doc. 03–31776 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-588–046]

Notice of Rescission of Antidumping Duty Changed Circumstances Review: Polychloroprene Rubber from Japan

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

ACTION: Notice of Rescission of Antidumping Duty Changed Circumstances Review.

SUMMARY: On July 31, 2003, the Department of Commerce (the Department) published a notice of initiation of changed circumstances review of the antidumping duty finding on polychloroprene rubber (PR) from Japan to determine whether Showa Denko Elastomers, K.K. (SDEL) and Showa Denko K.K. (SDK) are the successor-in-interest companies to Showa DDE Manufacturing K.K. (SDEM) and DDE Japan Kabushiki Kaisha (DDE Japan). *See Notice of Initiation of Antidumping Duty Changed Circumstances Review: Polychloroprene Rubber from Japan*, 68 FR 44924 (July 31, 2003) (*Notice of Initiation*). On October 24, 2003, we published a notice of preliminary results, determining that the restructured manufacturing and marketing joint venture, SDEL and SDK, are the successor-in-interest companies to SDEM and DDE Japan, for purposes of determining antidumping liability in this proceeding. *See Notice of Preliminary Results of Antidumping Duty Changed Circumstances Review: Polychloroprene Rubber from Japan*, 68 FR 60913 (October 24, 2003) (*Notice of Preliminary Results*). Interested parties were invited to comment on these preliminary results. On December 5, 2003, SDEL and SDK withdrew their request for a changed circumstances review. The Department is now rescinding this changed circumstances antidumping duty administrative review.

EFFECTIVE DATE: December 24, 2003.

FOR FURTHER INFORMATION CONTACT: Zev Primor or Mark Manning, AD/CVD Enforcement, Group II, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4114 or (202) 482–5253, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 6, 1973, the Treasury Department published in the **Federal Register** (38 FR 33593) the antidumping duty finding on PR from Japan. On June 17, 2003, SDEL and SDK submitted a letter stating that they are the successor-in-interest to SDEM and DDE Japan, and, as such, entitled to receive the same antidumping treatment as accorded these companies. On July 18, 2003, at the request of the Department, SDEL and SDK submitted additional information and documentation pertaining to their changed circumstances request. On July 31, 2003, the Department published a notice of

initiation of changed circumstances review of the antidumping duty finding on PR from Japan to determine whether SDEL and SDK are the successor-in-interest companies to SDEM and DDE Japan. *See Notice of Initiation*. On October 24, 2003, we published a notice of preliminary results, determining that the restructured manufacturing and marketing joint venture, SDEL and SDK, are the successor-in-interest companies to SDEM and DDE Japan, for purposes of determining antidumping liability in this proceeding. *See Notice of Preliminary Results*, 68 FR at 60913. In the same notice, the Department invited interested parties to comment on the preliminary results. Prior to receiving any comments, on December 5, 2003, SDEL and SDK petitioned the Department to withdraw their request for a changed circumstances review.

Scope of Review

Imports covered by this review are shipments of PR, an oil resistant synthetic rubber also known as polymerized chlorobutadiene or neoprene, currently classifiable under items 4002.41.00, 4002.49.00, 4003.00.00 of the *Harmonized Tariff Schedule of the United States* (HTSUS). HTSUS item numbers are provided for convenience and customs purposes. The written description remains dispositive.

Rescission of Changed Circumstances Review

On December 5, 2003, SDEL and SDK petitioned the Department to withdraw their request for a changed circumstances review. No interested parties, including the petitioner, objected to this withdrawal request. Consequently, the Department is now rescinding this antidumping duty changed circumstances review. The U.S. Customs and Border Protection will continue to suspend entries of subject merchandise at the appropriate cash deposit rate for all entries of PR from Japan.

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 the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with regulations and the terms of an APO is a sanctionable violation.

This notice is in accordance with sections 751(b) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: December 17, 2003.

Holly A. Kuga,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 03–31777 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A-580–839]

Certain Polyester Staple Fiber from the Republic of Korea: Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision

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

ACTION: Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision on Polyester Staple Fiber from the Republic of Korea.

SUMMARY: On August 22, 2002, the Court of International Trade (''CIT'') affirmed the Department's second remand determination and entered a judgment order in *Geum Poong Corporation and Sam Young Synthetics Co. Ltd. v. United States v. E.I. Dupont De Nemours, Inc., et. al.*, Slip. Op. 02–95, 2002 Ct. Intl. Trade LEXIS 94 (CIT 2002), a lawsuit challenging certain aspects of the Department of Commerce's (''the Department'') *Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber from the Republic of Korea and Antidumping Duty Orders: Certain Polyester Staple Fiber from the Republic of Korea and Taiwan*, 65 FR 16880 (March 30, 2000) and accompanying Issues and Decision Memorandum (March 22, 2000) (''*Issues and Decision Memorandum*''), and *Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber from the Republic of Korea, and Antidumping Duty Orders: Certain Polyester Staple Fiber from the Republic of Korea and Taiwan*, 65 FR 33807 (May 25, 2000) (collectively, ''*Final Determination*''). The Department appealed this decision. On October 9, 2003, the CIT's opinion upholding the Department's final remand was affirmed without opinion by the U.S. Court of Appeals for the Federal Circuit. *See Geum Poong Corp. and Sam Young Synthetics Co. v. United States*, et. al, Court No. 03–1056, 1057, 2003 U.S. App. LEXIS 21438 (Fed. Cir. 2003) (Nonprecedential).

In its remand determination, the Department reviewed the record evidence and derived a facts available profit cap using the financial statements of Saehan Industries, Inc., (''Saehan'') and SK Chemical Co. Ltd., (''SK Chemical''), and calculated a profit rate for Geum Poong Corporation (''Geum Poong'') using the same information.

As a result of the remand determination, Geum Poong will be excluded from the antidumping duty order on certain polyester staple fiber from Korea because its antidumping rate decreased from 14.10 percent to 0.12 percent (*de minimis*). The All-Others rate decreased from 11.38 percent to 7.91 percent. The antidumping duty rates for respondents Sam Young Synthetics Co. (''Sam Young''), and Samyang Corporation (''Samyang'') were unchanged from the *Final Determination*. As there is now a final and conclusive court decision in this action, we are amending our *Final Determination*.

EFFECTIVE DATE: December 24, 2003.

FOR FURTHER INFORMATION CONTACT: Andrew McAllister or Judith Rudman, Group I, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–1174, or(202) 482–0192, respectively.

SUPPLEMENTARY INFORMATION:

Background

Following the publication of the *Final Determination*, the petitioners and the respondents in this case filed lawsuits with the CIT challenging the Department's Final Determination.

In the underlying investigation, the Department was required to calculate a CV profit rate for Geum Poong. Based on the information on the record, the Department determined that a combination of the CV profit rates calculated for the other respondents, Sam Young and Samyang, and a general profit ratio for the entire man-made fibers industry in Korea, extracted from a Bank of Korea (''BOK'') publication, was a reasonable method for calculating Geum Poong's profit and was permissible under section 773 (e)(2)(B)(iii) of the Act. (*See Final Determination*).

In its September 6, 2001, opinion, the Court affirmed certain aspects of the Department's method for calculating Geum Poong's CV profit. (*See Geum Poong Corp. v. United States*, 163 F. Supp. 2d. 669 (CIT 2002) (''*Geum Poong I*''). The Court also remanded certain aspects of the Department's determination. Specifically, the Court stated that the Department had not

adequately explained why a profit cap was not available and, even assuming a profit cap could not be applied, the Department had not adequately explained why the profit methodology it selected was reasonable. *Id.* at 678–9.

On October 5, 2001, the Department submitted its *Final Results of Redetermination Pursuant to Court Remand* (''*Redetermination I*'') in response to the Court's remand order in *Geum Poong I*. In that redetermination, the Department stated its view that as a matter of law none of the profit information on the record of this proceeding could be used as a profit cap because all of the profit rates under consideration included, or likely included, profits on non-Korean sales. The Department further provided an explanation of its decision to reject certain profit data and to combine other profit rates to calculate the CV profit rate for Geum Poong.

In *Geum Poong Corporation and Sam Young Synthetics Co., Ltd. v. United States v. E. I. Dupont De Nemours, Inc., et. al.*, Slip Op 02–26 (March 8, 2002) (''*Geum Poong II*''), the Court remanded again the issue of Geum Poong's CV profit.

We released the *Draft Redetermination Pursuant to Court Remand* (''*Draft Results*'') to interested parties on April 16, 2002. Comments on the *Draft Results* were received from the petitioners, Geum Poong and Sam Young on April 23, 2002. On April 30, 2002, the Department responded to the Court's Order of Remand by filing its *Final Results of Redetermination Pursuant to Court Remand* (''*Final Results of Redetermination*'').

In the *Final Results of Redetermination*, we calculated a ''facts available profit cap'' using the financial statements of Saehan and SK Chemical. As per the Court's express instructions, we used this ''facts available profit cap'' as the CV profit rate for Geum Poong.

The CIT affirmed the Department's *Final Results of Redetermination* on August 22, 2002. *See Geum Poong Corporation and Sam Young Synthetics Co., Ltd. v. United States v. E.I. Dupont De Nemours, Inc.*, Court No. 00–06–00298, Slip. Op. 02–95 (CIT 2002). The Department appealed this decision. On October 9, 2003, the CIT's decision was affirmed by the United States Court of Appeals for the Federal Circuit. *See Geum Poong Corp. and Sam Young Synthetics Co. V. United States*, et. al, Court No. 03–1056, 1057, 2003 U.S. App. LEXIS 21438 (Fed. Cir. 2003) (Nonprecedential). On September 30, 2002, the Department published *Certain Polyester Staple Fiber from the Republic of Korea: Notice of Court Decision and Suspension of Liquidation* (''*Timken Notice*''). See 67 FR at 61316. No party appealed the Federal Circuit opinion. Accordingly, we are now publishing the *Amended Final Determination* as provided in the *Timken Notice*.

Amendment to the Final Determination

Because there is now a final and conclusive decision in the court proceeding, effective as of the publication date of this notice, we are amending the *Final Determination* and establishing the following revised weighted-average dumping margins:

Exporter/manufacturer	Weighted-average margin percentage
Geum Poong Corporation Ltd.	0.12 (de minimis)
All-Others	7.91

The antidumping duty rates for respondents Sam Young and Samyang were unchanged from the *Final Determination*. The Department will issue appraisement instructions directly to U.S. Customs and Border Protection (''CBP''). The Department will instruct CBP to revise cash deposit rates for all parties subject to the All-Others rate, effective as of the publication of this notice. Furthermore, we will instruct CBP to liquidate entries from Geum Poong, which have been suspended pursuant to the antidumping duty order. In accordance with the Court's decision, Geum Poong is now excluded from the antidumping duty order and its entries should be liquidated without regard to antidumping duties.

This notice is issued and published in accordance with section 751(a)(1) of the Act.

Dated: December 17, 2003.

James J. Jochum,

Assistant Secretary for for Import Administration.

[FR Doc. 03–31775 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of Coastal Zone Management Programs and National Estuarine Research Reserves

AGENCY: Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), DOC.

ACTION: Notice of intent to evaluate and notice of availability of final evaluation findings.

SUMMARY: The NOAA Office of Ocean and Coastal Resource Management (OCRM) announces its intent to evaluate the performance of the Texas Coastal Management Program; the North Carolina National Estuarine Research Reserve; the Grand Bay National Estuarine Research Reserve, Mississippi; and the Guana/Tolomato/Matanzas National Estuarine Research Reserve, Florida.

The Coastal Zone Management Program evaluation will be conducted pursuant to section 312 of the Coastal Zone Management Act of 1972 (CZMA), as amended, and regulations at 15 CFR part 923, subpart L. The National Estuarine Research Reserve evaluations will be conducted pursuant to sections 312 and 315 of the CZMA and regulations at 15 CFR part 921, subpart E and part 923, subpart L.

The CZMA requires continuing review of the performance of states with respect to coastal program implementation. Evaluation of Coastal Zone Management Programs and National Estuarine Research Reserves requires findings concerning the extent to which a state has met the national objectives, adhered to its Coastal Management Program document or Reserve final management plan approved by the Secretary of Commerce, and adhered to the terms of financial assistance awards funded under the CZMA.

The evaluations will include a site visit, consideration of public comments, and consultations with interested Federal, state and local agencies and members of the public. Public meetings will be held as part of the site visits.

Notice is hereby given of the dates of the site visits for the listed evaluations, and the dates, local times, and locations of the public meetings during the site visits.

The Guana/Tolomato/Matanzas National Estuarine Research Reserve, Florida, evaluation site visit will be held February 9–12, 2004. One public meeting will be held during the week. The public meeting will be on Monday, February 9, 2004, at 6 p.m., at the Reserve's offices at 9741 Ocean Shore Boulevard, Marineland, Florida.

The Texas Coastal Management Program evaluation site visit will be held March 22–26, 2004. One public meeting will be held during the week. The public meeting will be on Thursday, March, 25, 2004, at 1 p.m., at the Carlos F. Truan Natural Resources Center, Conference Room 1003, Texas

A&M University-Corpus Christi, 6300 Ocean Drive, Corpus Christi, Texas.

The Grand Bay National Estuarine Research Reserve, Mississippi, evaluation site visit will be held March 24–26, 2004. One public meeting will be held during the week. The public meeting will be on Wednesday, March 24, 2004, at 6:30 p.m., at the East Jackson County/Orange Grove Community Center, 9313 Old Stage Road, Moss Point, Mississippi.

The North Carolina National Estuarine Research Reserve evaluation site visit will be held March 29-April 2, 2004. Three public meetings will be held during the week. The first public meeting will be on Tuesday, March 30, 2004, at 7 p.m., at the Currituck County Satellite Office, 1123 Ocean Trail, Corolla, North Carolina. The second public meeting will be on Wednesday, March 31, 2004, at 7 p.m., at the Duke University Marine Laboratory Auditorium, 135 Duke Marine Lab Road, Beaufort, North Carolina. The third public meeting will be held on Thursday, April 1, 2004, at 7 p.m., at the King Hall Auditorium, University of North Carolina at Wilmington, 601 South College Road, Wilmington, North Carolina.

Copies of states' most recent performance reports, as well as OCRM's notifications and supplemental request letters to the states, are available upon request from OCRM. Written comments from interested parties regarding these Programs are encouraged and will be accepted for each Program until 15 days after the last public meeting held for that Program. Please direct written comments to: Ralph Cantral, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, N/ORM7, 10th Floor, Silver Spring, Maryland 20910. When the evaluations are completed, OCRM will place a notice in the **Federal Register** announcing the availability of the Final Evaluation Findings.

Notice is hereby given of the availability of the final evaluation findings for the Connecticut and Rhode Island Coastal Management Programs. Sections 312 and 315 of the Coastal Zone Management Act of 1972 (CZMA), as amended, require a continuing review of the performance of coastal states with respect to approval of coastal management programs, and the operation and management of NERRs.

The states of Connecticut and Rhode Island were found to be implementing and enforcing their federally approved coastal management programs, addressing the national coastal management objectives identified in CZMA Section 303(2)(A)-(K), and adhering to the programmatic terms of their financial assistance awards. Copies of these final evaluation findings may be obtained upon written request from: Ralph Cantral, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, N/ORM7, 10th Floor, Silver Spring, Maryland 20910.

FOR FURTHER INFORMATION CONTACT: Ralph Cantral, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, N/ORM7, 10th Floor, Silver Spring, Maryland 20910, (301) 713–3155, Extension 118.

(Federal Domestic Assistance Catalog 11.419; Coastal Zone Management Program Administration)

Dated: December 17, 2003.

Richard W. Spinrad,

Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 03–31662 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 121803B]

Marine Mammals; Permits No. 774–1437, 914–1470, 782–1438 and 782–1446

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

ACTION: Issuance of permit amendments.

SUMMARY: Notice is hereby given that the following Permits have been amended to extend the expiration dates:

774–1437–06 - The National Marine Fisheries Service, Southwest Fisheries Science Center, P.O. Box 271, La Jolla, CA 92038, (Dr. Robert L. Brownell, Jr., Principal Investigator);

914–1470–02 - University of Southern Mississippi, Department of Biological Sciences, USM Box 5018, Hattiesburg, MS 39401 [Principal Investigator: Dr. Bobby L. Middlebrooks];

782–1438–07 and 782–1446–07 - National Marine Mammal Laboratory, National Marine Fisheries Service, NOAA, 7600 Sand Point Way, NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0070, [Dr. Sue Moore, Principal Investigator (PI)]

ADDRESSES: The amendment and related documents are available for review upon written request or by appointment in the following office(s):

All Permits - Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;

782–1438–07 and 782–1466–07 - Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426;

774–1437 - Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018;

914–1470–02 - Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

FOR FURTHER INFORMATION CONTACT: Ruth Johnson or Amy Sloan (301)713–2289.

SUPPLEMENTARY INFORMATION: The requested amendments have been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Issuance of this amendment, as required by the ESA was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered species which is the subject of this permit, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 18, 2003.

Tammy Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–31754 Filed 12–23–03; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Request for Public Comments on Commercial Availability Request under the United States-Caribbean Basin Trade Partnership Act (CBTPA)

December 22, 2003.

AGENCY: The Committee for the Implementation of Textile Agreements

ACTION: Request for public comments concerning a request for a determination that certain shirting fabrics, for use in blouses, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA.

SUMMARY: On December 18, 2003, the Chairman of CITA received a petition from School Apparel, Inc. alleging that certain shirting fabrics, classified in subheading 5210.11 of the Harmonized Tariff Schedule of the United States (HTSUS), used in the production of women's and girls' blouses, cannot be supplied by the domestic industry in commercial quantities in a timely manner. It requests that blouses of such fabrics cut and sewn in one or more CBTPA beneficiary country be eligible for preferential treatment under the CBTPA. CITA hereby solicits public comments on this request, in particular with regard to whether such shirting fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be submitted by January 8, 2004, to the Chairman, Committee for the Implementation of Textile Agreements, room 3001, United States Department of Commerce, 14th and Constitution Avenue, NW. Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Janet E. Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act (CBERA), as added by Section 211(a) of the CBTPA; Section 6 of Executive Order No. 13191 of January 17, 2001.

BACKGROUND:

The CBTPA provides for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns or fabrics formed in the United States or a beneficiary country. The CBTPA also authorizes quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more CBTPA beneficiary country from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarns cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191, the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA and directed CITA to establish procedures to ensure appropriate public participation in any such determination. On March 6, 2001, CITA published procedures in the Federal Register that it will follow in considering requests. (66 FR 13502).

On December 18, 2003, the Chairman of CITA received a petition from School Apparel, Inc., alleging that certain shirting fabrics, of HTS subheading 5210.11, not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric, cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting quota- and duty-free treatment under the CBTPA for women's and girls' blouses that are both cut and sewn in one or more CBTPA beneficiary country from such fabrics.

CITA is soliciting public comments regarding this request, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. Also relevant is whether other fabrics that are supplied by the domestic industry in commercial quantities in a timely manner are substitutable for the fabrics for purposes of the intended use. Comments must be received no later than January 8, 2004. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230.

If a comment alleges that these shirting fabrics can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation, such as a signed statement by a manufacturer of the fabrics stating that it produces the fabrics that are the subject of the request, including the quantities that can be supplied and the time necessary to fill an order, as well as any relevant information regarding past production.

CITA will protect any business confidential information that is marked ''business confidential'' from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, NW., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 03–31877 Filed 12–22–03; 4:24 pm]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Request for Public Comments on Commercial Availability Request under the United States-Caribbean Basin Trade Partnership Act (CBTPA)

December 22, 2003.

AGENCY: The Committee for the Implementation of Textile Agreements

ACTION: Request for public comments concerning a request for a determination that certain shirting fabrics, for use in blouses, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA.

SUMMARY: On December 18, 2003, the Chairman of CITA received a petition from School Apparel, Inc. alleging that certain shirting fabrics, classified in subheading 5513.11 or 5513.21 of the Harmonized Tariff Schedule of the United States (HTSUS), used in the production of women's and girls' blouses, cannot be supplied by the domestic industry in commercial quantities in a timely manner. It requests that blouses of such fabrics cut and sewn in one or more CBTPA beneficiary country be eligible for preferential treatment under the CBTPA. CITA hereby solicits public comments on this request, in particular with regard to whether such shirting fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be submitted by January 8, 2004, to the Chairman, Committee for the Implementation of Textile Agreements, room 3001, United States Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act (CBERA), as added by Section 211(a) of the CBTPA; Section 6 of Executive Order No. 13191 of January 17, 2001.

BACKGROUND:

The CBTPA provides for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns or fabrics formed in the United States or a beneficiary country. The CBTPA also authorizes quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more CBTPA beneficiary country from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarns cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191, the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA and directed CITA to establish procedures to ensure appropriate public participation in any such determination. On March 6, 2001, CITA published procedures in the Federal Register that it will follow in considering requests. (66 FR 13502).

On December 18, 2003, the Chairman of CITA received a petition from School Apparel, Inc., alleging that certain shirting fabrics, of HTS subheading 5513.11 and 5513.21, not of square construction, containing more than 70 warp ends and filling picks per square centimeter, of average yarn number exceeding 70 metric, cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting quota- and duty-free treatment under the CBTPA for women's and girls' blouses that are both cut and sewn in one or more CBTPA beneficiary country from such fabrics.

CITA is soliciting public comments regarding this request, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. Also relevant is whether other fabrics that are supplied by the domestic industry in commercial quantities in a timely manner are substitutable for the fabrics for purposes of the intended use. Comments must be received no later than January 8, 2004. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, DC 20230.

If a comment alleges that these shirting fabrics can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation, such as a signed statement by a manufacturer of the fabrics stating that it produces the fabrics that are the subject of the request, including the quantities that can be supplied and the time necessary to fill an order, as well as any relevant information regarding past production.

CITA will protect any business confidential information that is marked ''business confidential'' from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, N.W., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 03–31878 Filed 12–22–03; 4:24 pm]

BILLING CODE 3510–DR–S

COMMODITY FUTURES TRADING COMMISSION

Chicago Mercantile Exchange: Proposed Amendments to the Live Cattle and Feeder Cattle Futures Contracts Increasing the Maximum Daily Price Fluctuation Limit to $0.030 per Pound

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability for public comment of the proposed amendments to the Chicago Mercantile Exchange's live cattle and feeder cattle futures contracts increasing the maximum daily price fluctuation limit to $0.030 per pound.

SUMMARY: The Chicago Mercantile Exchange (CME or Exchange) has requested that the Commission approve the subject proposed amendments for the live cattle and feeder cattle futures contracts. The proposals were submitted pursuant to the provisions of section 5c(c)(2) of the Commodity Exchange Act (Act) and Commission Regulation 40.5. The proposals will increase the maximum daily price fluctuation limits for the affected futures contracts to $0.030 per pound from $.015 per pound above or below the previous trading day's settlement price.

The Director of the Division of Market Oversight (Division) of the Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, has determined that publication of the Exchange's proposed amendments for comment is in the public interest, and will assist the Commission in considering the views of interested persons.

DATES: Comments must be received on or before January 8, 2004.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. In addition, comments may be sent by facsimile transmission to (202) 418–5521 or by electronic mail to *secretary@cftc.gov.* Reference should be made to ''CME Live Cattle and Feeder Cattle Price Limit Amendments.''

FOR FURTHER INFORMATION CONTACT: Please contact John L. Bird, Jr. of the Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, (202) 418–5276. Facsimile number: (202) 418–5527. Electronic mail: *jbird@cftc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The CME's live cattle and feeder futures contracts currently restrict price fluctuations in any one day to not more that $0.015 per pound above or below the previous trading day's settlement price. The contracts' existing terms also provide for the expansion of the maximum daily price fluctuation limits to $0.03 per pound if prices for two specified contract months move up or down the $0.015 per pound maximum daily price fluctuation limit over two consecutive trading days. The maximum daily price fluctuation limits can be further expanded to $0.05 per pound if prices for two specified contract months move up or down the $0.03 per pound daily price limit for two consecutive trading days. These expanded maximum daily price fluctuation limits revert to the next smaller daily price limit on the next business day if futures prices for the two specified contract months fail to move up or down the maximum daily price fluctuation limit during a given trading day.

The proposed amendments will increase the permitted daily price fluctuation to $0.030 per pound. The amendments also will delete the above-noted provisions or expanding the maximum daily price fluctuation limits.

The Exchange intends to implement the amendments with respect to all existing and newly listed futures contract months immediately following approval by the Commission, and following notification of market participants.

In support of the proposed amendments, the Exchange states the following:

In the 25 trading sessions (between October 15 and November 24, 2003), at least one of the front two contract months in the even month cycle of Live Cattle Futures have experienced 1.5-cent limit settlements on 15 occasions. * * * Similarly, during those same 25 trading sessions the front two contract months in Feeder Cattle futures have experienced 1.5-cent limit settlements on 10 occasions.

The addition of expanded price limits in Live Cattle, and more recently in Feeder Cattle * * * was designed to address the problem of lock-limit sessions due to a sustained price move in a particular direction. However, in recent weeks both markets have been volatile, but within relatively broad ranges. This has prevented the Live Cattle expanded limits from being triggered in a timely fashion, and prevented those expanded levels from being sustained for more than a single day. The Exchange believes the same problem would have occurred in Feeder Cattle had expanded limits been in effect.

In regard to public comment on the proposed amendments, the CME states that:

Although the Commission has already posted this proposal on the CFTC Web site, the Exchange has learned that market participants are generally unaware of both the proposal and the ability to comment. To allow a full and open exchange of views on this matter, the Exchange believes it needs to be published in the **Federal Register**, and that those interested parties should be given a 15-day comment period to respond.

The Division is requesting comment on the proposals. The Division is particularly interested in views based on data and analysis that indicate whether or not implementation of the proposed amendments would be consistent with the requirements of the Commodity Exchange Act, as amended by the Commodity Futures Modernization Act of 2000. In this regard, the Commission historically has applied a policy that maximum daily price fluctuation limits adopted by exchanges should not be overly restrictive in relation to price movements observed in the underlying cash market.

Commenters who previously filed comments with the Commission via the Commission's web site need not re-file such comments as the Commission considers all comments filed with it in the course of reviewing proposed amendments, regardless of the method by which they are filed with the Commission.

Copies of the Exchange's proposed amendments will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Copies of the proposed amendments can also be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 418–5100.

Other materials submitted by the CME in support of the request for approval may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations there under (17 CFR part 145 (2000)), except to the extent they are entitled to confidential treatment as set forth in 17 CFR 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of Secretariat at the Commission's headquarters in accordance with 17 CFR 145.7 and 145.8.

Any person interested in submitting written data, views, arguments, or analysis pertaining to the proposed amendments or with respect to other materials submitted by the CME should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581 by the specified date.

Issued in Washington, DC on December 19, 2003.

Michael Gorham,

Director, Division of Market Oversight.

[FR Doc. 03–31778 Filed 12–23–03; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On December 11, 2003, the Department of Education published a 30-day public comment period notice in the **Federal Register** (Page 69074, Column 2) for the information collection, ''Part B of the Individuals with Disabilities Education Act Biennial Performance Report''. The correct title for this collection should be: ''Part B of the Individuals with Disabilities Education Act Annual Performance Report'' and the Abstract should read, ''State educational agencies are required to establish goals for the performance of children with disabilities in that State that promote the purposes of Part B of the Individuals with Disabilities Education Act (Part B). States must also establish performance indicators that the State will use to assess its progress in achieving these goals. Section 612(a)(16) of Part B requires States to report to the Secretary on the progress that the State has made toward meeting its goals. The Office of Special Education Programs (OSEP) is implementing an integrated, four-part accountability strategy: (1) Verifying the effectiveness and accuracy of States' monitoring, assessment, and data collection systems; (2) attending to States at high risk for compliance, financial, and/or management failure; (3) supporting States in assessing their performance and compliance, and in planning, implementing, and evaluating improvement strategies; and (4) focusing OSEP's intervention on States with low ranking performance on critical performance indicators. Component 3 of OSEP's accountability strategy is implemented through this Annual Performance Report. Reporting requirements for States' Self-Assessment, Improvement Plans, and Biennial Performance Reports are being combined in this Part B Annual Performance Report.'' The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Sheila Carey at her e-mail address *Sheila.Carey@ed.gov.*

Dated: December 19, 2003.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

[FR Doc. 03–31710 Filed 12–23–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 23, 2004.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early

opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 19, 2003.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: New Collection.

Title: National Assessment of Educational Progress 2004–2007 System Clearance.

Frequency: One-time.

Affected Public: State, local, or tribal gov't, SEAs or LEAs (primary); Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 906,322.

Burden Hours: 231,800.

Abstract: This clearance request covers all pilot, field, and full scale assessment and survey activities of the National Assessment of Educational Progress. Students are assessed and surveyed in the 4th, 8th and 12th grades as well as some of their teachers and school administrators.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2429. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov.* Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address, *Kathy.Axt@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 03–31711 Filed 12–23–03; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Innovation and Improvement; Overview Information; Charter Schools Program (CSP); Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004

Catalog of Federal Domestic Assistance (CFDA) Number: 84.282A, 84.282B, and 84.282C.

Dates: Applications Available: December 24, 2003.

Deadline for Transmittal of Applications: February 19, 2004.

Deadline for Intergovernmental Review: April 19, 2004.

Eligible Applicants: (a) State educational agencies (SEAs) in States with a State statute specifically authorizing the establishment of charter schools may apply for funding.

(b) Non-SEA eligible applicants may apply for funding directly from the U.S. Department of Education (Department) if the SEA in the State elects not to participate in the CSP or does not have an application approved under the program.

Estimated Available Funds: Although the Congress has not enacted a final appropriation for FY 2004, the Department is inviting applications for this competition now so that it may be prepared to make awards following final action on the Department's appropriations bill. Based on the congressional action to date, we estimate that $64,000,000 will be available for new awards under this competition. The actual level of funding depends on final congressional action.

Estimated Range of Awards: SEAs: $500,000-$8,000,000 per year. Other eligible applicants: $10,000-$150,000 per year.

Estimated Average Size of Awards: SEAs: $3,000,000 per year. Other eligible applicants: $130,000 per year.

Estimated Number of Awards: SEAs: 18–22. Other eligible applicants: 50–75.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the CSP is to increase national understanding of the charter school model and to expand the number of high-quality charter schools available to students across the Nation by providing financial assistance for the planning, program design, and initial implementation of charter schools and for evaluating the effects of charter schools, including the effects on students, student academic achievement, staff, and parents.

The Department will hold three (3) separate competitions under this program. All SEA applicants must apply for grant funds under CFDA No. 84.282A. Non-SEA eligible applicants that propose to use grant funds for planning, program design, and implementation must apply under CFDA No. 84.282B. Non-SEA eligible applicants that are requesting funds for dissemination activities must submit their applications under CFDA No. 84.282C.

Priorities: In accordance with 34 CFR 75.105(b)(2)(iv), these priorities are from section 5202(e) of the Elementary and Secondary Education Act of 1965, as amended (ESEA), 20 U.S.C. 7221a(e).

Competitive Preference Priorities: For FY 2004 these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 40 points to an applicant, depending on how well the application meets these priorities.

In awarding grants to SEAs under this competition, the Secretary gives priority to States to the extent that the State meets the statutory criterion described in paragraph (a) of this section, and one or more of the statutory criteria described in paragraphs (b) through (d) of this section.

An SEA that meets priority (a) but does not meet one or more of the other

priorities will not receive any priority points.

An SEA that does not meet priority (a) but meets one or more of the other priorities will not receive any priority points.

In order to receive preference, an applicant must identify the priorities that it believes it meets and provide documentation supporting its claims.

These priorities are:

(a) *Periodic Review and Evaluation* (10 points). The State provides for periodic review and evaluation by the authorized public chartering agency of each charter school at least once every 5 years, unless required more frequently by State law, to determine whether the charter school is meeting the terms of the school's charter, and is meeting or exceeding the academic achievement requirements and goals for charter schools as provided under State law or the school's charter.

(b) *Number of High-Quality Charter Schools* (10 points). The State has demonstrated progress in increasing the number of high-quality charter schools that are held accountable in the terms of the schools' charters for meeting clear and measurable objectives for the educational progress of the students attending the schools, in the period prior to the period for which an SEA or non-SEA eligible applicant applies for a grant under this competition.

(c) *One Authorized Public Chartering Agency Other than a Local Educational Agency (LEA), or an Appeals Process* (10 points). The State—

(1) Provides for one authorized public chartering agency that is not an LEA, such as a State chartering board, for each individual or entity seeking to operate a charter school pursuant to State law; or

(2) In the case of a State in which LEAs are the only authorized public chartering agencies, allows for an appeals process for the denial of an application for a charter school.

(d) *High Degree of Autonomy* (10 points). The State ensures that each charter school has a high degree of autonomy over the charter school's budgets and expenditures.

Invitational Priorities: Under these competitions we are particularly interested in applications that address the following priorities. For FY 2004 these priorities are invitational priorities. Under 34 CFR 75.105(c)(1), we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

(a) The applicant proposes to plan, design, and implement one or more high-quality charter schools to address parental interest in public school choice, particularly for parents of children attending schools identified for improvement under Title I, part A of the ESEA.

(b) The applicant proposes to plan, design, and implement one or more high-quality charter schools in geographic areas, including urban and rural areas, in which a large proportion or number of public schools have been identified for improvement, corrective action, or restructuring under Title I, Part A of the ESEA; and

(c) The applicant proposes to plan, design, and implement one or more high-quality charter schools in geographic areas in which a large proportion of students have difficulty meeting State academic content and student achievement standards.

Program Authority: 20 U.S.C. 7221–7221j.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 76, 77, 79, 80, 81, 82, 85, 86, 97, 98, and 99.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: Although the Congress has not enacted a final appropriation for FY 2004, the Department is inviting applications for this competition now so that it may be prepared to make awards following final action on the Department's appropriations bill. Based on the congressional action to date, we estimate that $64,000,000 will be available for new awards under this competition. The actual level of funding depends on final congressional action.

Estimated Range of Awards: SEAs: $500,000–$8,000,000 per year. Other eligible applicants: $10,000–$150,000 per year.

Estimated Average Size of Awards: SEAs: $3,000,000 per year. Other eligible applicants: $130,000 per year.

Estimated Number of Awards: SEAs: 18–22. Other eligible applicants: 50–75.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Note: Planning and implementation grants or subgrants awarded by the Secretary or an SEA to non-SEA eligible applicants will be awarded for a period of up to 36 months, no more than 18 months of which may be used for planning and program design; and no more than two years of which may be used for the initial implementation of a charter school. Dissemination grants and subgrants are awarded for a period of up to two years.

III. Eligibility Information

1. *Eligible Applicants:* (a) SEAs in States with a State statute specifically authorizing the establishment of charter schools may apply for funding.

Note: The Secretary awards grants to SEAs to enable them to conduct charter school programs in their States. SEAs use their CSP funds to award subgrants to eligible applicants, as defined in this notice, for planning, program design, and initial implementation of a charter school; and to support the dissemination of information about, including successful practices in, charter schools.

(b) Non-SEA eligible applicants may apply for funding directly from the Department if the SEA in the State elects not to participate in the CSP or does not have an application approved under the program.

Note: A non-SEA *eligible applicant* is defined as a developer that has applied to an authorized public chartering authority to operate a charter school and has provided to that authority adequate and timely notice, and a copy, of its CSP application, except that the Secretary or the SEA may waive these requirements in the case of a pre-charter planning grant. Non-SEA eligible applicants, like SEAs, must be in States that have statutes specifically authorizing charter schools. If an SEA's application is approved in this competition, the Department will return applications from non-SEA eligible applicants in that State to the applicants. In such a case, the non-SEA eligible applicant should contact the SEA for information related to the State's subgrant competition.

The following States currently have approved applications under this program: Arkansas, Connecticut, Delaware, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Tennessee, Utah, and Wisconsin. In these States, only the SEA is eligible to receive an award under this competition. Non-SEA eligible applicants in States that are not listed must apply directly to the Department on or before the deadline for transmittal of applications in order to be considered for funding in this competition.

(c) *Dissemination Grants.* A charter school may apply to an SEA for funds to carry out dissemination activities, whether or not the charter school has applied for or received funds under the CSP for planning or implementation, if the charter school has been in operation for at least three consecutive years and has demonstrated overall success, including—

(1) Substantial progress in improving student academic achievement;

(2) High levels of parent satisfaction; and

(3) The management and leadership necessary to overcome initial start-up problems and establish a thriving, financially viable charter school.

2. *Cost Sharing or Matching:* These competitions do not involve cost sharing or matching.

3. *Other:* All applicants must meet the definitions of *charter school*, *developer*, *eligible applicant*, and *authorized public chartering agency*, as defined in the authorizing statute. These definitions are in the application package.

IV. Application and Submission Information

1. *Address to Request Application Package:* Rik Lanzendorfer, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C148 FB6, Washington, DC 20202–5961. Telephone: (202) 205–9786 or by e-mail: *Rik.Lanzendorfer@ed.gov*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section. However, the Department is not able to reproduce in an alternative format the standard forms included in the application package.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 50 pages, using the following standards:

• A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

• Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, you must include all of the application narrative in Part III.

We will reject your application if—

• You apply these standards and exceed the page limit; or

• You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: December 24, 2003.

Deadline for Transmittal of Applications: February 19, 2004.

Note: We are requiring that applications for grants under these competitions be submitted electronically using the Electronic Grant Application System (e-Application) available through the Department's e-GRANTS system. For information about how to access the e-GRANTS system or to request a waiver of the electronic submission requirement, please refer to Section IV, Other Submission Requirements, in this notice.

The application package for this competition specifies the hours of operation of the e-Application Web site. If you are requesting a waiver of the electronic submission requirement, the dates and times for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are also in the application package.

We do not consider an application that does not comply with the deadline requirements.

Deadline for Intergovernmental Review: April 19, 2004.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions: Use of Funds for Dissemination Activities.* An SEA may reserve not more than 10 percent of the grant funds to support dissemination activities. A charter school may use those funds to assist other schools in adapting the charter school's program (or certain aspects of the charter school's program), or to disseminate information about the charter school through such activities as—

(a) Assisting other individuals with the planning and start-up of one or more new public schools, including charter schools, that are independent of the assisting charter school and the assisting charter school's developers, and that agree to be held to at least as high a level of accountability as the assisting charter school;

(b) Developing partnerships with other public schools, including charter schools, designed to improve student performance in each of the schools participating in the partnership;

(c) Developing curriculum materials, assessments, and other materials that promote increased student achievement and are based on successful practices within the assisting charter school; and

(d) Conducting evaluations and developing materials that document the successful practices of the assisting charter school and that are designed to improve student achievement.

We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Instructions and requirements for the transmittal of applications by mail or by hand (including a courier service or commercial carrier) are in the application package for these competitions. Application Procedures: The Government Paperwork Elimination Act (GPEA) of 1998 (Pub. L. 105–277) and the Federal Financial Assistance Management Improvement Act of 1999 (Pub. L. 106–107) encourage us to undertake initiatives to improve our grant processes. Enhancing the ability of individuals and entities to conduct business with us electronically is a major part of our response to these Acts. Therefore, we are taking steps to adopt the Internet as our chief means of conducting transactions in order to improve services to our customers and to simplify and expedite our business processes.

Some of the procedures in these instructions for transmitting applications differ from those in EDGAR (34 CFR 75.102). Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

We are requiring that applications for grants under Charter Schools Program—CFDA Numbers 84.282A, B, and C be submitted electronically using the Electronic Grant Application System (e-Application) available through the Department's e-GRANTS system. The e-GRANTS system is accessible through its portal page at: *http://e-grants.ed.gov.*

If you are unable to submit an application through the e-GRANTS system, you may submit a written request for a waiver of the electronic submission requirement. In your request, you should explain the reason or reasons that prevent you from using

the Internet to submit your application. Address your request to: Rik Lanzendorfer, U.S. Department of Education, 400 Maryland Avenue, SW., room FB6–3C148, Washington, DC 20202–5961. Please submit your request no later than two weeks before the application deadline date.

If, within two weeks of the application deadline date, you are unable to submit an application electronically, you must submit a paper application by the application deadline date in accordance with the transmittal instructions in the application package. The paper application must include a written request for a waiver documenting the reasons that prevented you from using the Internet to submit your application.

Pilot Project for Electronic Submission of Applications: We are continuing to expand our pilot project for electronic submission of applications to include additional formula grant programs and additional discretionary grant competitions. Charter Schools Program—CFDA Numbers 84.282A, B, and C is one of the programs included in the pilot project. If you are an applicant under the CSP competitions, you must submit your application to us in electronic format or receive a waiver.

The pilot project involves the use of e-Application. If you use e-Application, you will be entering data online while completing your application. You may not e-mail an electronic copy of a grant application to us. The data you enter online will be saved into a database. We shall continue to evaluate the success of e-Application and solicit suggestions for its improvement.

If you participate in e-Application, please note the following:

- When you enter the e-Application system, you will find information about its hours of operation. We strongly recommend that you do not wait until the application deadline date to initiate an e-Application package.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You must submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- Your e-Application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the Application for Federal Education Assistance (ED 424) to the Application Control Center after following these steps:

1. Print ED 424 from e-Application.
2. The institution's Authorizing Representative must sign this form.
3. Place the PR/Award number in the upper right hand corner of the hard copy signature page of the ED 424.
4. Fax the signed ED 424 to the Application Control Center at (202) 260–1349.

- We may request that you give us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of System Unavailability: If you are prevented from submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

1. You are a registered user of e-Application and you have initiated an e-Application for this competition; and
2. (a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system is unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time) on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under For Further Information Contact (see VII. Agency Contact) or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for Charter Schools Program—CFDA Numbers 84.282A, B, and C at: *http://e-grants.ed.gov*.

V. Application Review Information

1. *Selection Criteria:* All SEA and non-SEA applicants applying for CSP grant funds must address both the application requirements and selection criteria. All SEA and non-SEA applicants applying for CSP grant funds may choose to respond to the application requirements in the context of their response to the selection criteria.

(a) *SEAs (CFDA No. 84.282A).*

(i) *Application Requirements (CFDA No. 84.282A).* (A) Describe the objectives of the SEA's charter school grant program and describe how these objectives will be fulfilled, including steps taken by the SEA to inform teachers, parents, and communities of the SEA's charter school grant program;

(B) Describe how the SEA will inform each charter school in the State about Federal funds that the charter school is eligible to receive and Federal programs in which the charter school may participate;

(C) Describe how the SEA will ensure that each charter school in the State receives the school's commensurate share of Federal education funds that are allocated by formula each year, including during the first year of operation of the school;

(D) Describe how the SEA will disseminate best or promising practices of charter schools to each local educational agency in the State;

(E) If an SEA elects to reserve part of its grant funds (no more than 10 percent) for the establishment of a revolving loan fund, describe how the revolving loan fund would operate;

(F) If an SEA desires the Secretary to consider waivers under the authority of the CSP, include a request and justification for any waiver of statutory or regulatory provisions that the SEA believes is necessary for the successful operation of charter schools in the State; and

(G) Describe how charter schools that are considered to be LEAs under State law and LEAs in which charter schools are located will comply with sections 613(a)(5) and 613(e)(1)(B) of the Individuals with Disabilities Education Act.

(ii) *Selection Criteria (CFDA No. 84.282A).* SEAs that propose to use a portion of their grant funds for dissemination activities must address each selection criterion (A) through (H) individually and title each accordingly. SEAs that do not propose to use a portion of their grant funds for dissemination activities must address selection criteria (A) through (G) only, and need not address selection criterion (H).

The maximum possible score is 130 points for SEAs that do not propose to use grant funds to support dissemination activities, and 150 points for SEAs that propose to use grant funds to support dissemination activities.

The maximum possible score for each criterion is indicated in parentheses following the criterion.

To ensure fairness, if an SEA is not proposing to use grant funds to support dissemination activities, the Secretary will not consider points awarded under criterion (H) in determining whether to approve an application for funding.

In evaluating an application from an SEA, the Secretary considers the following criteria:

(A) The contribution the charter schools grant program will make in assisting educationally disadvantaged and other students to achieve State academic content standards and State student academic achievement standards (25 points).

(B) The degree of flexibility afforded by the SEA to charter schools under the State's charter school law (20 points).

(C) The ambitiousness of the objectives for the State charter school grant program (15 points).

(D) The quality of the SEA's strategy for assessing achievement of those objectives (15 points).

(E) The likelihood that the charter school grant program will meet those objectives and improve educational results for students (15 points).

(F) The number of high-quality charter schools to be created in the State (20 points).

(G) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks (20 points).

(H) In the case of SEAs that propose to use grant funds to support dissemination activities under section 5204(f)(6) of the ESEA, the quality of the dissemination activities (10 points) and the likelihood that those activities will improve student achievement (10 points).

(b) *Non-SEA Applicants (CFDA No. 84.282B and 84.282C).* The application requirements for all non-SEA applicants are listed in paragraph (i) in this section.

The selection criteria for non-SEA applicants for *Planning, Program Design, and Implementation Grants (CFDA No. 82.282B)* are listed in paragraph (ii) in this section.

The selection criteria for non-SEA applicants for *Dissemination Grants (CFDA No. 84.282C)* are listed in paragraph (iii) in this section.

(i) *Application Requirements (CFDA Nos. 84.282B and 84.282C).* (A) Describe the educational program to be implemented by the proposed charter school, including how the program will enable all students to meet challenging State student academic achievement standards, the grade levels or ages of students to be served, and the curriculum and instructional practices to be used;

(B) Describe how the charter school will be managed;

(C) Describe the objectives of the charter school and the methods by which the charter school will determine its progress toward achieving those objectives;

(D) Describe the administrative relationship between the charter school and the authorized public chartering agency;

(E) Describe how parents and other members of the community will be involved in the planning, program design, and implementation of the charter school;

(F) Describe how the authorized public chartering agency will provide for continued operation of the charter school once the Federal grant has expired, if that agency determines that the charter school has met its objectives;

(G) If the charter school desires the Secretary to consider waivers under the authority of the CSP, include a request and justification for waivers of any Federal statutory or regulatory provisions that the applicant believes are necessary for the successful operation of the charter school, and a description of any State or local rules, generally applicable to public schools, that will be waived for, or otherwise not apply to, the school;

(H) Describe how the grant funds will be used, including how these funds will be used in conjunction with other Federal programs administered by the Secretary; and

(I) Describe how students in the community will be informed about the charter school and be given an equal opportunity to attend the charter school.

(ii) *Selection Criteria (CFDA No. 84.282B).* Non-SEA Planning, Program Design, and Initial Implementation Grant applicants must address each selection criterion (A) through (I) individually and title each accordingly.

The maximum possible score for all of the criteria in this section is 145 points.

The maximum possible score for each criterion is indicated in parentheses following the criterion.

In evaluating an application from a non-SEA eligible applicant for Planning, Program Design, and Implementation, the Secretary considers the following criteria:

(A) The quality of the proposed curriculum and instructional practices (25 points).

(B) The degree of flexibility afforded by the SEA and, if applicable, the LEA to the charter school (10 points).

(C) The extent of community support for the application (10 points).

(D) The ambitiousness of the objectives for the charter school (15 points).

(E) The quality of the strategy for assessing achievement of those objectives (10 points).

(F) The likelihood that the charter school will meet those objectives and improve educational results for students during and after the period of Federal financial assistance (20 points).

(G) The extent to which the proposed project encourages parental involvement (20 points).

(H) The qualifications, including relevant training and experience, of the project director; and the extent to which the applicant encourages applications for employment from persons who are members of groups that traditionally have been underrepresented based on race, color, national origin, gender, age, or disability (10 points).

(I) The contribution the charter school will make in assisting educationally disadvantaged and other students to achieve to State academic content standards and State student academic achievement standards (25 points).

(iii) *Selection Criteria (CFDA No. 84.282C).* Non-SEA applicants for Dissemination Grants must address each selection criterion (A) through (E) individually and title each accordingly.

The maximum possible score for all of the criteria in this section is 125 points.

The maximum possible score for each criterion is indicated in parentheses following the criterion.

In evaluating an application from a non-SEA eligible applicant for a dissemination grant, the Secretary considers the following criteria:

(A) The quality of the proposed dissemination activities and the likelihood that those activities will improve student achievement (30 points).

(B) The extent to which the school has demonstrated overall success, including—

(1) Substantial progress in improving student achievement (15 points);

(2) High levels of parent satisfaction (15 points); and

(3) The management and leadership necessary to overcome initial start-up problems and establish a thriving, financially viable charter school (15 points).

(C) The extent to which the results of the proposed project will be disseminated in a manner that will enable others to use the information or strategies (20 points).

(D) The qualifications, including relevant training and experience, of the project director; and the extent to which the applicant encourages applications for employment from persons who are members of groups that traditionally have been underrepresented based on race, color, national origin, gender, age, or disability (10 points).

(E) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks (20 points).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we will notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we will notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* Under the Government Performance and Results Act (GPRA), one measure has been developed for evaluating the overall effectiveness of the CSP: To support the creation of a large number of high-quality charter schools. The objective of this goal is to encourage the development of a large number of high-quality charter schools that are free from state or local rules that inhibit flexible operation, are held accountable for enabling students to reach challenging state performance standards, and are open to all students. The Secretary has set an overall performance target that calls for an increase in both the number of states with charter school legislation and the number of charter schools in operation around the nation.

All grantees will be expected to submit an annual performance report documenting their contribution in assisting the Department in meeting this performance measure.

VII. Agency Contact

For Further Information Contact: Rik Lanzendorfer, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C148 FB6, Washington, DC 20202–5961. Telephone: (202) 205–9786 or by e-mail: *Rik.Lanzendorfer@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed in this section.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: December 19, 2003.

Nina Shokraii Rees,

Deputy Under Secretary for Innovation and Improvement.

[FR Doc. 03–31699 Filed 12–23–03; 8:45 am]

BILLING CODE 4000–01–U

DEPARTMENT OF ENERGY

Reimbursement for Costs of Remedial Action at Active Uranium and Thorium Processing Sites

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of the acceptance of Title X claims for reimbursement in fiscal year (FY) 2004.

SUMMARY: This Notice announces the Department of Energy (DOE) acceptance of claims in FY 2004 from eligible active uranium and thorium processing sites for reimbursement under Title X of the Energy Policy Act of 1992. In FY 2004, Congress appropriated $51 million for the Title X reimbursement program. Because of the amount of unpaid approved claims within the current reimbursement ceilings (approximately $80 million), DOE plans to accelerate the FY 2004 reimbursements to licensees in advance of the April 30, 2004, regulatory deadline. These payments will be prorated based on the amount of FY 2004 appropriations, unpaid approved claim balances (approximately $80 million), and claims received in May 2003 (approximately $38 million).

DATES: The closing date for the submission of claims in FY 2004 is May 3, 2004. These new claims will be processed for payment by April 30, 2005, together with unpaid approved claim balances from prior years, based on the availability of funds from congressional appropriations.

ADDRESSES: Claims should be forwarded by certified or registered mail, return receipt requested, to the U.S. Department of Energy, National Nuclear Security Administration Service Center, Environmental Programs Department, PO Box 5400, Albuquerque, NM 87185–5400, or by express mail to the U.S. Department of Energy, National Nuclear Security Administration Service Center, Environmental Programs Department, H and Pennsylvania Streets, Albuquerque, NM 87116. All claims should be addressed to the attention of Mr. Gilbert Maldonado. Two copies of the claim should be included with each submission.

FOR FURTHER INFORMATION CONTACT: Contact Gilbert Maldonado at (505) 845–4035 of the U.S. Department of Energy, National Nuclear Security Administration Service Center, Environmental Programs Department.

SUPPLEMENTARY INFORMATION: DOE published a final rule under 10 CFR Part 765 in the **Federal Register** on May 23, 1994, (59 FR 26714) to carry out the requirements of Title X of the Energy Policy Act of 1992 (sections 1001–1004 of Public Law 102–486, 42 U.S.C. 2296a *et seq.*) and to establish the procedures for eligible licensees to submit claims for reimbursement. DOE amended the final rule on June 3, 2003, (68 FR 32955) to adopt several technical and

administrative amendments (*e.g.*, statutory increases in the reimbursement ceilings). Title X requires DOE to reimburse eligible uranium and thorium licensees for certain costs of decontamination, decommissioning, reclamation, and other remedial action incurred by licensees at active uranium and thorium processing sites to remediate byproduct material generated as an incident of sales to the United States Government. To be reimbursable, costs of remedial action must be for work which is necessary to comply with applicable requirements of the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 7901 *et seq.*) or, where appropriate, with requirements established by a State pursuant to a discontinuance agreement under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021). Claims for reimbursement must be supported by reasonable documentation as determined by DOE in accordance with 10 CFR Part 765. Funds for reimbursement will be provided from the Uranium Enrichment Decontamination and Decommissioning Fund established at the United States Department of Treasury pursuant to section 1801 of the Atomic Energy Act of 1954 (42 U.S.C. 2297g). Payment or obligation of funds shall be subject to the requirements of the Anti-Deficiency Act (31 U.S.C. 1341).

Authority: Section 1001–1004 of Public Law 102–486, 106 Stat. 2776 (42 U.S.C. 2296a *et seq.*).

Issued in Washington DC on this 16th of December, 2003.

David E. Mathes,

Commercial Disposition Office, Office of Logistics & Waste Disposition Enhancement.

[FR Doc. 03–31700 Filed 12–23–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995), intends to extend for three years, an information collection package with the Office of Management and Budget (OMB). Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, 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 respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before February 23, 2004. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Regina Washington or by fax at (202) 586–4617 or by e-mail at *regina.washington@ee.doe.gov* and to Susan L. Frey, Director, Records Management Division IM–11/ Germantown Bldg., Office of Business and Information Management, Office of the Chief Information Officer, U.S. Department of Energy, 1000 Independence Ave, SW., Washington, DC 20585–1290, or by fax at 301–903–9061 or by e-mail at *susan.frey@hqmail.*

FOR FURTHER INFORMATION CONTACT: Susan L. Frey, Director, Records Management Division, Office of Business and Information Management, Office of the Chief Information Officer, U.S. Department of Energy, 1000 Independence Ave, SW., Washington, DC 20585–1290, (301)–903–3666, or e-mail *susan.frey@hqmail.*

SUPPLEMENTARY INFORMATION: *This package contains:* (1) OMB No. 1910–1400; (2) *Package Title:* Compliance Statement: Energy/Water Conservation Standards for Appliances; (3) *Type of Review:* Renewal; (4) *Purpose:* DOE will collect information from manufacturers to verify that products covered under the Energy Policy and Conservation Act comply with required energy conservation and water conservation standards prior to distributing these products in commerce. DOE will make a determination of compliance by examining manufacturer's compliance statements and certification reports that each basic model meets the applicable energy and water conservation standard as prescribed in section 325 of the Act; (5) *Privacy Impact Assessment:* Not Applicable; (6) *Respondents:* 48; (7) *Estimated Number of Burden Hours:* 1,347.

Statutory Authority: EPCA mandates the use of uniform energy and water conservation standards and testing procedures for covered products. DOE has previously established compliance reporting requirements in § 430.62 of 10 CFR part 430. The authority for certification reporting under part 430 is section 326(d) of Part B of Title III of EPCA which states:

''For purposes of carrying out this part, the Secretary may require, under this part [42 U.S.C. 6291 *et seq.*] or other provision of law administered by the Secretary, each manufacturer of a covered product to submit information or reports to the Secretary with respect to energy efficiency, energy use, or, in the case of showerheads, faucets, water closets, and urinals, water use of such covered product * * * to ensure compliance with the requirements of this part.'' 42 U.S.C. 6296(d).

Issued in Washington, DC on December 18, 2003.

Sharon A. Evelin,

Acting Director, Records Management Division, Office of Business and Information Management, Office of the Chief Information Officer.

[FR Doc. 03–31702 Filed 12–23–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. EA–253–A]

Application To Export Electric Energy; Coral Canada U.S. Inc.

AGENCY: Office of Fossil Energy, DOE

ACTION: Notice of application.

SUMMARY: Coral Canada U.S. Inc. (Coral) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests or requests to intervene must be submitted on or before January 7, 2004.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–287–5736).

FOR FURTHER INFORMATION CONTACT: Steven Mintz (Program Office) 202–586–9506 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On January 9, 2002, Coral was issued an authorization to export electric

energy to Canada; that authorization expires on January 9, 2004. On November 24, 2003, the Office of Fossil Energy (FE) of the Department of Energy (DOE) received an application from Coral to renew its authorization to transmit electric energy from the United States to Canada as a power marketer. Coral, a Delaware corporation with its principal place of business in Houston, Texas, is indirectly owned by Shell Oil Company and Intergen, N.A. Coral does not own or control any electric power generation or transmission facilities and does not have a franchised service area.

Coral proposes to arrange for the delivery of electric energy to Canada over the existing international transmission facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Citizen Utilities, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power Inc., Minnkota Power Cooperative, New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, and Vermont Electric Transmission Company.

The construction, operation, maintenance, and connection of each of the international transmission facilities to be utilized by Coral, as more fully described in the application, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

Because Coral is exporting electricity under the existing authorization, they have requested expedited processing of this application in order to avoid any lapse in export authority. Accordingly, DOE has shortened the comment period and requests comments, protests, and requests to intervene be filed by January 7, 2004.

Procedural Matters: Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the Coral application to export electric energy to Canada should be clearly marked with Docket EA–253–A. Additional copies are to be filed directly with Robert Reilley, Vice President, Regulatory Affairs, Coral Canada U.S. Inc., 909 Fannin, Plaza One, Houston, TX 77010.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy Home Page at *http://www.fe.de.gov.* Upon reaching the Fossil Energy Home page, select ''Regulatory Programs,'' then ''Electricity Regulation,'' and then ''Pending Proceedings'' from the options menus.

Issued in Washington, DC, on December 18, 2003.

Anthony J. Como,

Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 03–31762 Filed 12–23–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 14, 2004, 6 p.m.

ADDRESSES: DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, TN.

FOR FURTHER INFORMATION CONTACT: Pat Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 576–4025; Fax (865) 576–5333 or e-mail: *halseypj@oro.doe.gov*.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

The meeting presentation will feature an overview of the Federal Facility Agreement Core Team concept. Included will be a discussion of the philosophy behind the Core Team concept, the types of issues they address, and their mission, makeup, and responsibilities.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Pat Halsey at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: Minutes of this meeting will be available for public review and copying at the Department of Energy's Information Center at 475 Oak Ridge Turnpike, Oak Ridge, TN between 8 a.m. and 5 p.m. Monday through Friday, or by writing to Pat Halsey, Department of Energy Oak Ridge Operations Office, PO Box 2001, EM–90, Oak Ridge, TN 37831, or by calling her at (865) 576–4025.

Issued at Washington, DC on December 19, 2003.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 03–31701 Filed 12–23–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–1656–017]

California Independent System Operator Corporation; Notice of Technical Conference

December 16, 2003.

The Federal Energy Regulatory Commission is convening a technical conference regarding the California Independent System Operator Corporation (CAISO) Revised Comprehensive Market Design Proposal 2002 (MD02), pursuant to its Order issued on October 28, 2003,[1] to further

[1] California Independent System Operator Corporation, 105 FERC ¶ 61,140 (2003) (October 28 Order).

facilitate and better understand several aspects of the proposed MD02. The conference will be held on January 28–29, 2004, at the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC beginning at 9 a.m. in a room to be announced at a later date.

The conference will focus on the flexible offer obligation proposal, the residual unit commitment process, pricing for constrained-output generators, marginal losses, and ancillary services. Participants are requested to restrict their contributions to this conference to these and other market efficiency issues not related to the mitigation of market power. Market Power Mitigation will be the focus of a second technical conference proposed to be held in early March 2004.

In the October 28 Order, the Commission also sought additional information and explanation from the CAISO in relation to certain elements of the MD02 proposal. Concurrently with this Notice the Commission Staff requests certain supplemental information from the CAISO to further clarify issues relating to certain aspects of the MD02 proposal, and to prepare for the March 2004 second technical conference. The dates by which the CAISO will be required to file information with the Commission are set out in a timetable in the Attachment to this Notice.

Interested participants are also invited to submit information and comments arising from the October 28 Order, the technical conference held in California on November 6, 2003, and from the additional information that will be submitted by the CAISO. Participants are also requested to submit information and comments to the Commission by the due dates listed in the timetable in the Attachment.

A second technical conference will be held in early March 2004 to finalize the outstanding issues relating to implementation of MD02, particularly the design of measures for the mitigation of market power, including local market power mitigation and treatment of imports. A separate notice of technical conference will be issued by the Commission in early February 2004 announcing the date and location of the second technical conference, and a final agenda.

The conference is open for the public to attend, and registration is not required. For more information about the conference, please contact: Olga Kolotushkina at (202) 502–6024 or at *olga.kolotushkina@ferc.gov*.

Magalie R. Salas,

Secretary.

Timetable for Submissions

1. Information on Market Issues to be filed by the CAISO—by January 7, 2004

Pursuant to the October 28 Order, the Commission requests that the CAISO clarify the following issues by January 7, 2004, so that interested participants may both respond and better prepare for discussions at the MD02 Technical Conference to be held on January 28–29, 2004.

- Clarification of the CAISO's approach to allocation of marginal losses—refer to ¶ 78 of the October 28 Order.
- Revised pricing mechanism for setting prices for constrained output generators in the forward market—refer to ¶ 89 of the October 28 Order.
- Further clarification of the statement by the CAISO that it ''does not prohibit energy from capacity committed in the day-ahead RUC from being sold by the unit owner via any bilateral transaction in the hour-ahead market, including sales to other Control Areas''—refer to ¶ 123 of the October 28 Order.
- Additional clarification on the CAISO's concern that a purchase of only capacity may undermine incentive to imports to acquire transmission capacity across ties as part of the residual unit commitment process—refer to ¶ 127 of the October 28 Order.

*2. Information on Market Issues To Be Filed by Other Participants—by January 14, 2004 **

Participants are invited to file reply comments by Wednesday, January 14, 2004, in response to:

- The CAISO's submission under item 1 above;
- Any other market issues, other than market power mitigation, raised in the October 28 Order; and
- The discussions relating to market issues, other than market power mitigation, that occurred at the November 6, 2003 Technical Conference held in California.

* The Commission requests that submissions be limited to market issues other than market power mitigation measures. Market power mitigation and resource adequacy issues will be the focus of the second Technical Conference to be held in early March. The Commission will issue a formal notice announcing the second conference in early February.

3. Information Requested From CAISO Under Request Issued on December 16, 2003—by January 12, 2004

4. Comments of Other Participants in Response to Information Submitted by the CAISO Under Data Request—Anticipated Date January 26, 2004

Formal notice inviting comments from interested participants relating to CAISO's submission pursuant to the Data Request will be published by the Commission as soon as practicable after the CAISO has submitted the requested information. It is anticipated that the date by which such comments should be filed will be January 26, 2004. This will be specified in the notice.

[FR Doc. E3–00623 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–31–000]

CenterPoint Energy Gas Transmission Company; Notice of Application

December 16, 2003.

Take notice that on December 9, 2003, CenterPoint Energy Gas Transmission Company (CenterPoint), 1111 Louisiana Street, Houston, Texas 77002–5231, filed in Docket No. CP04–31–000 pursuant to Section 7(b) of the Natural Gas Act, an application for permission and approval to abandon certain facilities located in Panola County, Texas. Specifically, CenterPoint proposes to abandon one rural tap and appurtenant facilities located on Line ST–1B, all as more fully described in the request which is on file with the Commission and open to public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link, select ''Docket #'' and follow the instructions. Call (202) 208–2222 for assistance.

CenterPoint states that it provides natural gas transportation service to CenterPoint Energy-Entex (Entex), an affiliated distribution company that serves two rural domestic customers on CenterPoint's Line ST–1B. CenterPoint avows that Line ST–1B was installed in 1954 for the primary purpose of receiving gas supplies from producers and transporting those supplies to CenterPont's mainline transmission system. Although installed as a gas supply facility, CenterPoint explains that the two rural taps were installed on Line ST–1B to deliver gas to Entex and its two rural customers, Mr. Ray Schultz

and Mr. Ronny White. Despite the fact that no production has flowed through the line for a number of years, CenterPoint emphasizes that it nonetheless delivers gas into the line from ST–1 to maintain pressure and continue deliveries to the two rural customers. Given that the line is no longer used for the gas supply purpose for which is was intended, CenterPoint claims that continued operation of Line ST–1B exclusively for the two rural customers is neither efficient nor economical.

CenterPoint states that it has offered Mr. Schultz and Mr. White the options of either converting to liquid propane gas fuel (LPG) at CenterPoint's expense or receiving a cash payment equal to the estimated conversion costs. CenterPoint provided Mr. Schultz's letter of consent in writing, however Mr. White rejected the offer. CenterPoint claims two other arrangements for gas service were tendered to Mr.White, one of which Mr. White rejected, and the other was deemed neither efficient nor economical by CenterPoint. CenterPoint asserts that it has notified Entex of its plan to abandon Mr. White's tap upon either written consent from Mr. White or Commission authorization to abandon its delivery tap. Accordingly, CenterPoint requests permission and approval to abandon the tap to Mr. White, and to compensate him for expenses necessary to convert the existing gas service to LPG fuel.

Any questions regarding this application should be directed to Lawrence O. Thomas, Director—Rates & Regulatory, CenterPoint Energy Gas Transmission Company, P.O. Box 21734, Shreveport, Louisiana 71151, or call (318) 429–2804.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10) by the comment date, below. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken; but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

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.

Comment Date: December 30, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00621 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–105–000]

Dominion Transmission, Inc.; Notice of Tariff Filing

December 16, 2003.

Take notice that on December 8, 2003, Dominion Transmission, Inc. (DTI) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets, with an effective date of January 7, 2004:

Third Revised Sheet No. 0
Second Revised Sheet No. 212
First Revised Sheet No. 212A
Third Revised Sheet No. 1171
Second Revised Sheet No. 2506

DTI states that the purpose of this filing is simply to revise the tariff for administrative purposes and to correct certain incorrect cross-references within the tariff. DTI states that the filing includes a series of minor tariff changes.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary''. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00627 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–361–018]

Gulfstream Natural Gas System, L.L.C.; Notice of Negotiated Rates

December 16, 2003.

Take notice that on December 10, 2003, Gulfstream Natural Gas System, L.L.C. (Gulfstream) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Original Sheet No. 8O, reflecting an effective date of November 1, 2003.

Gulfstream states that this filing is being made to implement negotiated rate transactions under Rate Schedules ITS and PALS, respectively, pursuant to Section 31 of the General Terms and Conditions of Gulfstream's FERC Gas Tariff.

Gulfstream states that Original Sheet No. 8O identifies and describes the negotiated rate transactions, including the exact legal name of the relevant shipper, the negotiated rates, the rate schedules, the contract terms, and the contract quantities. Gulfstream also states that Sheet 8O includes footnotes where necessary to provide further details on the transactions listed thereon.

Gulfstream states that copies of its filing have been mailed to all affected customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00626 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–176–098]

Natural Gas Pipeline Company of America; Notice of Negotiated Rates

December 16, 2003.

Take notice that on December 8, 2003, Natural Gas Pipeline Company of America (Natural) tendered for filing to become part of its FERC Gas Tariff, Sixth Revised Volume No. 1, First Revised Sheet No. 26W.12, to be effective December 3, 2003.

Natural states that the purpose of this filing is to terminate, effective December 3, 2003, an existing firm transportation negotiated rate transaction between Natural and Mirant Americas Energy Marketing, LP.

Natural states that copies of the filing are being mailed to all parties set out on the Commission's official service list in Docket No. RP99–176.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with sections 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with section 154.210 of the Commission's regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00618 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–187–001]

North Jersey Energy Associates, a Limited Partnership; Notice of Filing

December 16, 2003.

Take notice that on December 11, 2003, North Jersey Energy Associates, A Limited Partnership (NJEA) filed an amendment to its application in Docket No. ER04–187–000. NJEA states that the amendment revised the applicant's proposed market based rate tariff to prohibit sales within peninsular Florida, to specify the ancillary services available for sale under the tariff, and to withdraw the proposed Service Agreement No. 1 included with the original filing.

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 eLibrary (FERRIS) link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. 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.

Comment Date: December 23, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00624 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–28–000]

Northern Natural Gas Company; Notice of Request Under Blanket Authorization

December 16, 2003.

Take notice that on December 8, 2003, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124, filed in Docket No. CP04–28–000 an application, as supplemented on December 11, 2003, pursuant to Northern's blanket authority granted on September 1, 1982, at Docket No. CP82–401–000 and sections 157.205, 157.208, and 157.216 of the Commission's Regulations for authorization to replace, modify, and operate various pipeline facilities in Iowa, all as more fully set forth in the request which is on file with the

Commission and open to public inspection.

Northern proposes to: (1) Operate and replace by abandoning in place approximately 2.6 miles of its Grinnell 10-inch diameter branch line with 16-inch diameter pipeline located in Polk County; (2) up-rate the maximum allowable operating pressure (MAOP) on approximately 30 miles of the Des Moines B-Line in Boone, Dallas and Polk counties, and to operate this segment of pipeline at the higher MAOP; (3) hydrostatically test approximately 7.7 miles of the existing Des Moines 16-inch diameter beginning at Northern's Ogden compressor station in Boone County; and (4) install overpressure protection on its existing Des Moines B-Line at the Des Moines #1D Town Border Station.

Northern estimates that it will spend $4,064,000 of internally generated funds to construct the new pipeline facilities, collectively known as the Pleasant Hill project. Northern states that it needs to construct and operate the proposed Pleasant Hill facilities in order to meet its firm contractual obligations of 96,000 MMBtu equivalent of natural gas per day to MidAmerican Energy Company (MidAmerican).[1]

Any questions regarding this application should be directed to Michael T. Loeffler, Director, Certificates and Reporting for Northern, 1111 South 103rd Street, Omaha, Nebraska 68124, at (402) 398–7103 or Donna Martens, Senior Regulatory Analyst, at (402) 398–7138.

This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.fed.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. 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 intervenors to file electronically.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's procedural rules (18 CFR 855.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Comment Date: January 6, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00619 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

[1] *Northern Natural Gas Company,* 103 FERC ¶ 62,028 (2003).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT95–11–005]

Southern Star Central Gas Pipeline, Inc.; Notice of Filing Amended Refund Report

December 16, 2003.

Take notice that on December 8, 2003, Southern Star Central Gas Pipeline, Inc. (Southern Star), formerly Williams Gas Pipelines Central, Inc., tendered for filing an amended refund report regarding collection of Kansas ad valorem taxes in Southern Star's Docket No. GT95–11.

Southern Star states that this filing is being made in compliance with a Commission Letter Order dated September 23, 2003, directing Southern Star to amend its report filed on June 5, 2003, so that Commission staff would have sufficient information to completely process the filing. Southern Star states that the filing amends the previous report by providing an annual accounting of ad valorem taxes received from producers and notes that the associated refunds were made to customers as of November 28, 2003.

Southern Star states that a copy of this filing was served on all parties included on the official service list maintained by the Secretary in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before the protest date as shown below. 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Protest Date: December 23, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00625 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–106–000]

Southern Star Central Gas Pipeline, Inc.; Notice of Tariff Filing

December 16, 2003.

Take notice that on December 10, 2003 Southern Star Central Gas Pipeline, Inc. (Southern Star) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, First Revised Sheet No. 510, to become effective October 1, 2003.

Southern Star states that the tariff sheet is being submitted to provide the new URL for Electronic Data Interchange that Southern Star has transitioned to since its separation from Williams Gas Pipeline Companies as well as the new contact information. Southern Star states that it completed and tested the new EDI solution in September 2003 and subsequently went live with the new EDI environment on October 1, 2003 and requests an October 1, 2003 effective date for the tariff sheet listed above.

Southern Star states that copies of the tariff sheets are being mailed to Southern Star's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission,

888 First Street NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary''. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00628 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–29–000]

Transcontinental Gas Pipe Line Corporation; Notice of Request Under Blanket Authorization

December 16, 2003.

Take notice that on December 8, 2003, Transcontinental Gas Pipe Line Corporation (Transco), Post Office Box 1396, Houston, Texas 77251–1396, filed in Docket No. CP04–29–000, an application pursuant to sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (NGA), for authorization to construct and operate a new delivery point for the City of Monroe, a North Carolina Municipal Corporation (City of Monroe), under Transco's blanket certificate issued in Docket No. CP82–426–000, all as more fully set forth in the application, which is on file with the Commission and open to public inspection.

Transco proposes to construct, own, and operate a delivery point in Iredell County, North Carolina, for a new gas transportation customer, City of Monroe. The proposed facilities are two 6-inch tap valve assemblies, a meter station with one 4-inch ultrasonic flow meter, two hundred feet of 6-inch inlet piping to the meter station, 4-inch bypass piping, 6-inch yard piping, 6-inch outlet piping from the meter station, pulsation dampener vessel, odorization system, electronic flow measurement, communications equipment, and other appurtenant facilities. Transco states that the City of Monroe will initially receive at the proposed delivery point up to 20,400 dekatherms per day of gas from Transco on a firm or interruptible basis at the new delivery point. The estimated total cost of Transco's proposed facilities is approximately $878,500 and the City of Monroe will reimburse Transco for all costs associated with such facilities. Transco also states that the City of Monroe currently is served by Piedmont Natural Gas Company but due to a variety of business reasons, the City of Monroe wants to have gas delivered to its municipal distribution system directly by the Transco system in the future.

Transco further states that the City of Monroe will construct, own and operate any appurtenant facilities to enable it to receive gas from Transco at the proposed delivery point and move the gas to its distribution system. The City of Monroe's facilities will include approximately 38.5 miles of 10-inch pipeline extending from Transco's proposed delivery point to the City of Monroe's existing distribution facilities.

Any questions concerning this application may be directed to Randall R. Conklin, General Counsel, Alfred E. White, Jr. Senior Attorney, or Scott C. Turkington, Director, Rates & Regulatory at (713) 215–2000.

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 ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. 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 intervenors to file electronically.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Comment Date: January 30, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00620 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP88–391–029 and RP93–162–014]

Transcontinental Gas Pipe Line Corporation; Notice of Annual Cash-Out Filing

December 16, 2003.

Take notice that on November 24, 2003, Transcontinental Gas Pipe Line Corporation (Transco), filed its annual cash-out report for the period August 1, 2002 through July 31, 2003. Transco states that the report was filed to comply with the cash-out provisions in Section 15 of the General Terms and Conditions (GT&C) of Transco's FERC Gas Tariff.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before the date as indicated below. 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at

FERCOnlineSupport@ferc.gov or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Protest Date: December 22, 2003.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00622 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–35–002]

Williston Basin Interstate Pipeline Company; Notice of Compliance Filing

December 16, 2003.

Take notice that on December 8, 2003, Williston Basin Interstate Pipeline Company (Williston Basin), tendered for filing its response to the Commission's Order issued November 28, 2003 in Docket No. RP04–35–000.

Williston Basin states that on November 28, 2003, the Commission issued its Order in the above referenced docket, and accepted Williston Basin's negotiated service agreement with Prairielands Energy Marketing, Inc. to be effective November 1, 2003, subject to Williston Basin making a compliance filing to address the conditions of the Order. Williston Basin states that the instant filing is being made in compliance with the provisions of that Order.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with section 154.210 of the Commission's Regulations. 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 proceedings. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00629 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL04–36–000, et al.]

Consolidated Edison Company of New York, Inc., et al.; Electric Rate and Corporate Filings

December 16, 2003.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Consolidated Edison Company of New York, Inc., Consolidated Edison Solutions, Inc., KeySpan, Energy Services, Inc., Constellation New-Energy, Strategic Energy, New York Energy Buyers Forum, and Consumer Power Advocates, Complainants, v. New York Independent System Operator, Inc., Respondent

[Docket No. EL04–36–000]

Take notice that on December 15, 2003, Consolidated Edison Company of New York, Inc., Consolidated Edison Solutions, Inc., KeySpan Energy Services Inc., Constellation New-Energy, Strategic Energy, New York Energy Buyers Forum, Consumer Power Advocates (collectively referred to as Complainants) filed a Complaint against the New York Independent System Operator, Inc. (NYISO) requesting that the Commission direct the NYISO to: (a) Revise its calculation of the summer 2003 In-City Installed Capacity (ICAP) rebates such that it complies with the NYISO's Market Administration and Control Area Services Tariff; and (b) refund $20,835,249 to the Complainants.

Comment Date: January 13, 2004.

2. Ameren Energy Development Co., Ameren Energy Generating Co., Ameren Energy Marketing Co., AmerenEnergy Medina Valley Cogen, LLC, Central Illinois Light Co, AmerenEnergy Resources Generating Co., Union Electric Co.

[Docket Nos. ER01–294–002, ER00–3412–003, ER00–816–001, ER04–8–002, ER98–2440–003, ER04–53–002 and ER00–2687–002]

Take notice that on December 10, 2003, Ameren Energy, Inc. and the other affiliates of Ameren Corporation with market rate authority tendered for filing an updated market analysis in connection with their market-based rate authority.

Comment Date: December 31, 2003.

3. Devon Power LLC, Middletown, Middletown Power LL, Montville Power LLC, Norwalk Power LLC and NRG Power Marketing Inc.

[Docket No. ER03–563–025]

Take notice that on December 4, 2003, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC and NRG Power Marketing, Inc. (collectively, Applicants) and ISO-New England, Inc. (ISO), tendered for filing a report entitled ''Review of PUSH Implementation and Results'', prepared by the ISO in compliance with the Commission's Order, issued July 24, 2003, 104 FERC ¶ 61,123.

Comment Date: December 29, 2003.

4. New York Independent System Operator, Inc.

[Docket No. ER03–647–004]

Take notice that on December 8, 2003, the New York Independent System Operator, Inc. (NYISO) submitted for filing its Installed Capacity Auction Activity (ICAP) report in compliance with Commission's Order issued May 20, 2003, 103 FERC ¶ 61,201.

Comment Date: December 29, 2003.

5. Citizens Communications Company

[Docket No. ER03–1235–001]

Take notice that on December 11, 2003, Citizens Communications Company (Citizens) tendered a filing in compliance with the Commission Order issued in Docket No. ER03–1235–000 proceedings on October 8, 2003 as corrected by the Commission's Erratum Order issued October 22, 2003.

Comment Date: January 2, 2004.

6. Indiana Michigan Power Company

[Docket No. ER04–125–001]

On October 31, 2003, Indiana Michigan Power Company, d/b/a/ American Electric Power (I&M) filed a third Revised Service Agreement No. 17

with the City of Gas City, Indiana under I&M's FERC Electric Tariff MRS, Original Volume No. 7 (Third revised Service Agreement No. 17).

Take notice that on December 10, 2003, I&M submitted a filing to provide a complete page and correct clerical errors contained in Service Agreement No. 17. I&M notes that it is submitting corrected information to be substituted for the version filed on October 31, 2003.

Comment Date: December 31, 2003.

7. Southwest Power Pool, Inc.

[Docket No. ER04–219–000]

Take notice that on November 24, 2003, Southwest Power Pool, Inc. (SPP) submitted for filing a Letter Agreement between Southwestern Public Service Company d/b/a/ Xcel Energy (SPS) and Caprock Wind, LP (Caprock) (collectively Parties). SPP states that the agreement provides for the performance of certain engineering and design activities by Xcel and the payment for such activities by Caprock relating to the proposed interconnection of a generating facility to be owned and constructed by Caprock. SPP Also states while it is not a party to this Letter Agreement, it is submitting the Letter Agreement on behalf of the Parties as the relevant Transmission Provider. SPP seeks an effective date of October 2003 for this Letter Agreement.

Comment Date: December 24, 2003.

8. PacifiCorp

[Docket No. ER04–272–000]

Take notice that on December 8, 2003, PacifiCorp tendered for filing in accordance with 18 CFR 35 of the Commission's Rule and Regulations, a Generation Interconnection Facilities Agreement dated June 17, 2003 between PacifiCorp and Eurus Combine Hills 1 LLC and a Generation Interconnection Operation and Maintenance Agreement dated June 17, 2003, between PacifiCorp and Eurus Combine Hills 1 LLC and all related to Eurus Combine Hills 1 LLC's Combine Hills Turbine Ranch 1 wind generating facility.

PacifiCorp states that copies of this filing were supplied to the Public Utility Commission of Oregon, the Washington Utilities and Transportation Commission, and Eurus Combine Hills 1 LLC.

Comment Date: December 30, 2003.

9. Calpine Oneta Power, L.P.

[Docket No. ER04–279–000]

Take notice that on December 11, 2003, Calpine Oneta Power, L.P. tendered for filing, under Section 205 of the Federal Power Act, a rate schedule for system support services, whereby it would make available to Public Service Company of Oklahoma d/b/a American Electric Power, an emergency redispatch service.

Comment Date: January 2, 2004.

10. NorthWestern Energy

[Docket No. ER04–280–000]

Take notice that on December 11, 2003, NorthWestern Energy, a division of NorthWestern Corporation (NorthWestern), tendered for filing a Notice of Cancellation pursuant to 18 CFR 35.15, to reflect cancellation of the Non-Firm Point to Point Transmission Service Agreement between NorthWestern and Southern Energy Trading and Marketing, Inc., which now does business as Mirant Americas, Inc. The non-firm transmission service agreement is a conforming agreement under NorthWestern's Open Access Transmission Tariff. The agreement was executed July 10, 1996, but NorthWestern has never provided any service under agreement.

Comment Date: January 2, 2004.

11. ISO New England Inc.

[Docket No. OA97–237–000]

Take notice that on December 11, 2003, ISO New England Inc. filed its ''Quarterly Report for Regulators,'' as required by Appendix A to Market Rule 1, for the second quarter.

Comment Date: January 2, 2004.

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. E3–00631 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–13–000]

Saltville Gas Storage Company L.L.C.; Notice of Intent To Prepare an Environmental Assessment for the Proposed Saltville Storage Project and Request for Comments on Environmental Issues

December 16, 2003.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Saltville Storage Project involving the construction of a limited number of new facilities and operation of existing facilities by Saltville Gas Storage Company L.L.C. (Saltville) in Smyth and Washington Counties, Virginia.[1] Saltville is currently developing a new 8.2 billion cubic feet (Bcf), underground natural gas storage facility using depleted salt caverns that was previously authorized for construction and operation by the Virginia State Corporation Commission. Saltville has received all necessary state regulatory approvals to construct and operate its storage facility. *See* Appendix 1 for a list of the facilities and their construction status. The EA will focus its analysis on the facilities that still need to be constructed, and on restoration of the areas previously disturbed or currently being disturbed by on-going construction activities. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

The Saltville Storage Project is located entirely on land that is either already owned by Saltville or over which it already holds all necessary rights-of-

[1] Saltville's application was filed with the Commission under section 7(c) of the Natural Gas Act and part 157 of the Commission's regulations. The Commission determined that the project should be subject to Federal regulation. Therefore, Saltville has filed for approval to complete construction of the project and to operate it pursuant to Federal regulatory requirements.

way. Saltville does not require additional property rights from landowners in the vicinity of the project. The 6.7-mile-long, 24-inch-diameter natural gas pipeline has already been constructed and is in service. All of the facilities that remain to be constructed by Saltville would be located within its 650-acre property. Saltville commenced limited customer service on August 1, 2003.

Summary of the Project

Saltville wants to develop and operate up to four salt storage caverns with a total capacity of 8.2 Bcf. Caverns 1 and 2 have been completed and are in service. Well conversion work remains to be completed on well 23 in Cavern 3 and this conversion work is in progress. Saltville has also substantially completed all of the pipelines and other facilities necessary to operate this storage field with the exception of the following facilities that will be examined in the EA:

- Construction of a second 5,250 horsepower electric-motor driven reciprocating compressor and associated dehydrators and heaters at the existing compressor station;
- Development of Cavern 4 (recomplete Well 24) that would have a capacity of about 0.2 Bcf and associated gas and brine piping (about 500 and 200 feet, respectively) and controls;
- Installation of Cavern 3's *de minimus* associated gas and brine piping connections between the already installed gas and brine mainlines that are currently in-place adjacent to Wells 18, 19, 21, 22, and 23 and controls; and
- A new office building.

All of these facilities are within Saltville's property. No nonjurisdictional facilities are needed. The EA would also address any facility removal activities.

The location of the project facilities is shown in appendix 2.[2]

Land Requirements for the Project

No new land is required. All of the facilities that remain to be constructed would be located in previously disturbed areas that are within Saltville's 650-acre property. These areas are mostly covered with gravel or broken native rock at this time.

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than appendix 1 (maps), are available on the Commission's website at the ''eLibrary'' link or from the Commission's Public Reference and Files Maintenance Branch, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to ''eLibrary'' refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [3] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping''. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice of intent, the Commission requests public comments on the scope of the issues it will address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils
- Land use
- Water resources, fisheries, and wetlands
- Cultural resources
- Vegetation and wildlife
- Air quality and noise
- Public safety
- Endangered and threatened species

We will also evaluate possible alternatives to the proposed project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to Federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission(s official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

[3] ''We'', ''us'', and ''our'' refer to the environmental staff of the Office of Energy Projects (OEP).

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Saltville and stakeholders. This preliminary list of issues may be changed based on your comments and our analysis.

- Noise from compressor station operations.
- Public safety.
- Saltville fault.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EA and considered by the Commission. You should focus on the potential environmental effects of the proposal, and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your letter to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.
- Label one copy of the comments for the attention of Gas Branch 2.
- Reference Docket No. CP04–13–000.
- Mail your comments so that they will be received in Washington, DC on or before January 14, 2004.

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. However, the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link and the link to the User's Guide. Before you can file comments you will need to create a free account which can be created on-line.

We may mail the EA for comment. If you are interested in receiving it, please return the Information Request (appendix 4). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor''. Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must provide 14 copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission(s rules of practice and procedure (18 CFR 385.214) (*see* Appendix 3).[4] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance with ''eLibrary'', the eLibrary helpline can be reached at 1–866–208–3676, TTY (202) 502–8659, or at *ferconlinesupport@ferc.gov*. The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm*.

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00630 Filed 12–23–03; 8:45 am]

BILLING CODE 6717–01–P

[4] Interventions may also be filed electronically via the Internet in lieu of paper. *See* the previous discussion on filing comments electronically.

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2003–0206; FRL–7602–1]

Agency Information Collection Activities: Proposed Collection; Comment Request; Emission Control System Performance Warranty Regulations and Voluntary Aftermarket Part Certification Program—OMB Control Number: 2060–0060

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 the following proposed/continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB): Emission Control System Performance Warranty Regulations and Voluntary Aftermarket Part Certification Program, OMB Control Number 2060–0060, expiration date 02/29/04. 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 February 23, 2004.

ADDRESSES: Follow the detailed instructions in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Mrs. Chestine Payton, Certification and Compliance Division, Outreach and Planning Group, 6405J, telephone (202) 343–9240, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, telefax (202) 343–2804, and e-mail *payton.chestine@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number OAR–2003–0206, which is available for public viewing at the Air Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Avenue NW., Washington, DC. The Air 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 Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* You may 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 and OMB within 60 days of this notice, and according to the following detailed instructions: Submit your comments to EPA online using EDOCKET (our preferred method), by e-mail to *air-and-r-docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, OAR, Mail Code 6102T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in DOCKET 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 DOCKET. 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 DOCKET. 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: Parties potentially affected by this action are automotive manufacturers and builders of automotive after market parts.

Title: Emission Control System Performance Warranty Regulations &

Voluntary Aftermarket Part Certification Program, OMB# 2060–0060, Expiration date 02/29/04.

Abstract: The information required is the minimal necessary to ensure that the part to be certified actually performs as required. Without this information EPA would have no way to control and audit fraudulent or marginal submissions. Information is only collected when the part is tested to be certified, if no information is collected at the time of testing there will be no means of showing later that the part was properly designed. EPA would not be able to control the self-certification of parts and this could, therefore, result in certified parts that cause vehicles to fail emissions standards.

The information collected is part of the requirement of section 207(a) of the Clean Air Act, and as described in section 40 CFR part 85, subpart V. This is a voluntary certification program and there is no requirement that any manufacturer participate.

The total estimated involvement of the aftermarket part industry (replacement and specialty parts) is 1 part per year.

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 collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Burden Statement: EPA's burden estimated for this information collection is broken down into three parts: reporting, testing and record keeping burden. EPA estimates that the reporting burden will be 20 hours, testing 150 hours and annual record keeping 1 hour. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclosure 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; adjusting the existing ways to comply with any previously applicable instructions and requirements; training personnel to be able to respond to a collection of information; searching data sources; completing and reviewing the collection of information; and transmitting or otherwise disclosing the information.

Respondents/Affected Entities: Parties potentially affected by this action are automotive manufacturers and builders of automotive after market parts.

Estimated Number of Respondents: 1.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 861 hours.

Estimated Total Annualized Cost Burden: $ 37,380.

Dated: December 15, 2003.

Robert Brenner,

Acting Assistant Administrator, Office of Air and Radiation.

[FR Doc. 03–31707 Filed 12–23–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6646–8]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/*

Weekly receipt of Environmental Impact Statements

Filed December 15, 2003 Through December 18, 2003

Pursuant to 40 CFR 1506.9.

Due to administrative leave being granted on December 26, 2003, EPA's Notice of Availability of Weekly Receipts of Environmental Impact Statements (EISs) are being published on December 24, 2003. All EISs received on December 19, 2003 will be published in January 2, 2004 **Federal Register** (FR) with all Wait Periods and Comment Periods calculated from the December 24, 2003 FR date.

EIS No. 030567, Draft EIS, FHW, NY, NY–17 Parksville/SH–5223, Liberty-County Line, Part 1 Construction and Reconstruction to Interstate Standards, Funding and U.S. Army COE Section 404 Permit Issuance, Town of Liberty, Sullivan County, NY, Comment Period Ends: February 6, 2004, Contact: Robert E. Arnold (518) 472–3636.

EIS No. 030568, Final EIS, IBW, TX, Lower Rio Grande Flood Control Project, Alternative Vegetation Maintenance Practices Impacts, Implementation, Portions of the Rio Grande, Cameron, Hidalgo and Willacy Counties, TX, Wait Period Ends: January 22, 2004, Contact: Douglas Echlin (915) 832–4741.

EIS No. 030569, Final EIS, AFS, WA, Gotchen Risk Reduction and Restoration Project, Implementation, Mount Adams Ranger District, Gifford Pinchot National Forest, Skamania and Yakima Counties, WA, Wait Period Ends: January 22, 2004, Contact: Bruce Holmson (509) 395–3410. This document is available on the Internet at: *http://www.fs.fed.us/gpnf/.*

EIS No. 030570, Draft EIS, FHW, OR, Pioneer Mountain to Eddyville U.S. 20, the Corvallis-Newport Highway, Improvements, Right-of-Way Grant and U.S. Army COE Section 404 Permit, Lincoln County, OR, Comment Period Ends: February 6, 2004, Contact: John Gernhauser (503) 399–5749.

EIS No. 030571, Final EIS, BLM, WY, South Powder River Basin Coal Project, Application for Leasing of Five Federal Coal Tracts: NARO Tracts: NARO North and NARO South (North Antelope/ Rochelle Mine Complex), Little Thunder (Black Thunder Mine) West Roundup (North Rochelle Mine) and West Antelope (Antelope Mine), Campbell and Converse Counties, WY, Wait Period Ends: January 22, 2004, Contact: Nancy Doelger (307) 261–7627. This document is available on the Internet at: *http://www.blm.gov/nepa/prbcoal-feis.*

EIS No. 030572, Final EIS, COE, CA, San Diego Harbor Deepening (Central Navigation Channel) Involving Three Components: Federal Central Navigation Channel Deepening, Disposal of the Dredged Material at the LA–5 Ocean Disposal Site and Relocation and Disposal and Abandonment of a 69 kV Electrical Site, San Diego County, Wait Period Ends: January 22, 2004, Contact: Joy Jaiswal (213) 452–3851.

EIS No. 030573, Draft Supplement, NIH, MT, Rocky Mountain Laboratories' (RML) Integrated Research Facility, Construction and Operation, Housing Biosafety Level (BSL)-2, BSL–3 and BSL–4 Laboratories, Analyzation of Associated Potential Impacts, Ravalli County, MT, Comment Period Ends: February 11, 2004, Contact: Valerie Nottingham (301) 496–3537.

EIS No. 030574, Final EIS, FHW, IN, I–69 Evansville to Indianapolis Corridor Study, I–69 Completion in Southwestern Indiana and Corridor

Selection, IN, Wait Period Ends: January 22, 2004, Contact: Robert Dirks (317) 226–7492. This document is available on the Internet at: *http://www.169indyevn.org.*

EIS No. 030575, Draft EIS, NPS, PA, Lackawanna Heritage Valley, a State and National Heritage Area, Management Action Plan, Implementation, Lackawanna, Luzerne, Wayne and Susquehanna Counties, PA, Comment Period Ends: February 6, 2004, Contact: Peter Samuel (215) 597–1848.

Dated: December 19, 2003.

Joseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–31709 Filed 12–23–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7602–4]

Board of Scientific Counselors, Executive Committee Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Pub. L. 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of an Executive Committee Meeting of the Board of Scientific Counselors (BOSC).

DATES: The meeting will be held on Thursday, January 22, 2004, from 8:30 a.m. to 5 p.m., and on Friday, January 23, 2004, from 8:30 a.m. to 2 p.m. All times noted are Eastern Time. The meeting may adjourn early on Friday if all business is finished.

ADDRESSES: The meeting will be held at the Lowes L'Enfant Plaza Hotel, 480 L'Enfant Plaza SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Lorelei Kowalski, Designated Federal Officer, Environmental Protection Agency, Office of Research and Development, Office of Science Policy Mail Code 8104R), 1200 Pennsylvania Avenue NW., Washington, DC 20460 at (202) 564–3408.

SUPPLEMENTARY INFORMATION: Proposed agenda items include, but are not limited to: discussion of ORD mercury, global change, and endocrine disruptors multi-year plans; update on ORD's computational toxicology plan; briefing on the reorganization of EPA's Science Advisory Board; briefing on public health outcomes; briefing on EPA's Science Inventory; and discussion of BOSC future issues and plans. The meeting is open to the public. Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting should contact Lorelei Kowalski, Designated Federal Officer, by mail at Office of Research and Development (Mail Code 8104R), 1200 Pennsylvania Avenue NW., Washington, DC 20460, by e-mail at *kowalski.lorelei@epa.gov*, or by telephone at (202) 564–3408. In general, each individual making an oral presentation will be limited to a total of three minutes.

Information on Services for the Handicapped: Individuals requiring special accommodations at this meeting should contact Lorelei Kowalski, Designated Federal Officer, at (202) 564–3408, at least five business days prior to the meeting so that appropriate arrangements can be made to facilitate their participation.

Dated: December 18, 2003.

Kevin Y. Teichman,

Director, Office of Science Policy.

[FR Doc. 03–31705 Filed 12–23–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2003–0388; FRL–7338–2]

Pesticide Product; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Written comments, identified by the docket ID number OPP–2003–0388, must be received on or before January 23, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: The Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511C), listed in this unit:

Regulatory Action Leader	Telephone number/e-mail address	Mailing address	File symbol
Todd Peterson	(703) 308–7224; e-mail address: *peterson.todd@epa.gov*.	Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001	50932–RN
Alan Reynolds	(703) 605–0515; e-mail address: *reynolds.alan@epa.gov*	Do.	69592–O
Susanne Cerrelli	(703) 308–8077; e-mail address: *cerrelli.susanne.gov*	Do.	74128–R 74128–E

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you manufacture pesticides or apply pesticides to growing crops. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be

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

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

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2003–0388. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

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

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2003–0388. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2003–0388. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency (7502C), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2003–0388.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, Attention: Docket ID Number OPP–2003–0388. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI To the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the registration activity.

7. Make sure to submit your comments by the deadline in this notice.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

Products Containing Active Ingredients Not Included in Any Previously Registered Products

1. *File symbol*: 50932–RN. *Applicant*: Woodstream Corporation, 69 N. Locust Street, Lititz, PA 17543. *Product name*: Animal Repellent Granular. Biochemical pesticide. *Active ingredient*: Oil of black pepper at 0.480% and piperine at 0.185%. *Proposed classification/Use*: None. For use as an animal repellent.

2. *File symbol*: 69592–O. *Applicant*: Agraquest Inc., 1530 Drew Avenue, Davis, CA, 95616. *Product name*: QST 6047 Technical. Insecticide. *Active ingredient*: *Streptomyces galbus* strain QST 6047 at 2.0%. *Proposed classification/Use*: None. Manufacturing use product for formulation into insecticidal products; for control of lepidopteran pests on growing crops.

3. *File symbol*: 74128–R. *Applicant*: Myco-Forestis Corporation 801, Route 344 P.O. Box 3158 L'Assomption, Quebec Canada, J5W 4M9. *Product name*: *Chondrostereum purpureum* strain HQ1 concentrate. Biological herbicide. *Active ingredient*: *Chondrostereum purpureum* strain HQ1 at 24.8%. *Proposed classification/Use*: None. For manufacturing use.

4. *File symbol*: 74128–E. *Applicant*: Myco-Forestis Corporation. *Product name*: Myco-Tech Paste. Biological herbicide. *Active ingredient*: *Chondrostereum purpureum* strain HQ1 at 9.1%. *Proposed classification/Use*: None. For woody vegetation management in right's of way, woodlots, and conifer plantations to inhibit sprouting and regrowth of freshly cut tree species such as: Birch, pin-cherry, poplar/aspen, red and sugar maple, and speckled alder.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: December 11, 2003.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E3–00604 Filed 12–23–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7601–9]

Proposed CERCLA Administrative Cost Recovery Settlement; Broad Brook Mill Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement for recovery of past and future response costs concerning the Broad Brook Mill Superfund Site (previously identified as the Millbrook Condominiums Site) in East Windsor, Connecticut with Hamilton Sundstrand Corporation (''Settling Party''). The settlement requires the Settling Party to pay $322,301.88 in reimbursement of past response costs and pay all future response costs not inconsistent with the National Contingency Plan on a periodic basis to the EPA Hazardous Substance Superfund. The settlement includes a covenant not to sue the Settling Party pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the EPA Superfund Records Center, 1 Congress Street, Suite 1100 (HSC), Boston, MA 02114–2023 (Telephone No. 617–918–1440).

DATES: Comments must be submitted on or before January 23, 2004.

ADDRESSES: The proposed settlement is available for public inspection at the EPA Superfund Records Center, 1 Congress Street, Suite 1100 (HSC), Boston, MA 02114–2023, Telephone No. (617) 918–1440. A copy of the proposed settlement may be obtained from Man Chak Ng, Senior Enforcement Counsel, U.S. Environmental Protection Agency, Region 1, 1 Congress Street, Suite 1100 (SES), Boston, MA 02114–2023, Telephone No. (617) 918–1785. Comments should reference the Broad Brook Mill Superfund Site in East Windsor, Connecticut and EPA Docket No. CERCLA–01–2003–0014 and should be addressed to Man Chak Ng, Senior Enforcement Counsel, U.S. Environmental Protection Agency, Region 1, 1 Congress Street, Suite 1100 (SES), Boston, MA 02114–2023.

FOR FURTHER INFORMATION CONTACT: Man Chak Ng, Senior Enforcement Counsel, U.S. Environmental Protection Agency, Region 1, 1 Congress Street, Suite 1100 (SES), Boston, MA 02114–2023.

Dated: December 5, 2003.

Susan Studlien,

Director, Office of Site Remediation and Restoration, EPA Region 1.

[FR Doc. 03–31706 Filed 12–23–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

DATE AND TIME: Wednesday, January 7, 2004 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Draft Advisory Opinion 2003–36: Republican Governors Association by Executive Director, Edward T. Tobin III.

Notice of Availability: Petition for Rulemaking on Public Access to Materials Relating to Closed Enforcement Cases.

Routine Administrative Matters.

DATE AND TIME: Tuesday, January 13, 2004 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, § 438(b), and title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

FOR FURTHER INFORMATION CONTACT: Robert Biersack, Deputy Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 03–31848 Filed 12–22–03; 10:52 am]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, NW., Room 940. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 011290–031.

Title: International Vessel Operators Hazardous Material Association Agreement.

Parties: Alianca Navegacao e Logistica Ltda.; APL Co. PTE Ltd.; Atlantic Container Line AB; Australia-New Zealand Direct Line; Bermuda Container Line; Canada Maritime Agencies Ltd.; China Shipping Container Lines Co., Ltd.; CMA CGM, S.A.; Compania Latino Americana de Navegacion SA; Contship Containerlines; Crowley Maritime Corporation; CSX Lines, LLC; Evergreen Marine Corp. (Taiwan) Ltd.; Hamburg-Südamerikanische Dampfschifffahrtsgesellschaft KG; Hanjin Shipping Co., Ltd.; Hapag-Lloyd Container Linie GmbH; Hyundai Merchant Marine Co., Ltd.; Independent Container Line Ltd.; Italia di Navigazione, S.p.A.; Kawasaki Kisen Kaisha Ltd.; Lykes Lines Limited, LLC; Marine Transport Lines, Inc.; Maruba SCA; Mediterranean Shipping Co. S.A.; Mitsui O.S.K. Lines, Ltd.; A.P. Moller-Maersk A/S; National Shipping Co. of Saudi Arabia; Nippon Yusen Kaisha Line; Orient Overseas Container Line Limited; P&O Nedlloyd B.V.; P&O Nedlloyd Limited; Safmarine Container Lines; Seaboard Marine Ltd.; Senator Lines GmbH; TMM Lines Limited; Tropical Shipping & Construction Co., Ltd.; Yang Ming Marine Transport Corp.; and Zim Israel Navigation Company, Ltd.

Synopsis: The amendment adds Senator Lines as a party to the agreement and deletes Wallenius-Wilhelmsen A/S as a party, removes reference to Hamburg-Süd's former trade name, and updates Maersk's corporate name.

Agreement No.: 011305–012.

Title: United Alliance Agreement.

Parties: Hanjin Shipping Co., Ltd.; Senator Lines GmbH; and United Arab Shipping Company, S.A.G.

Synopsis: The amendment would drop Senator Lines as a party to the agreement and recast the agreement as a vessel sharing arrangement under the name Hanjin/United Arab Vessel Sharing and Slot Allocation Agreement.

Agreement No.: 011626–009.

Title: Aliança/HSDG/P&O Nedlloyd Agreement.

Parties: Aliança Navegacao e Logistica Ltda., Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG,; Mercosul Line Navegaçao e Logistica Ltda., P&O Nedlloyd Limited, and P&O Nedlloyd B.V. Inc.

Synopsis: The amendment revises the vessel contributions and space allocations under the agreement, deletes references to Hamburg Süd's trade names and updates its address, updates Mercosul Line's corporate name and address, and renames and restates the agreement. The parties request expedited review.

Agreement No.: 011741–005.

Title: U.S. Pacific Coast-Oceania Agreement.

Parties: Australia-New Zealand Direct Line, FESCO Ocean Management Limited, Hamburg-Süd, Lykes Lines Limited LLC, A.P. Moller-Maersk A/S P&O Nedlloyd B.V., and P&O Nedlloyd Limited.

Synopsis: The amendment adds Lykes as a party to the agreement, removes reference to Hamburg-Süd's former trade name, and updates Maersk's corporate name.

Agreement No.: 011792–001.

Title: NYK/WWL/CSAV South America Space Charter Agreement.

Parties: Compania Sud Americana de Vapores S.A., Nippon Yusen Kaisha, and Wallenius-Wilhelmsen AS.

Synopsis: The amendment removes Wallenius as a party to the agreement; makes conforming changes related to Wallenius' removal; deletes Venezuela from the geographic scope of the agreement; adds service to Baltimore, MD; deletes obsolete language; and restates the agreement.

Agreement No.: 011867.
Title: Norasia/GSL Round the World Service Agreement.
Parties: Norasia Container Lines Limited and Gold Star Line Ltd.
Synopsis: The agreement would authorize the carriers to share vessel space in an around the world service between the United States, on the one hand, and Europe, Asia, Indian Subcontinent, the Middle East, and the Caribbean, on the other hand.
Agreement No.: 201140–001.
Title: NYSA–ILA Assessment Agreement.
Parties: New York Shipping Association, Inc. and the International Longshoremen's Association, AFL–CIO.
Synopsis: The amendment clarifies certain definitions and revises assessments on Bermuda and Puerto Rican trade cargo.

By Order of the Federal Maritime Commission.
Dated: December 19, 2003.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 03–31763 Filed 12–23–03; 8:45 am]
BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Correction

In the **Federal Register** Notice published December 11, 2003 (68 FR 69083) the reference to Colonial Trade Co., Inc. is corrected to read:
License Number: 4527F.
Name: Colonial Trade Co., Inc.
Address: 8319 Lages Lane, Baltimore, MD 21244.
Date Revoked: November 27, 2003.
Reason: Surrendered license voluntarily.

Dated: December 19, 2003.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 03–31764 Filed 12–23–03; 8:45 am]
BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 7, 2004.

A. Federal Reserve Bank of Chicago (Patrick Wilder, Managing Examiner) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Steven Joseph Bonnett, Dubuque, Iowa, to acquire voting shares of East Dubuque Bancshares, Inc., Dubuque, Iowa, and thereby indirectly acquire voting shares of East Dubuque Savings Bank, Dubuque, Iowa.

Board of Governors of the Federal Reserve System, December 18, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E3–00632 Filed 12–23–03; 8:45 am]
BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission (FTC) has submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act (PRA) information collection requirements contained in its Mail or Telephone Order Merchandise Trade Regulation Rule (MTOR or ''Rule''). The FTC is soliciting public comments on the proposal to extend through January 31, 2007 the current PRA clearance for information collection requirements contained in the Rule. That clearance expires on January 31, 2004.

DATES: Comments must be filed by January 23, 2004.

ADDRESSES: Send written comments to Secretary, Federal Trade Commission, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or by e-mail to *PRA–30-MailOrderRule@FTC.gov*, as prescribed below, and to: Records Management Center, ATTN: Desk Officer for the FTC, OMB, Room 10102 NEOB, fax#: 202/395–6566. The submissions should include the submitter's name, address, telephone number and, if available, FAX number and e-mail address. All comments should be captioned ''Mail or Telephone Order Merchandise Trade Regulation Rule: Paperwork comment.''

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Joel N. Brewer, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room 2207, 601 New Jersey Ave., NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: On October 10, 2003, the FTC sought comment on the information collection requirements associated with MTOR, 16 CFR Part 435 (Control Number: 3084–0106). *See* 68 FR 58683. No comments were received. Pursuant to the OMB regulations that implement the PRA (5 CFR Part 1320), the FTC is providing this second opportunity for public comment while seeking OMB approval to extend the existing paperwork clearance for the Rule.

Comments from members of the public are invited, and may be filed with the Commission in either paper or electronic form. A public comment filed in paper form should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled ''Confidential.'' [1] A public comment that does not contain any material for which confidential treatment is requested may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word), as part of or as an attachment to an e-mail message sent to the following e-mail box: *PRA–30–MailOrderRule@FTC.gov*. Regardless of the form in which they are filed, all timely comments will be considered by the Commission, and will be available (with confidential material redacted) for public inspection and copying at the Commission's principal office and on the Commission Web site at *www.ftc.gov*. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it

[1] FTC Rule 4.2(d), 16 CFR 4.2(d). The comment must also be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

receives, before placing those comments on the FTC Web site.

The Rule was promulgated in 1975 in response to consumer complaints that many merchants were failing to ship merchandise ordered by mail on time, failing to ship at all, or failing to provide prompt refunds for unshipped merchandise. The Rule took effect on February 2, 1976. A second rulemaking proceeding in 1993 demonstrated that the delayed shipment and refund problems of the mail order industry were also being experienced by consumers who ordered merchandise over the telephone. The Commission amended the Rule, effective on March 1, 1994, to include merchandise ordered by telephone, including by telefax or by computer through the use of a modem (*e.g.*, Internet sales), and the Rule was then renamed the ''Mail or Telephone Order Merchandise Rule.''

Generally, the MTOR requires a merchant to: (1) Have a reasonable basis for any express or implied shipment representation made in soliciting the sale; (2) ship within the time period promised and, if no time period is promised, within 30 days; (3) notify the consumer and obtain the consumer's consent to any delay in shipment; and (4) make prompt and full refunds when the consumer exercises a cancellation option or the merchant is unable to meet the Rule's other requirements.

The notice provisions in the Rule require a merchant who is unable to ship within the promised shipment time or 30 days to notify the consumer of a revised date and his or her right to cancel the order and obtain a prompt refund. Delays beyond the revised shipment date also trigger a notification requirement to consumers. When the Rule requires the merchant to make a refund and the consumer has paid by credit card, the Rule also requires the merchant to notify the consumer either that any charge to the consumer's charge account will be reversed or that the merchant will take no action that will result in a charge.

Burden statement:

Estimated total annual hours burden: 3,094,000 hours (rounded up to the nearest thousand).

In its 2000 PRA notice and submission to OMB regarding the Rule, FTC staff estimated that 45,919 established companies each spend an average of 50 hours per year on compliance with the Rule, and that approximately 1,985 new industry entrants spend an average of 230 hours (an industry estimate) for compliance measures associated with start-up.[2] 65 FR 77031 (December 8, 2000). Thus, the total estimated hours burden was 2,753,000 hours, rounded up to the nearest thousand [(45,919 × 50 hours) + (1,985 × 230 hours)].

No provisions in the Rule have been amended or changed since staff's prior submission to OMB. Thus, the Rule's disclosure and notification requirements remain the same. Since then, however, the number of businesses engaged in the sale of merchandise by mail or by telephone has increased. Based on the U.S. Department of Commerce 2002 Statistical Abstract,[3] approximately 53,600 establishments are now subject to the Rule. The staff attributes much of this growth to brick-and-mortar retailers expanding into electronic shopping, and the continued entry of ''dot.com'' merchants into the retail industry.

Conversely, based on the 2002 Statistical Abstract data, staff is reducing its estimate of new businesses per year from 1,985 to 1,800. Thus, the current total of affected entities is approximately 55,400 (established and new businesses).

Accordingly, staff estimates total industry hours to comply with the MTOR is 3,094,000 hours [(53,600 × 50 hours) + (1,800 × 230 hours)].

This is a conservative estimate. Arguably much of the estimated time burden for disclosure-related compliance would be incurred even absent the Rule. Industry trade associations and individual witnesses have consistently taken the position that compliance with the MTOR is widely regarded by direct marketers as being good business practice. The Rule's notification requirements would be followed in any event by most merchants to meet consumer expectations regarding timely shipment, notification of delay, and prompt and full refunds. Providing consumers with notice about the status of their orders fosters consumer loyalty and encourages repeat purchases, which are important to direct marketers' success. Thus, it appears that much of the time and expense associated with Rule compliance may not constitute ''burden'' under the PRA[4] although the above estimates account for it as such.

The mail-order industry has been subject to the basic provisions of the Rule since 1976 and the telephone-order industry since 1994. Thus, businesses have had several years (and some have had decades) to integrate compliance systems into their business procedures. Since staff's preceding PRA submission to OMB for the Rule, many businesses have upgraded the information management systems they need, in part, to comply with the Rule, and to track orders more effectively. These upgrades, however, were needed to deal with growing consumer demand for merchandise resulting, in part, from increased public acceptance of making purchases over the telephone and, more recently, the Internet.

Accordingly, most companies now maintain records and provide updated order information of the kind required by the Rule in their ordinary course of business. Nevertheless, staff continues to conservatively assume that the time devoted to compliance with the Rule by existing and new companies remains unchanged from its preceding estimate.

Estimated labor costs: $51,825,000, rounded to the nearest thousand.

Labor costs are derived by applying appropriate hourly cost figures to the burden hours described above. According to the 2002 Statistical Abstract, average payroll for ''electronic shipping and mail order houses,'' ''direct selling establishments,'' and ''other direct selling establishments'' rose from $14.41 per hour in 1999 to $15.19 per hour in 2000, an increase of $0.78 per hour. Assuming average payroll continued to increase $0.78 per hour per year, average payroll in 2002 would have reached $16.75 per hour. Because the bulk of the burden of complying with the MTOR is borne by clerical personnel, staff believes that the average hourly payroll figure for electronic shipping and mail order houses and direct selling establishments is an appropriate measure of a direct marketer's average labor cost to comply with the Rule. Thus, the total annual labor cost to new and established businesses in 2002 for MTOR compliance is approximately $51,825,000 (3,094,000 hours × $16.75/hr.). Relative to direct industry sales, this total is negligible.[5]

[2] Most of the estimated start-up time relates to the development and installation of computer systems geared to more efficiently handle customer orders.

[3] Statistical Abstract of the United States, 122nd edition, 2002, U.S. Department of Commerce, Economics and Statistics Administration, Table 1000, ''Retail Trade—Establishments, Employees and Payroll: 1999 and 2000.'' This is the most recent edition currently available.

[4] Under the OMB regulation implementing the PRA, burden is defined to exclude any effort that would be expended regardless of any regulatory requirement. 5 CFR 1320.3(b)(2).

[5] Projecting sales for ''electronic shopping and mail-order houses,'' ''direct selling establishments,'' and ''other direct selling establishments'' (according to the 2002 Statistical Abstract) to all merchants subject to the MTOR, staff estimates that total direct sales to consumers in 2002 to have been $124.88 billion. Thus, the labor cost for compliance by

Continued

Estimated annual non-labor cost burden: $0 or minimal.

The applicable requirements impose minimal start-up costs, as businesses subject to the Rule generally have or obtain necessary equipment for other business purposes, *i.e.*, inventory and order management, and customer relations. For the same reason, staff anticipates printing and copying costs to be minimal, especially given that telephone order merchants have increasingly turned to electronic communications to notify consumers of delay and to provide cancellation options. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the Rule.

William E. Kovacic,

General Counsel.

[FR Doc. 03–31714 Filed 12–23–03; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

Charges for Certain Disclosures

AGENCY: Federal Trade Commission.

ACTION: Notice regarding charges for certain disclosures.

SUMMARY: The Federal Trade Commission announces that the current $9.00 ceiling on allowable charges under Section 612(f) of the Fair Credit Reporting Act (''FCRA'') will remain unchanged for 2003. Under 1996 amendments to the FCRA, the Federal Trade Commission is required to increase the $8.00 amount referred to in paragraph (1)(A)(i) of Section 612(f) on January 1 of each year, based proportionally on changes in the Consumer Price Index (''CPI''), with fractional changes rounded to the nearest fifty cents. The CPI increased 14.89 percent between September 1997, the date the FCRA amendments took effect, and September 2003. This increase in the CPI and the requirement that any increase be rounded to the nearest fifty cents results in no change in the current maximum allowable charge of $9.00.

EFFECTIVE DATE: January 1, 2004.

ADDRESSES: Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Keith B. Anderson, Bureau of Economics, Federal Trade Commission, Washington, DC 20580, 202–326–3428.

SUPPLEMENTARY INFORMATION:

Section 612(f)(1)(A) of the Fair Credit Reporting Act, which became effective in 1997, provides that a consumer reporting agency may charge a consumer a reasonable amount for making a disclosure to the consumer pursuant to section 609 of the Act, in those cases where the FCRA does not require the disclosure to be made without charge.[1] The law states that, where a consumer reporting agency is permitted to impose a reasonable charge on a consumer for making a disclosure to the consumer pursuant to Section 609, the charge shall not exceed $8 and shall be indicated to the consumer before making the disclosure. Section 612(f)(2) goes on to state that the Federal Trade Commission (''the Commission'') shall increase the $8.00 maximum amount on January 1 of each year, based proportionally on changes in the Consumer Price Index, with fractional changes rounded to the nearest fifty cents.

The Commission considers the $8 amount referred to in paragraph (1)(A)(i) of Section 612(f) to be the baseline for the effective ceiling on reasonable charges dating from the effective date of the amended FCRA, *i.e.,* September 30, 1997. Each year the Commission calculates the proportional increase in the Consumer Price Index (using the most general CPI, which is for all urban consumers, all items) from September 1997 to September of the current year. The Commission then determines what modification, if any, from the original base of $8 should be made effective on January 1 of the subsequent year, given the requirement that fractional changes be rounded to the nearest fifty cents.

Between September 1997 and September 2003, the Consumer Price Index for all urban consumers and all items increased by 14.89 percent—from an index value of 161.2 in September 1997 to a value of 185.2 in September 2003. An increase of 14.89 percent in the $8.00 base figure would lead to a new figure of $9.19. However, because the statute directs that the resulting figure be rounded to the nearest $0.50, the allowable charge should be $9.00.

The Commission therefore determines that the allowable charge for the year 2004 will remain unchanged at $9.00.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 03–31715 Filed 12–23–03; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 031 0097]

General Electric Company; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 20, 2004.

ADDRESSES: Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments filed in electronic form should be directed to: *consentagreement@ftc.gov*, as prescribed in the Supplementary Information section.

FOR FURTHER INFORMATION CONTACT: Joanne Lewers, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2667.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission's Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the

existing and new businesses in 2002 would have amounted to .042% of sales.

[1] This provision, originally Section 612(a), was added to the FCRA in September 1996 and became effective in September 1997. It was relabeled Section 612(f) by Section 211(a) of the Fair and Accurate Credit Transactions Act of 1003 (''FACT Act''), Public Law 108–159, which was signed into law on December 4, 2003. Because Section 211(a) of the FACT Act provides for free annual disclosures, assessment of this charge will be less frequent, but will still apply to a consumer who has already received a free annual disclosure and doesn't otherwise qualify for an additional free disclosure. The charge will also be permitted until the free annual disclosure requirement becomes effective.

complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 18, 2003), on the World Wide Web, at *http://www.ftc.gov/os/2003/12/index.htm*. A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If a comment contains nonpublic information, it must be filed in paper form, and the first page of the document must be clearly labeled ''confidential.'' Comments that do not contain any nonpublic information may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to e-mail messages directed to the following e-mail box: *consentagreement@ftc.gov*. Such comments will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 CFR 4.9(b)(6)(ii)).

Analysis of Agreement Containing Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from General Electric Company (''GE''), which is designed to remedy the anticompetitive effects resulting from GE's acquisition of the nondestructive testing (''NDT'') business group of Agfa-Gevaert N.V. (''Agfa''). Under the terms of the Consent Agreement, GE will be required to divest its Panametrics ultrasonic NDT business to R/D Tech, Inc. (''R/D Tech''). The divestiture will take place no later than twenty (20) days from the date GE consummates its acquisition of the Agfa NDT business. The Consent Agreement also includes an Order to Maintain Assets that requires GE to preserve the Panametrics ultrasonic NDT business as a viable, competitive and ongoing operation until the divestiture is achieved.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to a stock and asset purchase agreement dated January 17, 2003, and amended September 19, 2003, GE proposes to acquire Agfa's NDT business group (''Proposed Acquisition''). The total value of the Proposed Acquisition is approximately $437 million. The Commission's Complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the U.S. markets for the research, development, manufacture, and sale of certain types of ultrasonic NDT equipment, specifically: (1) Portable flaw detectors, (2) corrosion thickness gages, and (3) precision thickness gages.

II. The Parties

GE is a diversified technology and services company headquartered in Fairfield, CT. GE is made up of a broad range of primary business units, each with its own number of divisions. GE Aircraft Engines, the business unit that proposes to acquire Agfa's NDT assets, is the world's leading manufacturer of jet engines for military and civil aircraft. Another business unit of GE, GE Power Systems, offers NDT equipment through the NDT Division of Panametrics, Inc. With its headquarters and manufacturing operations in Waltham, MA, Panametrics researches, designs, manufactures, and sells ultrasonic NDT equipment and systems.

Headquartered in Mortsel, Belgium, Agfa is one of the world's leading imaging companies. Agfa researches, develops, produces, and sells a wide variety of NDT equipment through its Krautkramer, Pantak, Seifert, and RADView subsidiaries. Agfa offers a complete range of ultrasonic NDT equipment, including portable and stationary instruments, customized testing machines and accessories, as well as application solutions, training and service.

III. Ultrasonic NDT Equipment

GE, through its Panametrics subsidiary, and Agfa, through its Krautkramer subsidiary, are the two largest suppliers of ultrasonic NDT equipment in the United States. Ultrasonic NDT equipment includes, among other products: (1) Portable flaw detectors; (2) corrosion thickness gages; and (3) precision thickness gages. Ultrasonic NDT equipment is used to inspect the structure and tolerance of materials without damaging the materials or impairing their future usefulness. Manufacturers and end users in a variety of industries use ultrasonic NDT equipment for quality control and safety purposes. Customers of these products purchase the type of ultrasonic NDT equipment that is best-suited for the inspection they need to conduct and, because of the unique performance characteristics of each type of equipment, there is little opportunity to switch to alternative equipment. In fact, even a price increase of five to ten percent for portable flaw detectors, corrosion thickness gages or precision thickness gages would not likely cause a significant number of customers for these products to switch to any alternative product.

The United States is the appropriate geographic market for portable flaw detectors, corrosion thickness gages and precision thickness gages in which to analyze the competitive effects of the Proposed Acquisition. Because ultrasonic NDT equipment frequently needs to be calibrated and repaired to ensure accuracy, customers prefer to purchase from suppliers with local service and support. Furthermore, customers tend to purchase from companies with a proven reputation for accurate and reliable equipment, and are reluctant to switch to a new company that does not have a proven track record for providing accurate and reliable equipment. Foreign suppliers that have not established the necessary service and support networks, brand reputation, and customer acceptance in the U.S. are not effective competitors for U.S. customers and would not be able to constrain a price increase for portable flaw detectors, corrosion thickness gages or precision thickness gages in the U.S.

The U.S. markets for portable flaw detectors, corrosion thickness gages, and precision thickness gages are all highly concentrated. If the Proposed Acquisition is consummated, GE's market share would exceed 70 percent in each of the U.S. markets for: (1) Portable flaw detectors; (2) corrosion thickness gages; and (3) precision thickness gages. In each of these markets, GE and Agfa are the two largest suppliers. For many customers, GE and Agfa are the two top choices when considering a supplier of portable flaw detectors, corrosion thickness gages and precision thickness gages. By eliminating competition between these two leading suppliers, the Proposed Acquisition would allow GE to exercise

market power unilaterally, thereby increasing the likelihood that purchasers of portable flaw detectors, corrosion thickness gages and precision thickness gages would be forced to pay higher prices and that innovation in these markets would decrease.

Significant impediments to new entry exist in each of the U.S. markets for portable flaw detectors, corrosion thickness gages and precision thickness gages. First, a new entrant would need to devote significant time and expense to researching and developing a product. Second, a new entrant must undertake the lengthy and costly process of establishing a track record of reliability and accuracy for its product. This track record is critical to customers because ultrasonic NDT equipment is relied upon to ensure the quality and performance of their products. Finally, a new supplier of portable flaw detectors, corrosion thickness gages or precision thickness gages must spend a great deal of time and money to develop a broad service and support network that customers depend upon. For these reasons, new entry into the markets for portable flaw detectors, corrosion thickness gages and precision thickness gages would not be accomplished in a timely manner even if prices increased substantially after the Proposed Acquisition. Additionally, new entry into the markets for portable flaw detectors, corrosion thickness gages, and precision thickness gages is unlikely to occur because the costs of entering the markets are high relative to the limited sales opportunities available to new entrants.

IV. The Consent Agreement

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the U.S. markets for the research, development, manufacture, and sale of portable flaw detectors, corrosion thickness gages, and precision thickness gages by requiring GE to divest its worldwide Panametrics ultrasonic NDT business. Pursuant to the Consent Agreement, the Panametrics ultrasonic NDT business will be divested to R/D Tech. The divestiture will take place no later than twenty (20) days from the date GE consummates its acquisition. If the Commission determines that R/D Tech is not an acceptable buyer or that the manner of the divestiture is not acceptable, GE must unwind the sale and divest the Panametrics ultrasonic NDT business to a Commission-approved buyer within ninety (90) days. Should GE fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest the Panametrics ultrasonic NDT business subject to Commission approval. The trustee will have the exclusive power and authority to accomplish the divestiture within twelve (12) months of being appointed, subject to any necessary extensions by the Commission.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. The Commission is satisfied that R/D Tech is a well-qualified acquirer of the divested assets. R/D Tech, a private corporation headquartered in Quebec, Canada, researches, designs, manufactures and sells eddy current, acoustic emission, and phased array instruments for manual and automated NDT inspections. With U.S. offices located in Massachusetts, North Carolina, Pennsylvania, and Texas, R/D Tech has the resources, related experience and capabilities to ensure that it will become an effective competitor in the markets for portable flaw detectors, corrosion thickness gages and precision thickness gages. R/D Tech has the necessary industry expertise to replace the competition that existed prior to the Proposed Acquisition. Furthermore, R/D Tech does not pose separate competitive issues as the acquirer of the divested assets because R/D Tech does not produce, or is not a major supplier of, any of the product lines being acquired.

The Consent Agreement contains several provisions designed to ensure that the divestiture of the Panametrics NDT business is successful. For a period of one (1) year from the date the divestiture of the business is accomplished, GE is prohibited from soliciting or inducing any employees or agents of the ultrasonic NDT equipment business involved in the divestiture to terminate their employment with R/D Tech. The Consent Agreement also requires that, post-divestiture, any remaining GE employees with access to confidential business information related to the Panametrics ultrasonic NDT business sign a confidentiality agreement. Pursuant to this agreement, employees will be required to maintain confidential business information as strictly confidential, including the nondisclosure of such confidential information to other GE employees. Finally, the Decision and Order allows the Commission to appoint an Interim Monitor, if necessary, to assure that GE complies with all of its obligations and performs all of its responsibilities as required by the Consent Agreement.

The Consent Agreement also contains an Order to Maintain Assets. This will serve to protect the viability, marketability and competitiveness of the Panametrics ultrasonic NDT business until it is divested to R/D Tech. The Order to Maintain Assets became effective upon the date the Commission accepted the Consent Agreement for placement on the public record and will remain in effect until GE successfully divests the Panametrics ultrasonic NDT business according to the terms of the Decision and Order.

In order to ensure that the Commission remains informed about the status of the Panametrics ultrasonic NDT business pending divestiture, and about the efforts being made to accomplish the divestiture, the Consent Agreement requires GE to file periodic reports with the Commission until the divestiture is accomplished.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Order to Maintain Assets, or to modify their terms in any way.

By direction of the Commission, Chairman Muris not participating and Commissioner Harbour recused.

Donald S. Clark,

Secretary.

[FR Doc. 03–31713 Filed 12–23–03; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Public Health Conference Support Cooperative Agreement Program for Human Immunodeficiency Virus Prevention

Announcement Type: New.

Funding Opportunity Number: 04039.

Catalog of Federal Domestic Assistance Number: 93.941.

Key Dates:

Letter of Intent (LOI) Deadline: For conferences between the dates of April 1, 2004 to September 30, 2004, submit LOI on or before January 19, 2004.

Application Deadline: March 3, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under the Public Health Service Act, section 301(a), 42 U.S.C. 241(a), as amended and

section 317(a), 42 U.S.C. 247b(a), as amended.

Purpose: The purpose of this program is to provide partial support for specific non-federal conferences in the areas of health promotion and disease prevention information/education programs. Conference support by CDC creates the appearance of CDC co-sponsorship; therefore, CDC will actively participate in the development and approval of those portions of the agenda supported by CDC funds. In addition, CDC reserves the right to approve or reject the content of the full agenda, press events, promotional materials (including press releases), speaker selection, and site selection. CDC funds will not be used for portions of meetings that are not approved. This program addresses the ''Healthy People 2010'' focus area of HIV, and the New Initiative: Advancing HIV Prevention.

Measurable outcomes of the program will be in alignment with one or more of the following performance goals for the National Center for HIV, STD and TB Prevention (NCHSTP): Strengthen the capacity of our HIV prevention partners nationwide to monitor the HIV epidemic, develop and implement effective HIV prevention interventions, and evaluate prevention programs.

Activities:

Awardee activities for this program are as follows: a. Manage all activities related to conference content (*e.g.*, objectives, topics, session design, workshops, special exhibits, speakers, fees, agenda composition, printing). Many of these items may be developed in concert with CDC personnel assigned to support the conference.

b. Provide draft copies of the agenda, objectives, and proposed related activities to the CDC Project Official for review and comment. Submit a copy of the final agenda, objectives, and proposed related activities to the CDC Grants Management Office for approval.

c. Determine and manage all promotional activities (*e.g.*, title, logo, announcements, mailers, press). CDC must review and approve the use of any materials with reference to CDC involvement or support.

d. Manage all registration processes with participants and registrants (*e.g.*, travel, reservations, correspondence, conference materials and hand-outs, badges, and registration procedures).

e. Plan, negotiate, and manage conference site arrangements, including all audiovisual needs.

f. Develop the content and manage the activities of the conference.

g. If the proposed conference is or includes a satellite broadcast, recipient will:

(1) Provide individual, on-camera rehearsals for all presenters.

(2) Provide at least one full dress rehearsal involving the moderator, all presenters, equipment, visuals, and practice telephone calls at least one day before the actual broadcast and as close to the actual broadcast time as possible.

(3) Provide full scripting and Teleprompter use for the moderator and all presenters.

h. Collaborate with CDC staff in reporting and disseminating conference results, recommendations, and relevant HIV prevention information. This information must be made available to appropriate Federal, State, and local agencies, healthcare providers, HIV/AIDS prevention and service organizations, and the general public.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC Activities for this program are as follows:

a. Provide technical assistance through telephone calls, correspondence, and site visits in the areas of program agenda development, implementation, and priority setting related to the cooperative agreement.

b. Provide scientific collaboration for appropriate aspects of the program, including selection of speakers, pertinent scientific information on HIV, preventive measures, and program strategies for the prevention of HIV infection.

c. Review draft agendas. The Grants Management Officer will approve or disapprove the final agenda and proposed related activities prior to release of restricted funds.

d. Assist applicant in reporting and disseminating results, recommendations, and relevant HIV prevention information.

II. Award Information

Type of Award: Cooperative Agreement.

CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: 2004.

Approximate Total Funding: $112,000.

Approximate Number of Awards: Five.

Approximate Average Award: $20,000.

Floor of Award Range: $15,000.

Ceiling of Award Range: $25,000.

Anticipated Award Date: April 1, 2004.

Budget Period Length: Six months.

Project Period Length: Six months.

Contingency awards will be made allowing usage of only 10 percent of the total amount to be awarded until a final full agenda, promotional materials (*i.e.*, brochures, Save-the-Date, etc.), and evaluation questions are approved by CDC. Funding will be provided to support costs associated with preparation of the agenda. The remainder of funds will be released only upon CDC approval of the final and full agenda. CDC reserves the right to terminate co-sponsorship at any time.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by public and private nonprofit organizations and by governments and their agencies, such as:

- Public nonprofit organizations
- Private nonprofit organizations
- Universities
- Colleges
- Technical Schools
- Research institutions
- Hospitals
- Community-based organizations
- Faith-based organizations
- Federally recognized Indian tribal governments
- Indian tribes
- Indian tribal organizations
- State and local governments or their Bona Fide Agents (this includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Marianna Islands, American Samoa, Guam, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau)

A Bona Fide Agent is an agency/organization identified by the state as eligible to submit an application under the state eligibility in lieu of a state application. If you are applying as a bona fide agent of a state or local government, you must provide a letter from the state or local government as documentation of your status. Place this documentation behind the first page of your application form. Foreign organizations are not eligible to apply.

III.2. Cost Sharing or Matching

Recipient financial participation is required for this program in accordance with this Program Announcement. CDC will not fund more than 75 percent of the total cost of the conference. At least 25 percent of the cost for the conference must be supported with non-federal funds. This factor will be included as an evaluation criterion in the review of your application.

III.3. Other

If you request a funding amount greater than the ceiling of the award

range, your application will be considered non-responsive and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

If your application is incomplete or non-responsive to the requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

Note: Title 2 of the United States Code section 1611 states that an organization described in section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

IV. Application and Submission Information

IV.1. Address To Request Application Package

To apply for this funding opportunity use application form PHS 5161–1. Forms are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.*

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: 770–488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Letter of Intent (LOI):

CDC requires that you send a LOI if you intend to apply for this program. Your LOI will be used as a pre-application mechanism. CDC will review and score your LOI. Only the high scoring LOIs will be invited to apply for funding. CDC will invite applicants to submit their full applications within 30 days after the LOI due date. Availability of funds may limit the number of applicants who receive an invitation to submit an application. Your LOI must be written in the following format:

- Maximum number of pages: Two
- Font size: 12-point unreduced
- Paper size: 8.5 by 11 inches
- Page margin size: One inch
- Printed only on one side of page
- Single-Spaced
- Written in plain language, avoid jargon

Your LOI must contain the following information:

a. Name of organization.
b. Mailing address.
c. Telephone and fax numbers.
d. E-mail address.
e. Title of the proposed conference.
f. Location of the proposed conference (city and state).
g. Conference dates.
h. Documented need for the conference.
i. Purpose of the conference.
j. Potential contribution to HIV/AIDS Prevention.
k. Intended audience (number and description of conference attendees).
l. Population(s) who that ultimately benefit from the information shared with conference attendees (population consists of persons at risk, *i.e.*, women, men who have sex with men (MSM), injecting drug users and persons living with HIV).
m. The estimated total cost of the conference.
n. The percentage of the total cost (which must be 75 percent or less) being requested from CDC.
o. The relationship of the conference to CDC's Funding Preferences, which are listed in section ''V.2 Review and Selection Process''.
p. Potential contribution toward the National HIV prevention goals based on the CDC HIV Prevention Strategic Plan:
1. Decrease new infections.
2. Increase knowledge of serostatus.
3. Increase linkage to prevention, care and treatment.
4. Strengthen monitoring, capacity and evaluation.
q. Potential contribution toward the New Initiative:
Advancing HIV Prevention (See Attachment)
1. Make voluntary testing a routine part of medical care.
2. Implement new models for diagnosing HIV infections.
3. Prevent new infections by working with persons diagnosed with HIV.
4. Further decrease perinatal HIV transmission.

Information on HIV prevention methods (or strategies) can include abstinence; monogamy, *i.e.*, being faithful to a single sexual partner; or using condoms consistently and correctly. These approaches can avoid risk (abstinence) or effectively reduce risk for HIV Prevention (monogamy, consistent and correct condom use).

If applicable, current recipients of CDC HIV funding must provide the award number and title of the funded programs.

Note: No attachments, booklets, or other documents accompanying the LOI will be considered.

Application:

You must include a project narrative with your application forms. Your narrative must be submitted in the following format:

- Maximum number of pages: 12 pages. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- Font size: 12-point unreduced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One inch.
- Double-spaced.
- Printed only on one side of page.
- Held together only by rubber bands or metal clips; not bound in any other way.
- Written in plain language only. Do not use jargon or abbreviations.
- Number all pages.
- Include a complete index to the application and appendices.

Your narrative should address activities to be conducted over the entire project period, and must include the following items in the order listed:

a. A project summary cover sheet that includes:
1. Name of organization.
2. Name of conference.
3. Location of conference.
4. Date(s) of conference.
5. Target population(s) who will benefit from the information shared with conference attendees (*e.g.*, youth, women, men who have sex with men (MSM), injecting drug users and persons living with HIV).
6. Intended audience (number and description of conference attendees).
7. Define conference objectives.
8. Dollar amount requested.
9. Total conference budget.

b. Biographical sketches and job descriptions of the individuals responsible for planning and coordinating the conference.

c. A budget narrative separately identifying and justifying line items to which the requested Federal funds would be applied.

d. A draft agenda for the proposed conference.

e. Award number and title of funded programs for current recipients of CDC HIV funding. Applicants must have not submitted the same proposal for review for funding to other parts of CDC.

Additional information may be included in the application appendices. The appendices will not be counted toward the narrative page limit.

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711.

For more information, see the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.* If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section ''VI.2. Administrative and National Policy Requirements.''

IV.3. Submission Dates and Times

For conferences during the dates of April 1, 2004 to September 30, 2004.

LOI Deadline Date: January 19, 2004.

CDC requires that you send a LOI if you intend to apply for this program. Failure to submit a LOI precludes you from submitting an application.

Application Deadline Date: March 3, 2004.

Explanation of Deadlines: LOIs and Applications must be received in the CDC Procurement and Grants Office by 4 p.m. Eastern Time on the deadline date. If you send your LOI or application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your LOI or application after closing due to: (1) carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the LOI or application as having been received by the deadline.

This program announcement is the definitive guide on LOI and application submission and address. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that you did not meet the submission requirements.

CDC will not notify you upon receipt of your LOI and your application. If you have a question about the receipt of your LOI or application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: (770) 488–2700. Before calling, please wait two to three days after the application deadline. This will allow time for the LOIs and applications to be processed and logged.

IV.4. Intergovernmental Review of Applications

Executive Order 12372 does not apply to this program.

IV.5. Funding Restrictions

Funding restrictions, which must be taken into account while writing your budget are as follows:

1. CDC funds will not be used for non-approved portions of meetings. CDC funds may be used for only those parts of the conference specifically supported by CDC as listed on the Notice of Cooperative Agreement Award. CDC funds may be used for direct costs, such as

a. Salaries.
b. Speaker fees.
c. Rental of conference-related equipment.
d. Registration fees.
e. Scholarships.
f. Transportation costs (not to exceed economy class fares) for non-federal employees.
g. Mileage for local participants.

2. CDC funds may not be used

a. To purchase equipment.
b. To pay honoraria.
c. For organizational dues.
d. To support entertainment.
e. For personal expenses not related to the conference.
f. For travel costs or payment to a Federal employee.
g. For per diem and expenses for local participants.
h. To reimburse indirect costs.
i. To purchase novelty items (*e.g.*, bags, T-shirts, hats, pens) distributed at meetings.
j. To purchase food or drinks.

3. CDC will not fund a conference after it has taken place.

Contingency awards will be made allowing usage of only 10 percent of the total amount to be awarded until a final full agenda, promotional materials (*i.e.*, brochures, Save-the-Date, *etc.*), and evaluation questions are approved by CDC. Funding will be provided to support costs associated with preparation of the agenda. The remainder of funds will be released only upon CDC approval of the final and full agenda. CDC reserves the right to terminate co-sponsorship at any time.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

IV.6. Other Submission Requirements

LOI Submission Address: Submit the original and two hard copies of your LOI by express mail or delivery service to: Technical Information Management—PA04039, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Rd., Atlanta, GA 30341–4146.

LOIs may not be submitted electronically.

Application Submission Address: Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management—PA04039, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

V. Application Review Information

V.1. Criteria

Letter of Intent Criteria:

The Letter of Intent will be evaluated against the following criteria:

1. The extent to which the LOI content requirements are complete. Does the LOI address all the content requirements listed in Section IV: ''Application and Submission Information?'' LOI must also address one or more of the elements listed in Section V. ''Application Review Information, Review and Selection Process.'' (20 points)

2. The extent to which the conference overall objectives are reliable, reasonable, measurable and specific. (15 points)

3. The extent to which the applicant demonstrates the need for the conference. (15 points)

4. The extent to which high risk populations will ultimately benefit from the conference. (15 points)

5. The extent to which the applicant discusses the potential contribution to HIV/AIDS prevention. (10 points)

6. The extent to which the conference will have potential contribution toward the New Initiative: Advancing HIV Prevention. (10 points)

7. The extent to which the conference will have potential contribution toward the National HIV Prevention Goals based on the CDC HIV Prevention Strategic Plan. (10 points)

8. The extent to which the overall format and organization of the LOI meets the format listed in the ''Content and Form of Submission'' Section of the Program Announcement. (5 points)

Application Criteria: You are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the

performance goals stated in the ''Purpose'' section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

Note: Use the following headings on your application narrative.

a. Proposed Program and Technical Approach (30 points):

1. The extent to which the proposed conference description fits one of the Funding Preferences listed in ''Section V. Application Review Information, Review and Section Process''.

2. The degree to which the conference objectives are specific, measurable, realistic, and time-phased. The extent to which evaluation of the conference assesses increased knowledge and attitudes of the conference participants.

3. The relevance and effectiveness of the proposed agenda in addressing the conference topic(s).

4. The degree to which conference activities relate to the prevention of HIV.

b. Applicant Capability and Experience (25 points):

1. The adequacy of existing resources to administer the program for the proposed conference.

2. The adequacy of existing and proposed facilities for conducting conference activities.

3. The degree to which the applicant has established relationships with related government agencies, community planning groups, and related community groups. Include letters of support (maximum of five letters) from such agencies, addressing related applicant's capability and experience. Letters of support must explain how the agency will work with the applicant to plan the proposed conference. Letters that do not pertain directly to the proposed conference, and specify how the agency will work with the applicant, will not be considered.

c. Qualifications of Program Personnel (25 points):

1. The qualifications and experience of the principal staff person, and his or her ability to devote adequate time to provide effective leadership.

2. Program personnel's ability to accomplish conference objectives.

3. Key personnel's (including associate staff persons, discussion leaders, and speakers) education and expertise relative to the conference objectives.

d. Purpose of the Conference (20 points):

1. Extent to which the applicant shows that participants and presenters will have the opportunity to interact during the conference, share information on successful and unsuccessful program experiences, and develop collaborative working relationships.

2. The extent to which the applicant shows the need for the conference.

3. Does the applicant describe non-federal resources for funding at least 25 percent of the cost for the conference?

e. Budget Justification and Adequacy of the Facility (reviewed, but not scored):

The proposed budget will be evaluated on the basis of its reasonableness, concise and clear justification, consistency with the intended use of cooperative agreement funds, and the extent to which the applicant documents financial support from other sources.

V.2. Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by NCHSTP. Incomplete applications or applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate your LOI and your application according to the criteria listed in the ''V.1. Criteria'' section above.

In addition, the following factors may affect the funding decision:

Preferences for funding may be given for ensuring a balance of funded agencies that:

1. Serve populations in special settings (*e.g.*, correctional institutions, shelters for runaway youth).

2. Target under-served geographic areas with high-risk populations (*e.g.*, migrant and rural populations).

3. The United States regions and territories are represented.

4. Target people of color (especially African Americans and Hispanic women of color).

5. Provide support of comprehensive primary and secondary prevention programs for persons living with HIV.

No preference will be given to organizations that have received CDC funding in past years.

V.3. Anticipated Announcement Award Date

April 1, 2004

VI. Award Administration Information

VI.1. Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will be notified by mail of the results of the application review.

VI.2. Administrative and National Policy Requirements

45 CFR Part 74 and Part 92

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html*.

The following additional requirements apply to this project:

- AR–5—HIV Program Review Panel Requirements
- AR–8—Public Health System Reporting Requirements
- AR–9—Paperwork Reduction Act Requirements
- AR–10—Smoke-Free Workplace Requirements
- AR–11—Healthy People 2010
- AR–12—Lobbying Restrictions
- AR–15—Proof of Non-Profit Status
- AR–20—Conference Support

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm*.

VI.3. Reporting Requirements

You must provide CDC with an original, plus two hard copies of the following reports:

a. Interim performance report, no less than 90 days before the end of the budget period. The performance report must include:

(1) The cooperative agreement number.

(2) Title of the conference.

(3) Name of the principal investigator, program director or coordinator.

(4) Name of the organization that conducted the conference.

(5) A copy of the agenda.

(6) A list of individuals who participated in the formally planned sessions of the meeting.

(7) A summary of the meeting results, including a discussion of how the meeting reached the stated conference objectives.

(8) The Program Review Panel's report that all written materials have been reviewed as required.

With the prior approval of CDC, copies of proceedings or publications resulting from the conference may be substituted for the performance report, provided they contain the information requested in items one through eight above.

b. Final financial and performance reports, no more than 90 days after the end of the project period.

The reports must be sent to the Grants Management Specialist listed in ''Agency Contacts'' section of this announcement.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, Telephone: (770) 488–2700.

For program technical assistance, contact: Victoria E. Saho, Project Officer, Technical Information and Communications Branch, Division of HIV/AIDS Prevention—Intervention Research and Support, National Center for HIV, STD and TB Prevention, 1600 Clifton Road, NE, M/S E49, Atlanta, GA 30333, Telephone: (404) 639–5211, E-mail: *vsaho@cdc.gov*.

For business management and budget assistance, contact: Carlos Smiley, Grants Management Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Room 3000, Atlanta, GA 30341–4146, Telephone: (770) 488–2722, E-mail: *csmiley1@cdc.gov*.

For business management and budget assistance in the territories contact: Cynthia Montgomery, Contract Specialist, CDC Procurement and Grants Office, 2920 Brandywine Rd., Atlanta, GA 30341–4146, Telephone: (770) 488–2632, E-mail: *caf5@cdc.gov*.

Dated: December 18, 2003.

Edward Schultz,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 03–31830 Filed 12–22–03; 10:26 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04080]

Health Resources and Services Administration Rapid Expansion of Antiretroviral Therapy Programs for HIV-Infected Persons in Selected Countries in Africa and the Caribbean Under the President's Emergency Plan for AIDS Relief; Notice of Availability of Funds-Amendment

A notice announcing the availability of fiscal year (FY) 2004 funds for a cooperative agreement to rapidly expand ART for low-income HIV-infected persons in selected countries in Africa and the Caribbean under the President's Emergency Plan for AIDS Relief was published in the **Federal Register** on December 1, 2003, Volume 68, Number 230, pages 67186–67192. The notice is amended as follows: On page 67188, Column 1, Section ''III.1. Eligible Applicants,'' please insert the following between the first and second paragraphs:

The intent of this solicitation to support organizations that can rapidly implement ARV programs in three or more countries in which each applicant already has an operational presence. Although applications that consist of partnerships or consortia (of organizations that individually do not meet the eligibility criteria) that were formed specifically for the purpose of responding to this RFA would technically meet the eligibility requirements, the duration of the experience of partnerships or consortia (of organizations that individually do not meet the eligibility criteria) in working together will be considered in evaluating the strength of the applicants' proposal.

In addition, on page 67188, Column 2, Section ''IV.1. Address to Request Application Package,'' please disregard the first sentence and replace it with the following:

To apply for this funding opportunity use either application form CDC 5161–1 or CDC 0.1246(E), but we would prefer form CDC 5161–1.

Dated: December 17, 2003.

Sandra R. Manning,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 03–31831 Filed 12–22–03; 10:26 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Citizens Advisory Committee on Public Health Service Activities and Research at Department of Energy (DOE) Sites: Idaho National Engineering and Environmental Laboratory Health Effects Subcommittee (INEELHES)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Agency for Toxic Substances and Disease Registry (ATSDR) and the Centers for Disease Control and Prevention (CDC) announce the following meeting.

Name: Citizens Advisory Committee on Public Health Service Activities and Research at Department of Energy (DOE) Sites: Idaho National Engineering and Environmental Laboratory Health Effects Subcommittee (INEELHES).

Times and Dates: 1 p.m.–4:45 p.m., January 21, 2004. 8 a.m.–4:30 p.m., January 22, 2004.

Place: The Hilton Garden Inn, 145 East Riverside Drive, Eagle, Idaho 83616, telephone 208–938–9600, fax 208–938–5200.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 50 people.

Background: Under a Memorandum of Understanding (MOU) signed in December 1990 with DOE, and replaced by MOUs signed in 1996 and 2000, the Department of Health and Human Services (HHS) was given the responsibility and resources for conducting analytic epidemiologic investigations of residents of communities in the vicinity of DOE facilities, workers at DOE facilities, and other persons potentially exposed to radiation or to potential hazards from non-nuclear energy production use. HHS delegated program responsibility to CDC.

In addition, a memo was signed in October 1990 and renewed in November 1992, 1996, and in 2000, between ATSDR and DOE. The MOU delineates the responsibilities and procedures for ATSDR's public health activities at DOE sites required under sections 104, 105, 107, and 120 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or ''Superfund''). These activities include health consultations and public health assessments at DOE sites listed on, or proposed for, the Superfund National Priorities List and at sites that are the subject of petitions from the public; and other health-related activities such as epidemiologic studies, health surveillance, exposure and disease registries, health education, substance-specific applied research, emergency response, and preparation of toxicological profiles.

Purpose: This subcommittee is charged with providing advice and recommendations to the Director, CDC, and the Administrator, ATSDR, regarding community concerns pertaining to CDC's and ATSDR's public health activities and research at this DOE

site. The purpose of this meeting is to provide a forum for community interaction and to serve as a vehicle for community concerns to be expressed as advice and recommendations to CDC and ATSDR.

Matters to be Discussed: Agenda items include Status of Stanford Cohen & Associates' Draft Report; INEEL Oversight Program of Food Products Grown Near the Aquifer; Presentation on Additional Food Products Grown Near the Aquifer; Overview of the Cancer Data Registry of Idaho and Minority Data; Progress Report on the National Institute for Occupational Safety and Health INEEL Cohort Data; Presentation of the Comprehensive Environmental Response, Compensation and Liability Act and the Relationship Between Maximum Contaminant Levels and Risk; Presentation on Fish as Bioconcentrators; and a Report on Other Activities at the Radiation Studies Branch. Agenda items are subject to change as priorities dictate.

For Further Information Contact: Ms. Natasha Friday, Executive Secretary, INEELHES, Radiation Studies Branch, Division of Environmental Hazards and Health Effects, National Center for Environmental Health, CDC, 1600 Clifton Road, NE (E–39), Atlanta, Georgia 30333, telephone (404) 498–1800, fax (404) 498–1811.

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 ATSDR.

Dated: December 18, 2003.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 03–31663 Filed 12–23–03; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–9019–N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances—July 2003 Through September 2003

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice lists CMS manual instructions, substantive and interpretive regulations, and other **Federal Register** notices that were published from July 2003 through September 2003, relating to the Medicare and Medicaid programs. This notice provides information on national coverage determinations affecting specific medical and health care services under Medicare. Additionally, this notice identifies certain devices with investigational device exemption numbers approved by the Food and Drug Administration that potentially may be covered under Medicare. Finally, this notice also includes listings of all approval numbers from the Office of Management and Budget for collections of information in CMS regulations.

Section 1871(c) of the Social Security Act requires that we publish a list of Medicare issuances in the **Federal Register** at least every 3 months. Although we are not mandated to do so by statute, for the sake of completeness of the listing, and to foster more open and transparent collaboration efforts, we are also including all Medicaid issuances and Medicare and Medicaid substantive and interpretive regulations (proposed and final) published during this 3-month time frame.

FOR FURTHER INFORMATION CONTACT: It is possible that an interested party may have a specific information need and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing information contact persons to answer general questions concerning these items. Copies are not available through the contact persons. (*See* Section III of this notice for how to obtain listed material.)

Questions concerning items in Addendum III may be addressed to Karen Bowman, Office of Strategic Operations and Regulatory Affairs, Centers for Medicare & Medicaid Services, C5–16–03, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–5252.

Questions concerning national coverage determinations in Addendum V may be addressed to Patricia Brocato-Simons, Office of Clinical Standards and Quality, Centers for Medicare & Medicaid Services, C1–09–06, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–0261.

Questions concerning Investigational Device Exemptions items in Addendum VI may be addressed to Sharon Hippler, Office of Clinical Standards and Quality, Centers for Medicare & Medicaid Services, C5–13–27, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–4633.

Questions concerning approval numbers for collections of information in Addendum VII may be addressed to Dawn Willinghan, Office of Strategic Operations and Regulatory Affairs, Regulations Development and Issuances Group, Centers for Medicare & Medicaid Services, C5–09–26, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–6141.

Questions concerning all other information may be addressed to Gwendolyn Johnson, Office of Strategic Operations and Regulatory Affairs, Regulations Development and Issuances Group, Centers for Medicare & Medicaid Services, C5–12–26, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–6954.

SUPPLEMENTARY INFORMATION:

I. Program Issuances

The Centers for Medicare & Medicaid Services (CMS) is responsible for administering the Medicare and Medicaid programs. These programs pay for health care and related services for 39 million Medicare beneficiaries and 35 million Medicaid recipients. Administration of the two programs involves (1) Furnishing information to Medicare beneficiaries and Medicaid recipients, health care providers, and the public and (2) maintaining effective communications with regional offices, State governments, State Medicaid agencies, State survey agencies, various providers of health care, all Medicare contractors that process claims and pay bills, and others. To implement the various statutes on which the programs are based, we issue regulations under the authority granted to the Secretary of the Department of Health and Human Services under sections 1102, 1871, 1902, and related provisions of the Social Security Act (the Act). We also issue various manuals, memoranda, and statements necessary to administer the programs efficiently.

Section 1871(c)(1) of the Act requires that we publish a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations at least every 3 months in the **Federal Register**. We published our first notice June 9, 1988 (53 FR 21730). Although we are not mandated to do so by statute, for the sake of completeness of the listing of operational and policy statements, and to foster more open and transparent collaboration, we are continuing our practice of including Medicare substantive and interpretive regulations (proposed and final) published during the respective 3-month time frame.

II. How To Use the Addenda

This notice is organized so that a reader may review the subjects of manual issuances, memoranda,

substantive and interpretive regulations, national coverage determinations (NCDs), and Food and Drug Administration (FDA)-approved investigational device exemptions (IDEs) published during the subject quarter to determine whether any are of particular interest. We expect this notice to be used in concert with previously published notices. Those unfamiliar with a description of our Medicare manuals may wish to review Table I of our first three notices (53 FR 21730, 53 FR 36891, and 53 FR 50577) published in 1988, and the notice published March 31, 1993 (58 FR 16837). Those desiring information on the Medicare National Coverage Determination Manual (NCDM, formerly the Medicare Coverage Issues Manual (CIM)) may wish to review the August 21, 1989, publication (54 FR 34555). Those interested in the revised process used in making NCDs under the Medicare program may review the September 26, 2003, publication (68 FR 55634).

To aid the reader, we have organized and divided this current listing into six addenda:

- Addendum I lists the publication dates of the most recent quarterly listings of program issuances.
- Addendum II identifies previous **Federal Register** documents that contain a description of all previously published CMS Medicare and Medicaid manuals and memoranda.
- Addendum III lists a unique CMS transmittal number for each instruction in our manuals or Program Memoranda and its subject matter. A transmittal may consist of a single or multiple instruction(s). Often, it is necessary to use information in a transmittal in conjunction with information currently in the manuals.
- Addendum IV lists all substantive and interpretive Medicare and Medicaid regulations and general notices published in the **Federal Register** during the quarter covered by this notice. For each item, we list the—
- Date published;
- **Federal Register** citation;
- Parts of the Code of Federal Regulations (CFR) that have changed (if applicable);
- Agency file code number; and
- Title of the regulation.
- Addendum V includes completed NCDs, or reconsiderations of completed NCDs, from the quarter covered by this notice. Completed decisions are identified by the section of the NCDM (or CIM) in which the decision appears, the title, the date the publication was issued, and the effective date of the decision.
- Addendum VI includes listings of the FDA-approved IDE categorizations, using the IDE numbers the FDA assigns. The listings are organized according to the categories to which the device numbers are assigned (that is, Category A or Category B), and identified by the IDE number.
- Addendum VII includes listings of all approval numbers from the Office of Management and Budget (OMB) for collections of information in CMS regulations in title 42; title 45, subchapter C; and title 20 of the CFR.

III. How To Obtain Listed Material

A. Manuals

Those wishing to subscribe to program manuals should contact either the Government Printing Office (GPO) or the National Technical Information Service (NTIS) at the following addresses:

Superintendent of Documents, Government Printing Office, Attn: New Orders, PO Box 371954, Pittsburgh, PA 15250–7954, Telephone (202) 512–1800, Fax number (202) 512–2250 (for credit card orders); or

National Technical Information Service, Department of Commerce, 5825 Port Royal Road, Springfield, VA 22161, Telephone (703) 487–4630.

In addition, individual manual transmittals and Program Memoranda listed in this notice can be purchased from NTIS. Interested parties should identify the transmittal(s) they want. GPO or NTIS can give complete details on how to obtain the publications they sell. Additionally, most manuals are available at the following Internet address: *http://cms.hhs.gov/manuals/default.asp*.

B. Regulations and Notices

Regulations and notices are published in the daily **Federal Register**. Interested individuals may purchase individual copies or subscribe to the **Federal Register** by contacting the GPO at the address given above. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

The **Federal Register** is also available on 24x microfiche and as an online database through *GPO Access.* The online database is updated by 6 a.m. each day the **Federal Register** is published. The database includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward. Free public access is available on a Wide Area Information Server (WAIS) through the Internet and via asynchronous dial-in. Internet users can access the database by using the World Wide Web; the Superintendent of Documents home page address is *http://www.gpoaccess.gov/fr/index.html*, by using local WAIS client software, or by telnet to *swais.gpoaccess.gov*, then log in as guest (no password required). Dial-in users should use communications software and modem to call (202) 512–1661; type swais, then log in as guest (no password required).

C. Rulings

We publish rulings on an infrequent basis. Interested individuals can obtain copies from the nearest CMS Regional Office or review them at the nearest regional depository library. We have, on occasion, published rulings in the **Federal Register**. Rulings, beginning with those released in 1995, are available online, through the CMS Home Page. The Internet address is *http://cms.hhs.gov/rulings*.

D. CMS's Compact Disk-Read Only Memory (CD–ROM)

Our laws, regulations, and manuals are also available on CD–ROM and may be purchased from GPO or NTIS on a subscription or single copy basis. The Superintendent of Documents list ID is HCLRM, and the stock number is 717–139–00000–3. The following material is on the CD–ROM disk:

- Titles XI, XVIII, and XIX of the Act.
- CMS-related regulations.
- CMS manuals and monthly revisions.
- CMS program memoranda.

The titles of the Compilation of the Social Security Laws are current as of January 1, 1999. (Updated titles of the Social Security Laws are available on the Internet at *http://www.ssa.gov/OP_Home/ssact/comp-toc.htm*.) The remaining portions of CD–ROM are updated on a monthly basis.

Because of complaints about the unreadability of the Appendices (Interpretive Guidelines) in the State Operations Manual (SOM), as of March 1995, we deleted these appendices from CD–ROM. We intend to re-visit this issue in the near future and, with the aid of newer technology, we may again be able to include the appendices on CD–ROM.

Any cost report forms incorporated in the manuals are included on the CD–ROM disk as LOTUS files. LOTUS software is needed to view the reports once the files have been copied to a personal computer disk.

IV. How To Review Listed Material

Transmittals or Program Memoranda can be reviewed at a local Federal Depository Library (FDL). Under the

FDL program, government publications are sent to approximately 1,400 designated libraries throughout the United States. Some FDLs may have arrangements to transfer material to a local library not designated as an FDL. Contact any library to locate the nearest FDL.

In addition, individuals may contact regional depository libraries that receive and retain at least one copy of most Federal Government publications, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library.

Superintendent of Documents numbers for each CMS publication are shown in Addendum III, along with the CMS publication and transmittal numbers. To help FDLs locate the materials, use the Superintendent of Documents number, plus the transmittal number. For example, to find the Hospice Manual, (CMS Pub. 21) transmittal entitled ''Payment of Amounts Owed Medicare,'' use the Superintendent of Documents No. HE 22.8/18 and the transmittal number 69.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance, Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.714, Medical Assistance Program)

Dated: December 2, 2003.

Jacquelyn Y. White,

Director, Office of Strategic Operations and Regulatory Affairs.

Addendum I

This addendum lists the publication dates of the most recent quarterly listings of program issuances.

November 2, 1999 (64 FR 59185)
December 7, 1999 (64 FR 68357)
January 10, 2000 (65 FR 1400)
May 30, 2000 (65 FR 34481)
June 28, 2002 (67 FR 43762)
September 27, 2002 (67 FR 61130)
December 27, 2002 (67 FR 79109)
March 28, 2003 (68 FR 15196)
June 27, 2003 (68 FR 38359)
September 26, 2003 (69 FR 55618)

Addendum II—Description of Manuals, Memoranda, and CMS Rulings

An extensive descriptive listing of Medicare manuals and memoranda was published on June 9, 1988, at 53 FR 21730 and supplemented on September 22, 1988, at 53 FR 36891 and December 16, 1988, at 53 FR 50577. Also, a complete description of the former CIM (now the NCDM) was published on August 21, 1989, at 54 FR 34555. A brief description of the various Medicaid manuals and memoranda that we maintain was published on October 16, 1992, at 57 FR 47468.

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS

[July 2003 through September 2003]

Transmittal No.	Manual/Subject/Publication No.
	Intermediary Manual
	Part 3—Audits, Reimbursement Program Administration (CMS–Pub. 13–3) (Superintendent of Documents No. HE 22.8/6)
1892	• Frequency of Billing Provider Education
1893	• Release Software
1894	• Review of Form CMS–1450 (previously Form HCFA–1450) for Inpatient and Outpatient Bills
1895	• Diabetes Outpatient Self-Management Training Services
1896	• Mammography Screening Diagnostic Mammography Diagnostic and Screening Mammography Performed With New Technologies Mammography Billing Charts for Billing for Computer Aided Detection Devices Common Working File Application of Age and Frequency Edits Hospital Outpatient Partial Hospitalization Services
1897	• Limitation on Payment for Services to Individuals Entitled to Benefits on the Basis of End-Stage Renal Disease Who Are Covered by Group Health Plans Definitions Retroactive Implementation Processing Claims Determining the 30-Month Coordination Period During Which Medicare May Be Secondary Payer Effect of Dual Entitlement Subsequent Periods of End-Stage Renal Disease Eligibility or Entitlement Amount of Secondary Medicare Payments Where Group Health Payments in Part for Items and Services Limitation on Right of Provider or Facility to Charge a Beneficiary Responsibility of Provider/Providers of Service and Renal Dialysis Facilities Action When Group Health Payments Erroneously Pay Primary Benefits Referral to Regional Offices of Cases Involving Taking Into Account Medicare Eligibility or Entitlement and Benefit Differentiation During Coordination Period Claimant's Right To Take Legal Action Against a Group Health Plan Medical Services Furnished to End-Stage Renal Disease Beneficiaries by Source Outside Group Health Plan Managed Care Plan Limitations on Payment for Services to Aged Beneficiaries Who are Covered by a Group Health Plan on the Basis of Current Employment Status Definitions Individuals Subject to Limitation on Payment, General Individuals Not Subject to Limitation on Payment, General Identification of Cases by Providers of Services Identification of Cases and Action Where There Is Indication of Possible Group Health Plan Coverage Action by Provider Where Medicare Is Secondary to Group Health Plan Limitation on Right of Provider or Facility to Charge a Beneficiary

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.		Manual/Subject/Publication No.
		Employer Plan Denies Claim for Primary Benefit
		Referral of Cases to Regional Offices
		Recovery of Mistaken Primary Medicare Payments
		Advice to Providers, Physicians, and Beneficiaries
		Mistaken Group Health Plan Primary Payments
		Claimant's Right to Take Legal Action Against a Group Health Plan
		Special Rules for Services Furnished by Source Outside Group Health Plan
		Managed Care Health Plan
		Medicare as Secondary Payer for Disabled Individuals
1898	•	Payment for Services Furnished by a Critical Access Hospital
		Carriers Manual
		Part 3—Program Administration
		(CMS Pub. 14–3) (Superintendent of Documents No. HE 22.8/7)
1808	•	Mandatory Assignment and Participation Program
		Participation Program
		Limiting Charge
1809	•	Durable Medical Equipment Regional Carriers—Billing Procedures Related to Advance Beneficiary Notice Upgrades
		Providing Upgrades of Durable Medical Equipment Prosthetic, Orthotics, and Supplies Without Any Extra Charge
1810	•	Payment for Physician Services Furnished to Dialysis Inpatients
		Dialysis Services (Codes 90935–90999)
1811	•	Release Software
		Contractor Testing Requirements
1812	•	Definitions of Lines 1 through 115
		Checking Reports
		Exhibits
1813	•	Data Element Requirements
		Payment to Physician for Purchased Diagnostic Tests
		Area Carriers—Physician's Services
		Payment Jurisdiction for Services Paid Under the Physician Fee Schedule and Anesthesia Services
		Claims Processing Instructions for Payment Jurisdiction for Claims Received On or After April 1, 2004
		Payment Jurisdiction for Purchased Services
		Jurisdiction for Shipboard Services
		Exceptions to Jurisdictional Payment
		Exhibit 10
		Items 14–33 Physician or Supplier Information
1814	•	Screening Mammography Examinations
		Identifying a Screening Mammography Claim and a Diagnostic Mammography Claim
		Adjudicating the Claim
		Diagnostic and Screening Mammograms Performed With New Technologies
1815	•	Repairs, Maintenance, Replacement, and Delivery
1816	•	Correct Coding Initiative
1817	•	Medicare Secondary Payment General Provisions
		Third Party Payer Pays Charges in Full
		Physician, Supplier, or Beneficiary Bills Medicare for Primary Benefits
		Multiple Insurers
		Third Party Payer Pays Primary Benefits When Not Required
		Right of Physician or Supplier to Charge Beneficiary
		General
		Definitions
		Current Employment Status
		Employer-Sponsored Managed Care Health Plan
		Nonconforming Group Health Plan
		Recovery of Mistaken Primary Medicare Payments
		Advice to Physicians/Suppliers and Beneficiaries
		Mistaken Group Health Plan Primary Payments
		Claimant's Right to Take Legal Action Against a Group Health Plan
		Special Rules for Services Furnished by Source Outside Group Health Plan
		Managed Care Health Plan
		Medicare Secondary Payer Provisions for Working Aged Individuals
		Individual Not Subject to Medicare Secondary Payer Provision
		Exception for Small Employers in Multi-Employer and Multiple Employer Group Health Plan
		Dually Entitled Individuals
		General
		Individuals Not Subject to Medicare Secondary Payer Provision
		Items and Services Furnished On or After January 1, 1987 and Before August 10, 1993 (Date of Enactment of Omnibus Budget Reconciliation Act of 1993)
1818	•	Filing the Request for Payment
1819	•	Special Requirements for Claims for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.		Manual/Subject/Publication No.
1820	•	Medicare Physician Fee Schedule Database 2004 File Layout Maintenance Process for the Medicare Physician Fee Schedule Database
		Carriers Manual Part 4—Professional Relations (CMS Pub. 14–4) (Superintendent of Documents No. HE 22.8/7–4)
28	•	Provider of Services or Supplier Information
		Program Memorandum Intermediaries (CMS Pub. 60A) (Superintendent of Documents No. HE 22.8/6–5)
A–03–057	•	Medicare Program-Update to the Hospice Payment Rates, Hospice Cap, Hospice Wage Index and the Hospice for Fiscal Year 2004
A–03–058	•	Change in Methodology for Determining Payment for Outliers Under the Acute Care Hospital Inpatient and Long-Term Care Hospital Prospective Payment System
A–03–059	•	Addition of Patient Status Code 43, Deletion of Patient Status Codes 71 and 72, and Information on New Patient Status Code 65
A–03–060	•	Medicare Program—Update to the Prospective Payment System for Home Health Agencies for Fiscal Year 2004
A–03–061	•	Tentative Settlement Requirements for Cost Reports from Home Health Agencies and Skilled Nursing Facilities That Have No Reimbursement Impact
A–03–062	•	Department of Veterans Affairs Claims Adjudication Services Project System Changes Needed
A–03–063	•	Installation of Version 30 of the Provider Statistical and Reimbursement Reporting System
A–03–064	•	X12N 837 Institutional Health Care Claim Companion Document
A–03–065	•	New Common Working File Edits to Ensure Accurate Coding and Payments for Discharge and/or Transfer Policies Under the Inpatient Prospective Payment System
A–03–066	•	Hospital Outpatient Prospective Payment System Implementation Instructions
A–03–067	•	The Supplemental Security Income Medicare Beneficiary Data for Fiscal Year 2002 for Inpatient Prospective Payment System Hospitals
A–03–068	•	Informing Beneficiaries About Which Local Medical Review Policy and/or National Coverage Determination Is Associated With Their Claim Denial
A–03–069	•	October Outpatient Code Editor Specification Version (V4.3)
A–03–070	•	Inclusion of the State of New York in Demonstration for Settlement of Payments for Home Health Services to Dual Eligibles and Instructions for Processing Fiscal Year 2000 Claims Under the Demonstration. Regional Home Health Intermediaries Only.
A–03–071	•	Retroactive Correction of Provider Statistical and Reimbursement System Report Data Related to Mammography and Outpatient Therapy Services
A–03–072	•	Instructions for Provider Credit Balance Reporting Related Activities
A–03–073	•	Fiscal Year 2004 Inpatient Prospective Payment System, Long Term Care Hospital, and Other Billing Changes
A–03–074	•	Inpatient Rehabilitation Facility Annual Update: Prospective Payment System Pricer Changes for Fiscal Year 2004
A–03–075	•	Medicare Part A Skilled Nursing Facility Prospective Payment System Update
A–03–076	•	October 2003 Update of the Hospital Outpatient Prospective Payment System
A–03–077	•	October Medicare Outpatient Code Editor Specification Version 19.0 for Bills From Hospitals That Are Not Paid Under the Outpatient Prospective Payment System
A–03–078	•	Reimbursement for Automated Multi-Channel Chemistry Tests for End-Stage Renal Disease Beneficiaries
A–03–079	•	Installation of Version 31 of the Provider Statistical and Reimbursement Reporting System
A–03–080	•	End-Stage Renal Disease Reimbursement for Automated Multi-Channel Chemistry Test
A–03–081	•	Conflicting Policies With Provider Reimbursement Manual 15–1, Section 2771
A–03–082	•	Clarification for Billing Under the 2300 Provider Number by Hospital-Based Renal Dialysis Facilities
		Program Memorandum Carriers (CMS Pub. 60B) (Superintendent of Documents No. HE 22.8/6–5)
B–03–050	•	Multiple Primary Payers on Part B Claims-Revision to Change Request 2050
B–03–051	•	Therapy Modifier Bypass for Ambulance Claims
B–03–052	•	Addition of Temporary ''Q'' Codes for Drugs Used in Infusion Pumps
B–03–053	•	Healthcare Provider Taxonomy Codes Crosswalk
B–03–054	•	Establishing and Maintaining Provider and Supplier Enrollment Data in Provider kEnrollment, Chain and Ownership System as Needed for Use By the Railroad Medicare Carrier to Pay Claims
B–03–055	•	Common Working File crossover Editing for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies Claims During an Inpatient Stay
B–03–056	•	Durable Medical Equipment Regional Carriers—Additional Instructions for Health Insurance Portability and Accountability Act Implementatyion on National Drug Codes and the National Council of Prescription Drug Programs
B–03–057	•	Additional Guidelines for Implementing the National Council for Prescription Drug Program Format
B–03–058	•	Procedures for the Reconciliation of Total Funds Expended for Multi-Carriers Systems Medicare Contractors Used in the Preparation of Form CMS–1522, Monthly Contractor Financial Report

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.	Manual/Subject/Publication No.
B–03–059	• Minimum Number of Pricing Files That Must Be Maintained Online for Medicare Single Drug Pricer
B–03–060	• Expansion of Beneficiary History and Claims in Process Files in the Voucher Insurance Plan Viable Medicare System. Phase 2—Adjudication Claims in Process File Expansion
B–03–061	• Durable Medical Equipment Regional Carriers National Council of Prescription of Drug Programs Crosswalk Requirements
B–03–062	• Procedures for Non-Medicare Secondary Payer Overpayments With Original Balance Less than $10
B–03–063	• Healthcare Provider Taxonomy Codes Crosswalk
B–03–064	• Clarification—ICD–9 Coding
B–03–065	• Changes to Code List for Therapy Services
B–03–066	• Durable Medical Equipment Regional Carriers—Eliminate Combined Working File Edit for Cancer Diagnosis for National Drug Codes
B–03–067	• National Council for Prescription Drug Programs Batch Transmittal Standard 1.1 Billing Request Companion Document
B–03–068	• 2004 Annual Update for Skilled Nursing Facility Consolidated Billing for the Common Working File and Medicare Carriers
B–03–069	• Schedule for Completing the Calendar Year 2004 Fee Schedule Updates and the Participating Physician Enrollment Procedures
	Program Memorandum Intermediaries/Carriers (CMS Pub. 60A/B) (Superintendent of Documents No. HE 22.8/6–5)
AB–03–094	• October 2003 Quarterly Updates for Skilled Nursing Facility Consolidated Billing
AB–03–095	• Remittance Advice Remark and Reason Code Update
AB–03–096	• Quarterly Update of Healthcare Common Procedure Coding System Codes Used for Home Health Consolidated Billing Enforcement
AB–03–097	• Delay in Implementation of Outpatient Therapy Caps to September 1, 2003
AB–03–098	• Medicare Summary Notice Implementation for Contractors Using Arkansas Part A Standard System and HCFA Part B Standard System
AB–03–099	• Instructions for Fiscal Intermediary Standard System and Multi-Carriers System Healthcare Integrated General Ledger Accounting System Changes
AB–03–100	• October Quarterly Update for 2003 Durable Medical Equipment, Prosthetics, Orthotics, and Supplies Fee Schedule
AB–03–101	• Clarification for CR 2562: Collection of Fee-for-Service Payments Made During Periods of Managed Care Enrollment
AB–03–102	• Clarifications Regarding Coverage of Hyperbaric Oxygen Therapy for the Treatment of Diabetic Wounds of the Lower Extremities
AB–03–103	• Medicare Secondary Payer Debt Referral and Write-Off Closed Instructions
AB–03–104	• Changes to the Laboratory National Coverage Determination Edit Software for October 1, 2003
AB–03–105	• Harkin Grantees: Complaint Tracking System and Aggregate Reports
AB–03–106	• Third Clarification of Medicare Policy Regarding the Implementation of the Ambulance Fee Schedule
AB–03–107	• Federal Bankruptcy/State Insurer Liquidation Actions and Medicare Secondary Payer Debt
AB–03–108	• Medicare Secondary Payer—(1) Use of Inter-Contractor Notices and the Common Working File for the Development of the Medicare Secondary Payer Conditional Payment Amount for Liability, No-Fault, Worker's Compensation, and Federal Tort Claims Act Cases; (2) Reminder Regarding Termination Updates to the Common Working File; (3) Reminder Regarding Savings Information to Non-Lead Contractors
AB–03–109	• Discontinue Use of the Healthcare Integrity and Protection Data Bank for Provider Enrollment Only
AB–03–110	• Adjustment to the Rural Mileage Payment Rate for Ground Ambulance Services
AB–03–111	• Shared System Maintainer Hours for Resolution of Problems Detected During Health Insurance Portability and Accountability Act Transaction Release Testing
AB–03–112	• Transmittal AB–03–112 Has Been Rescinded
AB–03–113	• Update of Codes in the Program Integrity Management Reporting System and the Contractor Administrative Cost and Financial Management System
AB–03–114	• Claims Processing and Payment of Incomplete Screening Colonoscopies
AB–03–115	• Payment Denial for Medicare Services Furnished to Alien Beneficiaries Who Are Not Lawfully Present in the United States
AB–03–116	• Update of Rates and Wage Index for Ambulatory Surgical Center Payment Effective October 1, 2003
AB–03–117	• Contractor Guidance for Connection to the Medicare Data Communication Network for Real-time Eligibility Inquiries (270/271) Via a Route Other Than Insurance Value-Added Network Services
AB–03–118	• Cease Further Work on the Eligibility File-Based Standard Trading Partner Agreement for the Purpose of Coordination of Benefits
AB–03–119	• Final Update to the 2003 Medicare Physician Fee Schedule Database
AB–03–120	• Medicare Secondary Payer—(1) Copy of Recovery Demand Packages Resulting From a Data Match or Non-Data Match Group Health Plan Recovery Action to Insurers/Third Party Administrators of Employers; (2) Documentation Required When an Insurer/Third Party Administrator Wishes to Resolve a Debt on Behalf of Its Client, an Employer Debtor
AB–03–121	• Requirement to Cross Claims Over to Multiple Supplemental Insurers
AB–03–122	• Notice of Interest Rate for Medicare Overpayments and Underpayments
AB–03–123	• Scheduled Release for October Updates to Software Programs and Pricing/Coding Files
AB–03–124	• Standard System Automation of the Notice of Change to Medicare Secondary Payer Auxiliary File Process
AB–03–125	• Consolidation of Claims Cross-Over Process
AB–03–126	• Change in Type of Service for L04080
AB–03–127	• Payment for Fecal Leukocyte Examination Under Clinical Laboratory Improvement Amendments of 1988 Certificate for Provider-Performed Microscopy Procedures During Calendar Year 2003

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.	Manual/Subject/Publication No.
AB–03–128	• Clarification to Transmittal AB–03–044 (CR 2611), Addition of New Temporary ''K'' Codes
AB–03–129	• Addition of Three New International Classifications of Diseases, Ninth Revision, Clinical Modification Diagnosis Codes To Be Effective as Part of the October 1, 2003, International Classification of Diseases, Clinical Update
AB–03–130	• Levocarnitine for Use in the Treatment of Carnitine Deficiency in End-Stage Renal Disease Patients
AB–03–131	• Update to Health Care Claims Status Category Codes and Health Care Claim Status Codes for Use With the Health Care Claim Status Request and Response ASCX12N 276/277
AB–03–132	• Provider Education Article: Guidelines for Medicare Part B Laboratory Testing
AB–03–133	• Managing Medicare Appeals Workloads in Fiscal Year 2004
AB–03–134	• Modifier and Condition Code for Providers to Use When Billing for Implantable Automatic Defibrillators for Beneficiaries in Medicare+Choice Plan
AB–03–135	• Darbepoetin Alfa (Trade Name Aranesp) and Epoetin Alfa (Trade Name Epogen) for Treatment of Anemia in End-Stage Renal Disease Patients on Dialysis
AB–03–136	• Correction to Quarterly Update of Health Care Common Procedure Coding System Codes Used for Home Health Consolidated Billing Enforcement
AB–03–137	• Update of Home Care Common Procedure Coding System Codes and Payment for Ambulatory Surgical Centers and File Names, Descriptions and Instructions for Retrieving the 2004 Ambulatory Surgical Center Home Health Care Common Procedure Coding System Additions, Deletions, and Master Listing
AB–03–138	• Modification of Medicare Policy for Erythropoietin
AB–03–139	• Appeals Quality Improvement and Data Analysis Activities
AB–03–140	• 2004 Healthcare Common Procedure Coding System Annual Update Reminder
AB–03–141	• CMS Companion Document for the Accredited Standards Committee X12N276/277 Health Care Claim Status Request and Response
AB–03–142	• The Coordination of Benefits Contractor Will Post the Lead Medicare Contractor in the Group Name Field on the Common Working File and Expansion of Lead Contractor Viewing in the Electronic Correspondence Referral System
AB–03–143	• Implementation of Certain Initial Determination and Appeal Provisions Within Section 521 of the Medicare, Medicaid and State Child Health Insurance Program Benefits Improvement and Protection Act of 2000
AB–03–144	• Establishing a Uniform Process for the Preparation and Mailing of Case Files From the Contractor to the Office of Hearings and Appeals of the Social Security Administration
AB–03–145	• Instructions for Contractors Other Than the Religious Nonmedical Health Care Institution Specialty Intermediary Regarding Claims For Beneficiaries With Religious Nonmedical Health Care Institution Elections
AB–03–146	• Reminder Notice of the Implementation of the Ambulance Transition Schedule
AB–03–147	• Core Elements and Required Statements for a Valid Privacy Authorization
	State Operations Manual (CMS Pub. 7) (Superintendent of Documents No. HE 22.8/12)
31	• Regional Offices Assignment of Provider and Supplier Identification Number
	Hospice Manual (CMS Pub. 10) (Superintendent of Documents No. HE 22.8/2)
806	• Hospital Manual, Credit Balance Reporting Requirements—General Provisions Payment of Amounts Owed Medicare Medicare Credit Balance Reporting Certification Page
807	• Payment for Services Furnished by a Critical Access Hospital
	Home Health Agency Manual (CMS Pub. 11) (Superintendent of Documents No. HE 33.8/5)
305	• Diabetes Outpatient Self-Management Training
306	• Home Health Agency Manual, Credit Balance Reporting Requirements—General Provisions Completing the Centers for Medicare & Medicaid Services—838 Payment of Amounts Owed Medicare Medicare Credit Balance Report Certification Page
	Skilled Nursing Facility Manual (CMS Pub. 12) (Superintendent of Documents No. HE 22.8/3)
377	• Credit Balance Reporting Requirements—General Provisions Payment of Amounts Owed Medicare Medicare Credit Balance Report Certification Page

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.	Manual/Subject/Publication No.
	Coverage Issues Manual (CMS Pub. 6) (Superintendent of Documents No. HE 22.8/14)
173	• Implantable Automatic Defibrillators
	Peer Review Organization (CMS Pub. 19) (Superintendent of Documents No. 22.8/8–15)
91	• Case Review and Health Care Quality Improvement Program—has been moved to Corresponding Internet-Only Manual chapter in Pub. 100–10, Medicare Quality Improvement Organizations Manual, which can be found at *http://www.cms.hhs.gov/manuals.*
92	• Denials, Reconsiderations and Appeals—has been moved to corresponding Internet-Only Manual chapters in Pub. 100–10, Medicare Quality Improvement Organization Manual, which can be found at *http://www.cms.hhs.gov/manuals.*
93	• Agreements—has been moved to Corresponding Internet-Only Manual chapter in Pub. 100–10, Medicare Quality Improvement Organization Manual, which can be found at *http://www.cms.hhs.gov/manuals.*
94	• Confidentiality and Disclosure—has been moved to the Corresponding Internet-Only Manual, which can be found at *http://www.cms.hhs.gov/manuals.*
95	• Outreach Activities—has been moved to corresponding Internet-Only Manual chapters in Pub. 100–10, Medicare Quality Improvement Organizations Manual, which can be found at *http://www.cms.hhs.gov/manuals.*
96	• Payment Error Prevention Program—has been moved to corresponding Internet-Only Manual chapter in Pub.100–10, Medicare Improvement Organizations Manual, which can be found at *http://www.cms.hhs.gov/manuals.*
97	• Beneficiary Complaint Review—has been moved to corresponding Internet-Only Manual chapter in Pub. 100–10, Medicare Quality Improvement Organizations Manual, which can be found at *http://www.cms.hhs.gov/manuals.*
98	• Data Management—has been moved to corresponding Internet-Only Manual chapter in Pub. 100–10, Medicare Quality Improvement Organizations Manual, which can be found at *http://www.cms.hhs.gov/manuals.*
	Hospice Manual (CMS Pub. 21) (Superintendent of Documents No. HE 22.8/18)
69	• Hospice Manual, Credit Balance Reporting Requirements—General Provisions Completing the Centers for Medicare & Medicaid Services—838 Payment of Amounts Owed Medicare Medicare Credit Balance Report Certification Page
	Outpatient Physical Therapy and Comprehensive Outpatient Rehabilitation Facility Manual (CMS Pub. 9) (Superintendent of Documents No. HE 22. 8/9)
18	• Outpatient Physical Therapy/Comprehensive Outpatient Rehabilitation Facility/Community Mental Health/Clinic Manual, Credit Balance Reporting Requirements General Provisions Completing the Centers for Medicare & Medicaid Services—838 Payment of Amounts Owed Medicare Medicare Credit Balance Reporting Certification Page
	Rural Health Clinic Manual & Federally Qualified Health Centers Manual (CMS Pub. 27) (Superintendent of Documents No. He 22.8/19:985)
39	• Rural Health Clinic and Federally Qualified Health Center Manual, Credit Balance Reporting—General Provisions Completing the CMS–838 Payment of Amounts Owed Medicare Medicare Credit Balance Reporting Certification Page
	Rural Dialysis Facility Manual
	(Non-Hospital Operated) CMS Pub. 29) (Superintendent of Documents No. 22.8/13)
96	• Renal Health Clinic Manual, Credit Balance Reporting Requirement—General Provisions Completing the Centers for Medicare & Medicaid Services–838 Payment of Amounts Owed Medicare Medicare Credit Balance Report Certification Page

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.	Manual/Subject/Publication No.
	Provider Reimbursement Manual
	Part 2 Provider Cost Reporting Forms and Instructions **Chapter 11/Form CMS 22.8/4** **(CMS Pub. 15–2–11)**
5	• Reimbursement Information
	ESRD Network Organizations Manual
	(CMS Pub. 81) **(Superintendent of Documents No. HE 22.9/4)**
15	• Background and Responsibilities Administration Confidentiality and Disclosure Information Management Quality Improvement Community Information and Resource Sanctions and End-Stage Renal Disease Grievances Publication Policy Information Collection
	Medicare Claims Processing Manual
	(CMS Pub. 100–04)
3	• New Effective Data for CR2112 (Revisions to the Outpatient Prospective Payment System Pricer Software and Outpatient Code Editor for Blood Deductible and Technician)
	Financial Management
	(CMS Pub. 100–06)
19	• Intermediary Claims Accounts Receivable
	Medicare Program Integrity
	(CMS Pub. 100–08)
44	• When to Develop New/Revised Local Medical Review Policy Coverage Provisions in Local Medical Review Policy Contractor Medical Director Local Medical Review Policy Development Process Final Local Medical Review Policy Web Site Requirements
45	• Focused Medical Review Activity Report
46	• Prepayment Edits
47	• Data Analysis Centers for Medicare & Medicaid Services Mandated Edits
48	• Written Orders Prior to Delivery
49	• Denial Notices
50	• Instructions for Processing Advance Determination of Medicare Coverage Request
51	• Update of Codes in the Program Integrity Management Reporting System and the Contractor Administrative Cost and Financial Management System
	Quality Improvement Organization
	(CMS Pub. 100–10)
2	• Introduction Referrals Quality Review Diagnostic Related Group Limitation on Liability Determinations Third-Level Physician Review Use of the Physician Reviewer Assessment Format Review Setting Requesting Medical Records/Reviewing Documentation Providing Opportunity for Discussion Adhering to Review Timeframes Monitoring Hospitals' Physician Acknowledgement Statements
3	• Introduction Quality Improvement Project Process Developing and Conducting Interventions Documenting and Disseminating Results Centers for Medicare & Medicaid Services Project Support and Guidance Activities

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.		Manual/Subject/Publication No.
		Related Activities Through Quality Improvement Organizations, Carrier, Intermediary, and End-Stage Renal Diseases Network Cooperation
4	•	Beneficiary Request for Review of Hospital-Issued Notice of Non-Coverage by a Quality Improvement Organization
5	•	Intermediary/Carrier Memorandum of Agreement Specifications Introduction Memorandum of Agreement With State Agencies Responsible for Licensing/Certification of Providers/Practitioners
6	•	Statutory and Regulatory Requirements General Requirements Confidential Information Disclosure of Confidential Quality Improvement Organization Information to Officials and Agencies Disclosure of Quality Improvement Organization Information for Research Purposes Disclosure of Quality Improvement Organization Sanction Information Re-disclosure of Quality Improvement Organization Information
7	•	Beneficiary Helpline Language Beneficiary Complaints Physician/Provider Meeting Activities Quality Improvement Organization/Intermediary/Carriers Coordination Activities Background Confidentiality Requirements Report Requirements Distribution Requirements Publications Policy Definition Requirements Disagreements Information Collection Policy Centers for Medicare & Medicaid Services Office of Clinical Standards and Quality Requirement Statutory and Regulatory Requirements—Office of Management & Budget Centers for Medicare & Medicaid Services, Information Collection Approval Process Additional Consideration
8	•	Introduction Review Responsibilities Monitoring Hospital Payment Patterns and Developing Collaborating With Provider and Practitioner Groups Collaborating Efforts With Federal and State Agencies and Other Medicare Contractors
9	•	Scope of Review Complaints That Do Not Meet Statutory Requirements Referral Review Process Notice of Disclosure Final Response to Complaints Disclosure of Quality Review Information to Complaints Corrective Actions Coordination With Other Entities Data Analysis and Reporting Requirements
10	•	Authority Purpose of Quality Improvement Organization Review Quality Improvement Organization Responsibilities Centers for Medicare & Medicaid Services' Role Health Care Quality Improvement Program Hospital Payment Monitoring Program
		End Stage Renal Disease (CMS Pub. 100–14)
1	•	Forward Purpose of the Network Manual Statutes and Regulations End-Stage Renal Disease Network Organization's Manual Revisions Acronyms and Glossary Purpose of End-Stage Renal Disease Network Organization Requirements for End-Stage Renal Disease Network Organization Responsibilities of End-Stage Renal Disease Network Organization Health Care Quality Improvement Program Goals Network Organization's Role in Health Care Quality Improvement Program
2	•	Forward Purpose of the Network Manual Statutes and Regulations

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.		Manual/Subject/Publication No.
		Revision to the End-Stage Renal Disease Organizations Manual
		Purpose of End-Stage Renal Disease Network Organization
		Requirements for End-Stage Renal Disease Network Organizations
		Responsibilities of End-Stage Renal Disease Network Organizations
		Goals
		Network Organization's Role in Health Care Quality Improvement Program
3	•	Organizational Structure
		Establishing the Network Computer
		Board of Directors
		Other Committees
		Network Staff
		Required Administrative Reports/Activities
		Quarterly Progress and Status Reports
		Annual Report
		Semi-Annual Report of Network Operating Costs
		New End-Stage Renal Disease Patient Orientation Package Activities
		Internal Quality Control Program
		Internal Quality Control Program Requirements
		Managed Care Manual (CMS Pub. 100–16)
26	•	Alternate Employer Group Enrollment Election
		Optional Employer Group Medicare+Choice Enrollment Election
		Request Submitted via Internet
		Request Signature and Data
		Effective Dates
		Notice Requirements
		Optional Employer Group Medicare+Choice Disenrollment Election
		Medigap Guaranteed Issue Notification Requirements
		General Rule
		Effective Date
		Researching and Acting on a Change of Address
		Clarified the Notice Requirements for Out of Area Permanent
27	•	Noncontracted Provider Appeals
		Storage of Appeal Case Files by the Independent Review Entity
		Representative Filing on Behalf of the Enrollee
		Storage of Hearing Files
28	•	Streamlined Marketing Review Process
		Introduction
		Marketing Review Process
		Guidelines for Advertising Material
		Guidelines for Advertising (Pre-Enrollment) Material
		Guidelines for Beneficiary Notification Materials
		Model Annual Notice of Change
		General Guidance on Dual Eligibility
		Guideline for Outreach Program
		Submission Requirements
		Centers for Medicare & Medicaid Services' Review/Approval Process
		Model Direct Mail Letter
		Summary of Benefits for Medicare+Choice Organizations
		Referral Programs
		Allowable Actions for Medicare+Choice Organizations
		Specific Guidance About the Use of Independent Insurance Agents
		Answers to Frequently Asked Questions About Promotional Marketing of Multiple Lines of Business
29	•	Introduction
		Quality Assessment and Performance Improvement Program
		Administration of the Quality Assessment and Performance Improvement Program
		Medicare+Choice Organizations Using Physician Incentive Plans
		Health Information System
		Quality Assessment and Performance Improvement
		Centers for Medicare & Medicaid Services' Directed Special Projects
		Reporting Time Frames
		Communication Process
		Quality Assessment and Performance Improvement
		Process for Centers for Medicare & Medicaid Services' Multi-Year Quality Assessment and Performance Improvement Program Project Approvals
		Evaluation of Quality Assessment and Performance Improvement Program Projects
		The Medicare+Choice Deeming Program
		Terminology
		General Rule

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.		Manual/Subject/Publication No.
		Obligations of Deemed Medicare and Medicaid Organizations
		Oversight of Accrediting Organizations
		Application Requirements
		Reporting Requirements
		Informal Hearing Procedures
30	•	Reasonable Cost-Based Payments—General
		Reasonable Cost Payments
		Bill Processing
		Principles of Payments
		Budget and Enrollment Forecast
		Interim Per Capita Rate
		Interim Payment for Health Care Prepayment Plans
		Electronic Transfer of Funds
		Payment Report
		Interim and Final Cost and Enrollment Report
		Adjustment of Payments
		Final Cost Report
		Final Settlement Process for Medicare Health Care Prepayment Plans
		Final Settlement Payment for Medicare Health Care Prepayment Plans
		Recovery of Overpayment
		Interest Charges for Medicare Overpayments/Underpayments
		The Basic Rules
		Definition of Final Determination
		Rate of Interest
		Accrual of Interest
		Waiver of Interest
		Rules Applicable to Partial Payments
		Exception to Applicability
		Nonallowable Interest Cost
		Centers for Medicare & Medicaid Services' General Payment Principles
		Medicare Payments to Health Care Prepayment Plans
		Prudent Buyer Principle
		Allowable Costs
		Costs Not Reimbursable Directly to the Health Care Prepayment Plans
		Deductible and Coinsurance
		Hospice Care Costs
		Medicare as Secondary Payer
31	•	Overview of Enrollment and Payment Process
		Purpose of the Chapter
		Medicare+Choice Organization Data Processing Responsibilities
		Centers for Medicare & Medicaid Services' Group Health Plan System
		Enrollment/Disenrollment Requirements and Effective Dates
		General
		Enrollments
		Cost-Based Medicare+Choice Organizations Only
		Medicare+Choice Organizations Only
		Disenrollments
		Cost-Based Medicare+Choice Organizations Only
		Medicare+Choice Organizations Only
		Cost-Based Medicare+Choice Organizations Only—Employer Group Health Plan
		Retroactive Enrollment
		Medicare Membership Information
		The Centers for Medicare & Medicaid Services' Medicare+Choice
		Organizations Only Interface Submitting Medicare Membership
		Information to Centers for Medicare & Medicaid Services
		Submission of Enrollment/Disenrollment Transaction Records
		Submission of Correction Transaction Records
		Health Insurance Claim Number
		Transaction Type Code and the Prior Commercial Indicator
		Transaction Type Codes
		Prior Commercial Months Field
		Special Status Beneficiaries—Medicare+Choice Organizations
		Special Status Beneficiaries
		Special Status—Hospice
		Special Status—End-Stage Renal Disease
		Special Status—Institutionalized
		Special Status—Medicaid/Medical Assistance Only
		Special Status—Working Aged
		When to Submit ''Special Status'' Information (Medicare+Choice Organizations Only)
		Other Medicare Membership Information

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[July 2003 through September 2003]

Transmittal No.	Manual/Subject/Publication No.
	Risk Adjustment Payment
	Bonus Payment
	Extra Payment in Recognition of Quality Congestive Heart Failure
	Outpatient Care
	Benefit Stabilization Fund
	Electronic Submission of Membership Records to Centers for Medicare & Medicaid Services
	Timeliness Requirements
	Record Submission Schedule
	Sending the Transaction File to Centers for Medicare & Medicaid Services
	Electronic Data Transfer
	Centers for Medicare & Medicaid Services' Data Center Access
	Data Processing Vendor
	Receiving Medicare Membership Information Form Centers for Medicare & Medicaid Services
	General
	Centers for Medicare & Medicaid Services' Transaction Reply/Monthly Activity Report
	Transaction Reply Field Information
	Plan Payment Report
	Demographic Report—Medicare+Choice Organizations Only
	Medicare Fee-For-Service Bill Itemization and Summary Report
	Monthly Membership Report
	Bonus Payment Report
	Working Aged Transaction Status Report
	Retroactive Payment Adjustment Policy
	Standard Operating Procedures for State and County Code Adjustments
	Standard Operating Procedures for Processing of Institutional Adjustments
	Standard Operating Procedures for Medicaid Retroactive Adjustments
	Standard Operating Procedures for End-Stage Renal Disease Retroactive Adjustments
	Processing of Working Aged Retroactive Adjustments
	Standard Operating Procedures for Retroactive Adjustment Plan Elections
	Centers for Medicare & Medicaid Services, Social Security Administration, and Customer Service Center Disenrollments
	General
	Medicare Customer Service Center Disenrollments
	Centers for Medicare & Medicaid Services' Disenrollments
	Coordination With the Medicare Fee-For-Services Program
	Pro-Rate Deductible
	Duplicate Payment Prevention by Cost-Based Medicare+Choice Organizations

Addendum IV—Regulation Documents Published in the Federal Register [July 2003 Through September 2003]

Publication date	FR Vol. 68 page No.	CFR parts affected	File code	Title of regulation
July 2, 2003	39764		CMS–1473–NC	Medicare Program; Home Health Prospective Payment System Rate Update for FY 2004.
July 15, 2003	41861		OFR Correction	Medicare Program; Prospective Payment System for Long-Term Care Hospitals: Annual Payment Rate Updates and Policy Changes.
July 25, 2003	44091		CMS–3117–N	Medicare Program; Meeting of the Medicare Coverage Advisory Committee September 9, 2003.
July 25, 2003	44089		CMS–1260–N	Medicare Program; Meeting of the Advisory Panel on Ambulatory Payment Classification Groups—August 22, 2003.
July 25, 2003	44088		CMS–3124–WN	Medicare Program; Withdrawal of Medicare Coverage of Multiple-Seizure Electroconvulsive Therapy, Electrodiagnostic Sensory Nerve Conduction Threshold Testing, and Noncontact Normothermic Wound Therapy.
July 25, 2003	44000	42 CFR Part 424	CMS–1185–P	Medicare Program; Elimination of Statement of Intent Procedures for Filing Medicare Claims.
July 25, 2003	43998	42 CFR Part 406	CMS–4018–P	Medicare Program; Continuation of Medicare Entitlement When Disability Benefit Entitlement Ends Because of Substantial Gainful Activity.

Publication date	FR Vol. 68 page No.	CFR parts affected	File code	Title of regulation
July 25, 2003	43995	42 CFR Parts 405 and 411.	CMS–6014–P	Medicare Program; Interest Calculation.
July 25, 2003	43940	42 CFR Parts 411 and 489.	CMS–1475–FC	Medicare Program; Third Party Liability Insurance Regulations.
August 1, 2003	45674	42 CFR Part 412	CMS–1474–F	Medicare Program; Changes to the Inpatient Rehabilitation Facility Prospective Payment System and Fiscal Year 2004 Rates.
August 1, 2003	45346	42 CFR Parts 412 and 413.	CMS–1470–F	Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2004 Rates.
August 4, 2003	46036	42 CFR Parts 409, 411, 413, 440, 483, 488, and 489.	CMS–1469–F	Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities—Update.
August 11, 2003	47637	42 CFR Part 412	CMS–1470–F	Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2004 Rates.
August 12, 2003	47966	42 CFR Parts 410 and 419.	CMS–1471–P	Medicare Program; Changes to the Hospital Outpatient Prospective Payment System and Calendar Year 2004 Payment Rates.
August 15, 2003	49030	42 CFR Parts 410 and 414.	CMS–1476–P	Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2004.
August 15, 2003	48805	42 CFR Part 424	CMS–0008–IFC	Medicare Program; Electronic Submission of Medicare Claims.
August 20, 2003	50428	42 CFR Part 405	CMS–1229–P	Medicare Program; Payment Reform for Part B Drugs.
August 22, 2003	50840	42 CFR Parts 409, 417, and 422.	CMS–4041–F	Medicare Program; Modifications to Managed Care Rules.
August 22, 2003	50794		CMS–1236–N	Medicare Program; September 15 and 16, 2003, Meeting of the Practicing Physicians Advisory Council and Request for Nominations.
August 22, 2003	50793		CMS–4053–N	Medicare Program: Meeting of the Advisory Panel on Medicare Education—September 18, 2003.
August 22, 2003	50790		CMS–2136–FN	Medicaid Program; State Allotments for Payment of Medicare Part B Premiums for Qualifying Individuals: Federal Fiscal Year 2002.
August 22, 2003	50784		CMS–2166–N	State Children's Health Insurance Program; Final Allotments to States, the District of Columbia, and U.S. Territories and Commonwealths for Fiscal Year 2004.
August 22, 2003	50735	42 CFR Part 414	CMS–1167–P	Medicare Program; Payment for Respiratory Assist Devices With Bi-level Capability and a Back-up Rate.
August 22, 2003	50722		CMS–2226–CN	Medicare, Medicaid, and CLIA Programs; Laboratory Requirements Relating to Quality Systems and Certain Personnel Qualifications; Correction.
August 22, 2003	50717	42 CFR Part 413	CMS–1199–F	Medicare Program; Electronic Submission of Cost Reports.
August 29, 2003	51912	42 CFR Part 447	CMS–2175–FC	Medicaid Program; Time Limitation on Price Recalculations and Recordkeeping Requirements Under the Drug Rebate Program.
September 9, 2003	53266	42 CFR Part 412	CMS–1262–P	Medicare Program; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility.
September 9, 2003	53222	42 CFR Parts 413, 482, and 489.	CMS–1063–F	Medicare Program; Clarifying Policies Related to the Responsibilities of Medicare-Participating Hospitals in Treating Individuals With Emergency Medical Conditions.
September 26, 2003	55634		CMS–3062–N	Medicare Program; Revised Process for Making Medicare National Coverage Determinations.
September 26, 2003	55618		CMS–9018–N	Medicare and Medicaid Programs; Quarterly Listing of Program Issuances—April 2003 Through June 2003.
September 26, 2003	55616		CMS–2182–FN	Medicare and Medicaid Programs; Reapproval of the Community Health Accreditation Program (CHAP) for Deeming Authority for Hospices.

Publication date	FR Vol. 68 page No.	CFR parts affected	File code	Title of regulation
September 26, 2003	55566	42 CFR Parts 410 and 414.	CMS–1476–CN	Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2004; Correction.
September 26, 2003	55528	42 CFR Parts 483 and 488.	CMS–2131–F	Medicare and Medicaid Programs; Requirements for Paid Feeding Assistants in Long Term Care Facilities.
September 26, 2003	55527	42 CFR Part 447	CMS–2175–CN	Medicaid Program; Time Limitation on Price Recalculations and Recordkeeping Requirements Under the Drug Rebate Program; Correction
September 29, 2003	55882	42 CFR Parts 409, 411, 413, 440, 483, 488, and 489.	CMS–1469–CN	Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Correction.
September 30, 2003	56478		CMS–1233–N	Medicare Program; Hospice Wage Index for Fiscal Year 2004.
September 30, 2003	56383		CMS–1473–NC OFR Correction.	Medicare Program; Home Health Prospective Payment System Rate Update for FY 2004; Correction.

Addendum V—National Coverage Determinations [July 2003 Through September 2003]

A national coverage determination (NCD) is a determination by the Secretary with respect to whether or not a particular item or service is covered nationally under Title XVIII of the Social Security Act, but does not include a determination of what code, if any, is assigned to a particular item or service covered under this title, or determination with respect to the amount of payment made for a particular item or service so covered. We include below all of the NCDs that were issued during the quarter covered by this notice. The entries below include information concerning completed decisions as well as sections on program and decision memoranda, which also announce pending decisions or, in some cases, explain why it was not appropriate to issue an NCD. We identify completed decisions by the section of the NCDM (or CIM) in which the decision appears, the title, the date the publication was issued, and the effective date of the decision. Information on completed decisions as well as pending decisions has also been posted on the CMS Web site at *http://cms.hhs.gov/coverage*.

National Coverage Decisions [July 2003 Through September 2003]

COVERAGE ISSUES MANUAL (CIM) (CMS PUB. 06)

CIM section	Title	Issue date	Effective date
35–85.1	Implantable Automatic Defibrillators	08/22/03 09/22/03 (correction)	10/01/03 10/01/03

PROGRAM MEMORANDUM (PM)

PM No.	Title	Issue date	Effective date
AB–03–104	Changes to the Laboratory NCD Edit Software For 10/03	07/25/03	10/01/03

FEDERAL REGISTER PUBLICATIONS

Title	Publication date	Effective date
CMS–3062–N—Revised Process for Making National Coverage Determinations	09/26/03	N/A

Addendum VI—Categorization of Food and Drug Administration-Allowed Investigational Device Exemptions

Under the Food, Drug, and Cosmetic Act (21 U.S.C. 360c), devices fall into one of three classes. Also, under the new categorization process to assist CMS, the Food and Drug Administration (FDA) assigns each device with an FDA-approved investigational device exemption (IDE) to one of two categories. Category A refers to experimental/investigational device exemptions, and Category B refers to nonexperimental/investigational device exemptions. To obtain more information about the classes or categories, please refer to the **Federal Register** notice published on April 21, 1997 (62 FR 19328).

The following information presents the device number and category (A or B) for the second quarter, July through September 2003.

INVESTIGATIONAL DEVICE EXEMPTION NUMBERS, 3RD QUARTER 2003

IDE	Category
G020202	B
G020312	B
G020316	B
G030027	B
G030031	B

INVESTIGATIONAL DEVICE EXEMPTION NUMBERS, 3RD QUARTER 2003—Continued

IDE	Category
G030040	B
G030059	B
G030066	B
G030100	B
G030121	B
G030131	B
G030133	B
G030134	B
G030135	B
G030136	B

INVESTIGATIONAL DEVICE EXEMPTION NUMBERS, 3RD QUARTER 2003—Continued

IDE	Category
G030137	B
G030138	B
G030141	B
G030143	B
G030144	B
G030145	B
G030146	B
G030147	B
G030151	B
G030159	B

INVESTIGATIONAL DEVICE EXEMPTION NUMBERS, 3RD QUARTER 2003—Continued

IDE	Category
G030162	B
G030165	B
G030167	B
G030169	B
G030170	B
G030172	B
G030173	B
G030174	B
G030177	B

Addendum VII—Approval Numbers for Collections of Information

Below we list all approval numbers for collections of information in the referenced sections of CMS regulations in Title 42; Title 45, Subchapter C; and Title 20 of the Code of Federal Regulations, which have been approved by the Office of Management and Budget:

OMB control Nos.	Approved CFR sections in Title 42, Title 45, and Title 20 (**Note:** sections in Title 45 are preceded by ''45 CFR,'' and sections in Title 20 are preceded by ''20 CFR'')
0938–0008	414.40, 424.32, 424.44
0938–0022	413.20, 413.24, 413.106
0938–0023	424.103
0938–0025	406.28, 407.27
0938–0027	486.100–486.110
0938–0033	405.807
0938–0034	405.821
0938–0035	407.40
0938–0037	413.20, 413.24
0938–0041	408.6
0938–0042	410.40, 424.124
0938–0045	405.711
0938–0046	405.2133
0938–0050	413.20, 413.24
0938–0062	431.151, 435.1009, 440.220, 440.250, 442.1, 442.10–442.16, 442.30, 442.40, 442.42, 442.100–442.119, 483.400–483.480, 488.332, 488.400, 498.3–498.5
0938–0065	485.701–485.729
0938–0074	491.1–491.11
0938–0080	406.7, 406.13
0938–0086	420.200–420.206, 455.100–455.106
0938–0101	430.30
0938–0102	413.20, 413.24
0938–0107	413.20, 413.24
0938–0146	431.800–431.865
0938–0147	431.800–431.865
0938–0151	493.1405, 493.1411, 493.1417, 493.1423, 493.1443, 493.1449, 493.1455, 493.1461, 493.1469, 493.1483, 493.1489
0938–0155	405.2470
0938–0170	493.1269–493.1285
0938–0193	430.10–430.20, 440.167
0938–0202	413.17, 413.20
0938–0214	411.25, 489.2, 489.20
0938–0236	413.20, 413.24
0938–0242	416.44, 418.100, 482.41, 483.270, 483.470
0938–0245	407.10, 407.11
0938–0246	431.800–431.865
0938–0251	406.7
0938–0266	416.41, 416.47, 416.48, 416.83
0938–0267	410.65, 485.56, 485.58, 485.60, 485.64, 485.66
0938–0269	412.116, 412.632, 413.64, 413.350, 484.245
0938–0270	405.376
0938–0272	440.180, 441.300–441.305
0938–0273	485.701–485.729
0938–0279	424.5
0938–0287	447.31
0938–0296	413.170
0938–0300	431.800
0938–0301	413.20, 413.24
0938–0302	418.22, 418.24, 418.28, 418.56, 418.58, 418.70, 418.74, 418.83, 418.96, 418.100
0938–0313	418.1–418.405
0938–0328	482.12, 482.22, 482.27, 482.30, 482.41, 482.43, 482.53, 482.56, 482.57, 482.60, 482.61, 482.62, 482.66
0938–0334	491.9
0938–0338	486.104, 486.106, 486.110
0938–0354	441.60
0938–0355	484.10–484.52
0938–0357	409.40–409.50, 410.36, 410.170, 411.4–411.15, 421.100, 424.22, 484.18, 489.21
0938–0358	412.20–412.30

OMB control Nos.	Approved CFR sections in Title 42, Title 45, and Title 20 (**Note:** sections in Title 45 are preceded by ''45 CFR,'' and sections in Title 20 are preceded by ''20 CFR'')
0938–0359	412.40–412.52
0938–0360	405.2100–405.2184
0938–0365	484.10, 484.11, 484.12, 484.14, 484.16, 484.18, 484.20, 484.36, 484.48, 484.52
0938–0372	414.330
0938–0378	482.60–482.62
0938–0379	442.30, 488.26
0938–0386	405.2100–405.2171
0938–0391	488.18, 488.26, 488.28
0938–0426	476.104, 476.105, 476.116, 476.134
0938–0429	447.53
0938–0443	473.18, 473.34, 473.36, 473.42
0938–0444	1004.40, 1004.50, 1004.60, 1004.70
0938–0445	412.44, 412.46, 431.630, 456.654, 466.71, 466.73, 466.74, 466.78
0938–0447	405.2133
0938–0449	440.180, 441.300–441.310
0938–0454	424.20
0938–0456	412.105
0938–0463	413.20, 413.24
0938–0465	411.404, 411.406, 411.408
0938–0467	431.17, 431.306, 435.910, 435.920, 435.940–435.960
0938–0469	417.107, 417.478
0938–0470	417.143, 417.408
0938–0477	412.92
0938–0484	424.123
0938–0486	498.40–498.95
0938–0501	406.15
0938–0502	433.138
0938–0512	486.301–486.325
0938–0526	462.102, 462.103. 475.100, 475.106, 475.107
0938–0534	410.38, 424.5
0938–0544	493.1–493.2001
0938–0565	411.20–411.206
0938–0566	411.404, 411.406, 411.408
0938–0567	Part 498 Subparts D and E, and 20 CFR 404.933
0938–0573	412.230, 412.256
0938–0581	493.1–493.2001
0938–0599	493.1–493.2001
0938–0600	405.371, 405.378, 413.20
0938–0610	417.436, 417.801, 422.128, 430.12, 431.20, 431.107, 434.28, 483.10, 484.10, 489.102
0938–0612	493.1–493.2001
0938–0618	433.68, 433.74, 447.272
0938–0653	493.1771, 493.1773, 493.1777
0938–0655	493.1840
0938–0657	405.2110, 405.2112
0938–0658	405.2110, 405.2112
0938–0667	482.12, 488.18, 489.20, 489.24
0938–0673	430.10
0938–0679	410.38
0938–0685	410.32, 410.71, 413.17, 424.57, 424.73, 424.80, 440.30, 484.12
0938–0686	493.551–493.557
0938–0688	486.301–486.325
0938–0690	488.4–488.9, 488.201
0938–0691	412.106
0938–0692	466.78, 489.20, 489.27
0938–0700	417.479, 417.500; 422.208, 422.210; 434.44, 434.67, 434.70; 1003.100, 1003.101, 1003.103, 1003.106
0938–0701	422.152
0938–0702	45 CFR 146.111, 146.115, 146.117, 146.150, 146.152, 146.160, 146.180
0938–0703	45 CFR 148.120, 148.124, 148.126, and 148.128
0938–0714	411.370–411.389
0938–0717	424.57
0938–0721	410.33
0938–0722	422.370–422.378
0938–0723	421.300–421.318
0938–0730	405.410, 405.430, 405.435, 405.440, 405.445, 405.455, 410.61, 415.110, 424.24
0938–0732	417.126, 417.470
0938–0734	45 CFR 5b
0938–0739	413.337, 413.343, 424.32, 483.20
0938–0742	422.300–422.312
0938–0749	424.57
0938–0753	422.000–422.700
0938–0754	441.152
0938–0758	413.20, 413.24
0938–0760	Part 484 Subpart E, 484.55

OMB control Nos.	Approved CFR sections in Title 42, Title 45, and Title 20 (**Note:** sections in Title 45 are preceded by ''45 CFR,'' and sections in Title 20 are preceded by ''20 CFR'')
0938–0761	484.11, 484.20
0938–0763	422.1–422.10, 422.50–422.80, 422.100–422.132, 422.300–422.312, 422.400–422.404, 422.560–422.622
0938–0768	417.800–417.840
0938–0770	410.2
0938–0778	422.64, 422.111, 422.560–422.622
0938–0779	417.126, 417.470, 422.64, 422.210
0938–0781	411.404–411.406, 484.10
0938–0786	438.352, 438.360, 438.362, 438.364
0938–0787	406.28, 407.27
0938–0790	460.12, 460.22, 460.26, 460.30, 460.32, 460.52, 460.60, 460.70, 460.71, 460.72, 460.74, 460.80, 460.82, 460.98, 460.100, 460.102, 460.104, 460.106, 460.110, 460.112, 460.116, 460.118, 460.120, 460.122, 460.124, 460.132, 460.152, 460.154, 460.156, 460.160, 460.164, 460.168, 460.172, 460.190, 460.196, 460.200, 460.202, 460.204, 460.208, 460.210
0938–0792	491.3, 491.8, 491.11
0938–0798	413.24, 413.65, 419.42
0938–0802	419.43
0938–0810	482.45
0938–0819	45 CFR 146.121
0938–0823	420.410
0938–0824	440.10, 482.13
0938–0827	45 CFR 146.141
0938–0829	422.568
0938–0832	Part 489
0938–0833	483.350–483.376
0938–0841	431.636, 457.50, 457.60, 457.70, 457.340, 457.350, 457.431, 457.440, 457.525, 457.560, 457.570, 457.740, 457.750, 457.810, 457.940, 457.945, 457.965, 457.985, 457.1005, 457.1015, 457.1180
0938–0842	412, 413
0938–0846	411.1, 411.350–411.357, 424.22
0938–0857	Part 419
0938–0860	Part 419
0938–0866	45 CFR Part 162
0938–0872	413.337, 483.20
0938–0873	422.152
0938–0874	45 CFR Parts 160 and 162
0938–0878	Part 422 Subparts F and G
0938–0883	45 CFR Parts 160 and 164
0938–0887	45 CFR 148.316, 148.318, 148.320
0938–0897	412.22, 412.533

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3119–PN]

RIN 0938–AM36

Medicare Program; Procedures for Maintaining Code Lists in the Negotiated National Coverage Determinations for Clinical Diagnostic Laboratory Services

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of proposed procedures for code maintenance.

SUMMARY: This proposed notice would establish the procedures for maintaining the lists of codes that were included in the national coverage determinations (NCDs) that were announced in the final rule published in the **Federal Register** on November 23, 2001 (66 FR 58788). It also sets forth the circumstances in which a laboratory is permitted to use the date the specimen was retrieved from storage for testing as the date of service instead of the date of collection. The proposed notice clarifies the meaning of the ''date of collection.'' In this proposed notice, we propose a standard time frame that would define when a specimen has been ''archived'' for undetermined later use.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on February 23, 2004.

ADDRESSES: In commenting, please refer to file code CMS–3119–PN. Because staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission or e-mail.

Mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3119–PN, P.O. Box 8011, Baltimore, MD 21244–8011. Please allow sufficient time for mailed comments to be timely received in the event of delivery delays.

If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) to one of the following addresses: Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–14–03, 7500 Security Boulevard, Baltimore, MD.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Jackie Sheridan-Moore, (410) 786–4635.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–9994.

I. Background

A. Current Statutory Authority and Medicare Policies

Sections 1833 and 1861 of the Social Security Act (the Act) provide for payment of, among other things, clinical diagnostic laboratory services under Medicare Part B. Diagnostic tests must be ordered either by a physician, as described in 42 CFR 410.32(a), or by a qualified nonphysician practitioner, as described in § 410.32(a)(3). Tests may be furnished by any of the entities listed in § 410.32(d). A laboratory furnishing tests on human specimens must meet all applicable requirements of the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (Pub. L. 100–578) enacted on October 31, 1988, as implemented by the regulations set forth at 42 CFR part 493. Part 493 applies to all laboratories non-exempt and non-excepted that test human specimens for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of human beings. Section 1862(a)(1)(A) of the Act generally provides that no Medicare payment may be made for expenses incurred for items or services that are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member. Moreover, section 1862(a)(7) of the Act excludes coverage for routine physical checkup expenses, eyeglasses (other than eyewear described in section 1861(s)(8) of the Act), or eye examinations for the purpose of prescribing, fitting, or changing eyeglasses. In addition, the Act excludes coverage for procedures performed (during the course of any eye examination) to determine the refractive state of the eyes, hearing aids or examinations therefore, or immunizations (except as otherwise allowed under section 1861(s)(10) and subparagraphs (B), (F), (G), or (H) of paragraph (1)). Under the above statutory authority, we have issued national coverage determinations and policies in a variety of documents, such as CMS (formerly HCFA) manual instructions, **Federal Register** notices, and CMS (formerly HCFA) Rulings. Medicare program manuals, program transmittals, and program memoranda are posted on the Internet at *http://cms.hhs.gov/manuals/default.asp.*

Under section 1842(a) of the Act, we contract with organizations to perform bill processing and benefit payment functions for Medicare Part B (Supplementary Medical Insurance). These Medicare contractors, who process Part B claims from noninstitutional entities, are called carriers. Under section 1816(a) of the Act, we contract with fiscal intermediaries to perform claims processing and benefit payment functions for Medicare Part A (Hospital Insurance). Fiscal intermediaries also process claims payable from the Medicare Part B trust fund that are submitted by providers that participate in Medicare Part A, such as hospitals and skilled nursing facilities. We use the term ''contractor(s)'' to mean carriers and fiscal intermediaries.

Medicare contractors review and adjudicate claims for services to ensure that Medicare payments are made only for services that are covered under Medicare Part A or Part B. In the absence of a specific national coverage determination, coverage decisions are made at the discretion of the local contractors.

B. Recent Legislation

Section 4554(b)(1) of the Balanced Budget Act of 1997 (BBA), Pub. L. 105–33, enacted on August 5, 1997, mandates use of a negotiated rulemaking committee to develop national coverage and administrative policies for clinical diagnostic laboratory services payable under Medicare Part B by January 1, 1999. Section 4554(b)(2) of the BBA requires that these national coverage policies be designed to promote program integrity and national uniformity and simplify administrative requirements with respect to clinical diagnostic laboratory services payable under Medicare Part B.

As directed by this statutory provision, we convened a negotiated rulemaking committee that developed recommendations for coverage and administrative policies in accordance with the provisions of the BBA. On March 10, 2000, we published a proposed rule (65 FR 13082) proposing to adopt the committee's recommendations. The final rule was published on November 23, 2001 (66 FR 58788).

C. National Coverage Determinations (NCDs)

The final rule on coverage and administrative policies for clinical diagnostic laboratory services included an addendum containing NCDs for 23 clinical diagnostic laboratory tests. These NCDs state our policy with respect to the circumstances under which the test(s) will be considered reasonable and necessary for Medicare purposes.

NCDs are binding on all Medicare carriers, intermediaries, quality improvement organizations, health maintenance organizations, competitive medical plans, and health care prepayment plans (*see* section 1869(f)(1)(A)(i) of the Act).

In accordance with the recommendations of the negotiated rulemaking committee, we developed these clinical diagnostic laboratory NCDs in a prescribed format. Each NCD has the following sections: the official title of the NCD, other names/abbreviations, description, Healthcare Common Procedure Coding System (HCPCS) codes, indications, limitations, International Classification of Diseases, Ninth Edition, Clinical Modification (ICD–9–CM) codes covered by the Medicare program, reasons for denial, ICD–9–CM codes denied, ICD–9–CM codes that do not support medical necessity, sources of information, coding guidelines, documentation requirements, and other comments.

For each of the clinical diagnostic laboratory service NCDs (laboratory NCDs), every ICD–9–CM diagnosis code falls into one of the three code lists. The list of covered codes is intended to reflect the coding translation of the conditions enumerated in the narrative indications section of the NCDs. The translation of the narrative to the appropriate ICD–9–CM diagnosis codes ensures national uniformity in the processing of claims for these clinical diagnostic laboratory tests.

On April 27, 1999, we published a general notice (64 FR 22619) outlining our procedures for developing and revisiting NCDs (the NCD process). We further updated the NCD process in a notice published in the **Federal Register** on September 26, 2003 (68 FR 55634). In the November 23, 2001 final rule (66 FR 58793) for coverage and administrative policies for clinical diagnostic laboratory services, we stated that we would use the NCD process for making changes to the laboratory NCDs. The NCD process is evidence-based and provides an opportunity for public

participation in the NCD decision-making process through the posting of announcements of issues under review on the Internet on the CMS coverage home page and requests for comment. At the conclusion of the NCD decision-making process, decision memoranda are published on the CMS website that announce the policy we intend to issue and discuss the evidence we evaluated and our rationale for the final national coverage determination. Coverage issues are announced at *http://cms.hhs.gov/coverage.*

Under the November 23, 2001 final rule (66 FR 58793), code lists can only be modified through the NCD process. However, subsequent experience with the code lists has indicated that processes for routine changes are necessary. For example, experience with the code lists has revealed that clerical errors occasionally occur despite rigorous review. In addition, the committees that maintain the laboratory and related code lists (ICD–9–CM and CPT–4) routinely issue changes that modify laboratory coding procedures. As a result, the code list for a laboratory NCD may not reflect the most current coding practices. For these reasons, HHS is pursuing new processes in this proposed notice to update code lists for clerical or routine changes.

D. Updates of Coding Systems

1. ICD–9–CM Codes

International Classification of Diseases, Ninth Edition, Clinical Modification (ICD–9–CM) codes were developed in 1977 as a means of classifying morbidity data for indexing medical records, medical case reviews, and ambulatory and other medical care programs, as well as for basic health statistics. It delineates the clinical picture of each patient, providing information beyond that needed for statistical groupings and analyses of healthcare trends. Early in its history, ICD–9–CM coding was used almost exclusively in institutional settings, such as hospitals. However, since 1989, § 424.32(a)(2) has required the reporting of ICD–9–CM coding on all bills for physicians' services. Thus, ICD–9–CM has come into nearly universal use as a means of reporting diagnoses for patients receiving healthcare services.

In September 1985, the ICD–9–CM Coordination and Maintenance Committee (the Committee) was formed. This is a Federal interdepartmental committee, co-chaired by CMS and the National Center for Health Statistics (NCHS), and charged with maintaining and updating the ICD–9–CM system. The Committee is jointly responsible for approving coding changes, and developing errata, addenda, and other modifications to the ICD–9–CM to reflect newly developed procedures and technologies and newly identified diseases. The Committee is also responsible for promoting the use of Federal and non-Federal educational programs and other communication techniques with a view toward standardizing coding applications and upgrading the quality of the classification system.

The Committee encourages participation in the above process by health-related organizations. In this regard, the Committee holds public meetings for discussion of educational issues and proposed coding changes. These meetings provide an opportunity for representatives of recognized organizations in the coding field, such as the American Health Information Management Association (AHIMA), the American Hospital Association (AHA), and various physician specialty groups, as well as physicians, medical records administrators, health information management professionals, and other members of the public, to contribute ideas on coding matters. After considering the opinions expressed at the public meetings and in writing, the Committee formulates recommendations that must be approved by the agencies.

ICD–9–CM coding updates are issued annually. Changes become effective October 1 of each year. Minutes from the ICD–9–CM Committee meetings are available on the Internet at *http://cms.hhs.gov/paymentsystems/icd9.* We announce the annual ICD–9–CM procedure coding changes in the **Federal Register** as part of the annual update of the hospital inpatient prospective payment system. In addition, information on the diagnosis coding changes is available on the Internet at *http://www.cdc.gov/nchs/icd9.htm.*

2. CPT–4 Coding

The Current Procedural Terminology (CPT), Fourth Edition, is a listing of descriptive terms and identifying codes for reporting medical services and procedures performed by physicians. The purpose of the terminology is to provide consistent codes for medical, surgical, and diagnostic services.

CPT descriptive terms and identifying codes currently serve a wide variety of important functions in the field of medical nomenclature.

The American Medical Association (AMA) owns CPT. AMA convenes the CPT Editorial Panel (the Panel) quarterly to consider requests and suggestions for changes to CPT. The Panel uses the services of an Advisory Committee with expertise in a wide variety of specialties. Portions of CPT panel meetings are open to the public for the opportunity to make presentations and participate in open discussions. Decision-making sessions, however, are closed. More information regarding the CPT Editorial Panel is available on the following Internet Web site: *http://www.ama-assn.org/ama/pub/category/3884.html.* CPT coding changes are announced annually. Category I changes become effective on January 1 of each year.

E. Implementation of NCDs

One of the goals of section 4554 of the BBA was to promote uniformity in Medicare processing of claims for clinical diagnostic laboratory services. In order to ensure consistent and uniform implementation of the laboratory NCDs throughout the country, we developed an electronic edit table module that will be installed in each of the Medicare claims processing contractors' systems. The edit module will ensure that (1) each contractor matches diagnosis to procedures in the same manner; (2) competing laboratories in an area will have their claims processed identically regardless of whether they are processed by the carrier or fiscal intermediary; and (3) all local contractors have implemented the laboratory NCDs at the same time.

Professional coders on the negotiated rulemaking committee assisted in the development of the laboratory NCDs. Also, we presented the proposed code list to the staff in the Department of Health and Human Services and the general public for review. Nevertheless, we have discovered clerical errors in the code lists. For example, several of the codes did not include the full range of digits. That is, a code that requires 5 digits may have had only 4 digits. We identify this problem by the term ''truncated codes.'' The issue of truncated codes is particularly problematic because our claims processing systems already include edit programs that will return claims to the biller when codes are incomplete. That is, if an entity bills the 4-digit code from the list instead of the 5-digit code, the claim will be returned to the laboratory. However, if the laboratory bills the appropriate 5-digit code, the claim will not be paid, as the 5-digit code is not on the covered code list. Other errors include instances in which the code and the descriptor did not match.

II. Provisions of the Proposed Notice

A. Proposed Process for Code Maintenance

In the preamble of the November 23, 2001, final rule (66 FR 58788), we announced that we intended to conduct maintenance of the 23 laboratory NCDs and create new laboratory NCDs through the NCD process described in the general notice in the **Federal Register** on April 27, 1999 (64 FR 22619). This process has since been updated by general notice published on September 26, 2003 (68 FR 55634). This is an evidence-based method in which determinations are made based on the scientific literature. Formal requests for an NCD must be made in the following manner:

- The request must be in writing.
- The request and supporting documentation must be submitted electronically unless there is good cause for only a hardcopy.
- The requestor must identify the request as a ''formal request for a national coverage'' determination.
- The requestor must state the Medicare benefit category.
- The requestor must submit adequate supporting documentation including:

—A full and complete description of the item or service in question;
—A compilation of the medical and scientific information currently available that measures the medical benefits of the item or service;
—A specific detailed description of the proposed use of the item or service including the target Medicare population and the medical condition(s) for which it can be used;
—An explanation of the design, purpose, and method of using the item or equipment;
—A description of any clinical trials or studies currently under way, which might be relevant to a decision; and
—The status of current Food and Drug Administration (FDA) administrative proceedings concerning a drug or device or a service using a drug or device subject to regulation by the FDA.

We continue to believe that this NCD process is appropriate for creating new NCDs for clinical diagnostic laboratory services. Likewise, the NCD process is appropriate for requests for substantive changes to the existing laboratory NCDs. However, we believe this process is unduly burdensome and time-consuming for correcting errors in coding and for incorporating new codes and coding changes that may be created by the ICD–9–CM Coordination and Maintenance Committee or the AMA Editorial Panel. Likewise, we believe that a streamlined process is appropriate for making coding changes that flow from the existing narrative. Since the narratives only describe covered conditions this abbreviated approach may be used in moving codes from the ''Does Not Support Medical Necessity'' list (which can be covered with documentation) to the ICD–9–CM codes covered by the Medicare list. ''ICD–9–CM Not Covered by Medicare'' list cannot be altered through this abbreviated process. Thus, we are proposing two additional processes for making requests for coding changes in the laboratory NCDs.

We are proposing, therefore, to have three separate processes for requesting changes to the laboratory NCDs. Substantive changes would use the normal evidence-based NCD process. Clerical changes to codes and descriptors would be requested, as set forth below, by a letter that outlines the coding change made subsequent to the publication of the NCD or coding error. Coding changes that flow from the narrative covered indications would be requested by letter detailing the covered indication from the narrative. Scientific evidence would not be required, but is welcomed to support the requestor's position.

1. Clerical Coding Change

Coding changes are made annually to both the ICD–9–CM diagnosis codes and the CPT procedure codes that may be incorporated in the laboratory NCDs. Whenever coding changes to codes or descriptors that are included in the NCD are made, we believe the NCDs should be updated expeditiously to reflect current coding practices. Similarly, clerical errors, such as typographical errors, should be corrected as quickly as possible. Consequently, we are proposing a streamlined process for making clerical changes to codes contained within the laboratory NCDs. We propose the following procedures:

- Whenever we discover truncated codes (that is, ICD–9–CM codes that were not displayed to their highest level of specificity), we would expand the code to the full number of digits. We would use the expanded code that most closely matches the ICD–9–CM descriptor displayed in the NCD.
- Whenever an ICD–9–CM or CPT code had been altered (that is, the descriptor was changed) by the responsible coding authority, we would make corresponding changes to the laboratory NCDs.
- Whenever the responsible coding authority deletes an ICD–9–CM or CPT code, we would remove the code from the NCD. We would not consider this as removal of coverage and would not first publish notice of removal of coverage before taking action.
- Whenever the responsible coding authority changes or replaces an ICD–9–CM or CPT code, we would make corresponding changes to the laboratory NCD based on the crosswalk announced by the coding authority.
- Whenever an ICD–9–CM or CPT code and its descriptor do not match (that is, the descriptor in the NCD is not the descriptor of the code in the coding manuals), we would look to the NCD narrative to determine which item (the code or descriptor) was correct and adjust the other item to match.
- Whenever the responsible coding authority adds a new code to a range of covered codes, we would revise the NCD to include this code.

We are proposing that the general public request clerical or ministerial changes by sending a letter to: Director, Coverage and Analysis Group, Mail Stop C1–09–06, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. In addition, we may initiate changes that we discover. We would incorporate all of these changes into the edit module software and announce them in the coding manual that we publish on the Internet at *http://www.cms.hhs.gov/ncd/labindexlist.asp#coding.*

We believe that the clerical nature of the changes makes public comments on these changes before implementation unnecessary. A method of recognizing necessary coding changes more rapidly would increase payment efficiency and accuracy. We believe that the urgent need to implement these clerical changes into the laboratory NCDs outweighs the benefit that could be derived from requesting public comment on these ministerial changes. Instead, we would accept comments that are generated from these clerical changes through the comment process described below.

2. Codes That Flow From the Covered Indications Narrative

We have received several requests for a procedure to make changes to the codes in the various laboratory NCD code lists by a process other than the NCD process. Many laboratories believe that there have been omissions of codes from the code lists. However, they believe that the current process of gathering scientific evidence to support coverage of a specific code is unduly burdensome and unnecessary since the narrative already includes coverage of the substance of the code description. Therefore, we propose to establish an

abbreviated process for handling requests for certain coding changes to the laboratory NCDs. In order for requests to qualify for this process, the code must flow from the existing narrative indications for the clinical diagnostic laboratory test. In other words, the requested change must be classified as a replacement of or an addition to an existing code. Requests that in effect constitute requests to add new indications must use the NCD evidence-based process outlined in the September 26, 2003, **Federal Register**. Thus, any requests to cover codes that are in the list of ICD–9–CM Codes Not Covered by Medicare must use the NCD evidence-based process.

The abbreviated process is similar to the NCD process in that it includes posting on the Internet and an opportunity for public comment before making a coding change. The principal difference between the processes is the volume of information required. Requesters using the abbreviated process would submit a letter detailing the provision of the NCD narrative that clearly indicates coverage for the requested code. Scientific literature is not required. However, scientific literature supporting the request and/or clinical guidelines from relevant healthcare organizations is welcome. We are proposing the following abbreviated process for coding changes that flow from the existing narrative of the NCD:

- Requests must be made in writing, clearly stating the rationale for the coding change.
- Requests must be sent to: Director, Coverage and Analysis Group, Centers for Medicare & Medicaid Services, C1–09–06, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.
- Our staff will review the request and contact the requestor for additional information, if necessary.
- We will announce on the Internet *(http://cms.hhs.gov/coverage)* any proposed coding changes. The announcement will provide for a 30-day public comment period.
- Within 60 days of the end of the comment period, we would publish a decision memorandum on the coverage website including a summary of comments received, that announces the decision we intend to issue, and a brief explanation for the determination, if not self-evident, in the request. Within 60 days after posting the decision memorandum, we would publish the decision as an instruction in a One Time Notification that includes the effective date of any changes. Codes that are removed from the covered list as a result of this process because they do not flow from the narrative would not be subject to additional prior notice of removal of coverage.
- We would incorporate coding changes into the software and coding manual. Coding changes would be made effective on a quarterly basis.

We would, whenever we become aware of the need to do so, also follow this process to implement the necessary changes. We specifically solicit comments on this streamlined process for making coding changes.

In summary, we are proposing three separate processes for maintaining the laboratory NCDs. Clerical and ministerial changes would be made expeditiously without prior posting on the Internet or public comment. Clerical changes would be announced in a CMS instruction before incorporation into the edit software. Coding changes that flow from the narrative of the existing NCD would be handled through an abbreviated process similar to the NCD process. Requests for coding changes that flow from the existing narrative NCD would not require scientific evidence. We would post a notice of this type of request on the Internet and accept public comments for 30 days before making a determination. Requests for a substantive change to an NCD would be handled through the normal NCD process described in the September 26, 2003, **Federal Register**. The requests require scientific evidence in support of the change in policy. We will post a tracking sheet announcing our acceptance of a request on the Internet and public comments will be solicited for 30 days before making a determination.

3. Code Lists for the Laboratory NCDs

We have generally published NCDs in the Medicare Coverage Issues Manual (CIM). This manual is being replaced by the National Coverage Determination (NCD) Manual. We have published some NCDs initially as a Program Memorandum but subsequently have moved the instruction to the CIM. However, we have not, up to this time, published NCDs that contained the detailed coding information that is contained in the clinical diagnostic laboratory service's NCDs that were negotiated.

The clinical diagnostic laboratory NCDs include long lists of ICD–9–CM codes, coding guidelines, and reasons for denial, resulting in a document of approximately 200 pages. Incorporation of this new style arising exclusively from the laboratory negotiated rulemaking process of NCD into the NCD Manual would dwarf the rest of the manual.

We are proposing to incorporate in the NCD Manual only the narrative portion of the NCDs. That is, we would include in the NCD Manual the description of the service, indications, and limitations. We are proposing that the coding lists and standardized portions of the NCDs would be displayed in a laboratory NCD Coding Manual that would be available electronically on the Internet at *http://www.cms.hhs.gov/ncd/labindexlist.asp#coding.* Printed copies can be made available to readers who do not have access to the Internet for a fee of 10 cents per page.

We believe this mechanism would make handling the NCD Manual easier for all users. Users could readily identify those conditions covered without having to weed through long documents with extensive lists of codes. In addition, we believe separating the coding information from the narrative policy helps to reinforce the differing procedures for substantively changing, as opposed to updating, coding in the NCDs.

In summary, we are proposing a streamlined method of updating the NCDs for coding changes of a clerical nature, that is, correcting errors, and accommodating annual coding updates. We are also proposing to publish only the narrative portion of the laboratory NCDs in the NCD Manual, the document where NCDs are normally compiled. The entire laboratory NCDs, including the code lists and coding guidelines, would be published in an electronic laboratory NCD Coding Manual that would be available on the Internet, and upon request, in printed form for a fee. We request public comment on these proposals.

B. Date of Service

In the final rule of coverage and administrative policies for clinical diagnostic laboratory services that we published on November 23, 2001, we clarified the date of service for clinical diagnostic laboratory services (66 FR 58792). Specifically, we stated that: ''For laboratory tests that require a specimen from stored collections, the date of service should be defined as the date the specimen was obtained from the archives.''

The final rule did not further define how long a specimen must be stored before it is considered ''archived.'' We clarified in Program Memorandum AB-02-134, that in the absence of specific instructions issued nationally through rulemaking, contractors have discretion in making determinations regarding the length of time a specimen must be stored to be considered ''archived.'' We

stated, however, that the rule contemplates a long storage period.

We have received numerous requests from laboratories to issue a national standard to clarify when a stored specimen can be considered ''archived.'' Regional laboratories interact with numerous contractors and find it difficult to automate their electronic billing software to handle variability in date of service by contractor jurisdiction. In other words, it is difficult for laboratories to electronically program their systems to calculate the date of service when in one jurisdiction it would be the collection date while in another the date of service would be the day that the specimen was retrieved from storage.

Consequently, we are proposing to further clarify the date of service provision for clinical diagnostic laboratory services. We propose that a specimen must be stored for more than 30 calendar days to be considered ''archived.'' The date of service for these archived specimens would be the date the specimen was obtained from storage. Specimens stored 30 days or less would have a date of service of the date the specimen was collected.

The final rule also clarified that the date of service for tests when the collection spanned more than 24 hours would be the date the collection began. These extended collection periods are common on fecal occult blood tests and urine collections for hormone analysis in pregnant women. This clarification was added in the November 23, 2001, final rule in response to public comments received on the March 10, 2000, proposed rule. Thus, we did not have the benefit of public input regarding the appropriateness of our solution.

We have received several comments since issuing the final rule that stated the common practice in the laboratory community is to use the date the collection ended as the date of service. Thus, we are soliciting public comment on a proposal to alter our policy to specify that the date of service for collections that span more than 24 hours would be the date the collection ended.

III. Collection of Information Requirements

Under the Paperwork Reduction Act (PRA) of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comments on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information collection burden on the affected public, including automated collection techniques.

In summary, we propose to establish a new process for handling requests for certain coding changes to the laboratory NCDs. In order for requests to qualify for this process, requests must be made in writing to us, clearly stating the rationale for the coding change. The request must articulate the code flow from the existing narrative indications for the clinical diagnostic laboratory test. In other words, the requested change must be classified as a correction, updating change, or replacement to an existing code. Requests that in effect constitute requests to add new indications must use the NCD evidence-based process outlined in the April 27, 1999, and subsequent September 26, 2003, **Federal Register**s.

The burden associated with the process referenced above is the time and effort necessary to submit a request in writing, clearly stating the rationale for the coding change. We believe that it will require one hour per request and that eight requests will be submitted on an annual basis.

In order to have this requirement approved under the PRA, we will amend the currently approved NCD/PRA documentation [OMB PRA approval # 0938–0776] to include the new code updating process and resubmit it to OMB for approval. We believe that this abbreviated process is less burdensome than the current process. The current process requires submission of scientific evidence in order to initiate a change in the NCD. This abbreviated process requires only an explanation of how a code flows from the narrative.

If you comment on these information collection and recordkeeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Regulations Development and Issuances Group, Attn: Julie Brown—CMS–3119–PN, Room C5–14–03, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, CMS Desk Officer.

IV. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this notice, and, if we proceed with a subsequent document, *we will respond to the comments in the final rule.*

V. Regulatory Impact Statement

In this notice, we propose an abbreviated mechanism for making changes to the lists of ICD–9–CM and CPT codes that are included in the laboratory NCDs. We also propose clarification of when a specimen is considered archived for purposes of the date of service provision contained in the November 21, 2001, final rule. We do not expect this document to impose any significant burden on laboratories. The proposed policy clarifications may lessen the burden on laboratories by establishing uniform procedures for reporting date of service on archived specimens. Should there be any unanticipated increase or decrease of burden, the effects will be minimal.

We have examined the impacts of this proposed notice as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternative and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We have reviewed this proposed notice and have determined it is not a major rule. Therefore, we are not required to perform an assessment of the costs and savings.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals, and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined that this proposed notice would not have a significant impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis *if a rule may have* a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this proposed notice would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This proposed notice would have no consequential effect on the governments mentioned or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet *when it promulgates a proposed rule (and subsequent final rule)* that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this proposed notice and have determined that it would not have a substantial effect on State or local governments.

In accordance with the provisions of Executive Order 12866, this document was reviewed by the Office of Management and Budget.

Authority: Sections 1816(a), 1833, 1842(a), 1861, 1862(a)(1)(A), and 1862(a)(7) of the Social Security Act (42 U.S.C. 1395h(a), 1395l, 1395u(a), 1395x, 1395y(a)(1)(A), and 1395y(a)(7))

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 23, 2003.

Thomas A Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: September 16, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–31573 Filed 12–23–03; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1226–GNC]

RIN 0938–ZA44

Medicare Program; Criteria and Standards for Evaluating Intermediary, Carrier, and Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Regional Carrier Performance During Fiscal Year 2004

AGENCY: Centers for Medicare & Medicaid Services (CMS), Health and Human Services (HHS).

ACTION: General notice with comment period.

SUMMARY: This notice describes the criteria and standards to be used for evaluating the performance of fiscal intermediaries, carriers, and Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) regional carriers in the administration of the Medicare program beginning on the first day of the first month following publication of this notice in the **Federal Register**. The results of these evaluations are considered whenever we enter into, renew, or terminate an intermediary agreement, carrier contract, or DMEPOS regional carrier contract or take other contract actions, for example, assigning or reassigning providers or services to an intermediary or designating regional or national intermediaries. We are requesting public comment on these criteria and standards.

DATES: *Effective Date:* The criteria and standards are effective January 2, 2004.

Comment Period: Comments will be considered if we receive them at the appropriate address as provided below no later than 5 p.m. (EDT) on January 23, 2004.

ADDRESSES: In commenting, please refer to file code CMS–1226–GNC. Because of staff and resource limitations, we cannot accept comments by facsimile (fax) transmission. Mail written comments (one original and two copies) to the following address:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1226–GNC, PO Box 8016, Baltimore, MD 21244–8016.

If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) to one of the following addresses:

Room 443–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC, 20201 or Room C5–14–03, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

For information on viewing public comments, see the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Sue Lathroum, (410) 786–7409.

SUPPLEMENTARY INFORMATION: In several instances, we identify a Medicare manual as a source of more detailed requirements. Medicare fee-for-service contractors have copies of the various Medicare manuals referenced in this notice. Members of the public also have access to our manual instructions.

Medicare manuals are available for review at local Federal Depository Libraries (FDLs). Under the FDL Program, government publications are sent to approximately 1,400 designated public libraries throughout the United States. To locate the nearest FDL, individuals should contact any public library.

In addition, individuals may contact regional depository libraries that receive and retain at least one copy of nearly every Federal government publication, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library. Information may also be obtained from the following Web site: *http://www.cms.hhs.gov/manuals.*

Finally, all of our regional offices (ROs) maintain all Medicare manuals for

public inspection. To find the location of our nearest available RO, you may call the individual listed at the beginning of this notice. That individual can also provide information about purchasing or subscribing to the various Medicare manuals.

Response to Public Comments: Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are unable to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the Comment Period section of this preamble, and, if we proceed with a subsequent document, we will respond to the comments in the preamble of that document.

Inspection of Public Comments: Comments received timely are available for public inspection or they are processed beginning approximately 3 weeks after the close of the comment period, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–7197.

I. Background

A. Part A—Hospital Insurance

Under section 1816 of the Social Security Act (the Act), public or private organizations and agencies participate in the administration of Part A (Hospital Insurance) of the Medicare program under agreements with us. These agencies or organizations, known as fiscal intermediaries, determine whether medical services are covered under Medicare, determine correct payment amounts and then make payments to the health care providers (for example, hospitals, skilled nursing facilities (SNFs), and community mental health centers) on behalf of the beneficiaries. Section 1816(f) of the Act requires us to develop criteria, standards, and procedures to evaluate an intermediary's performance of its functions under its agreement.

Section 1816(e)(4) of the Act requires us to designate regional agencies or organizations, which are already Medicare intermediaries under section 1816 of the Act, to perform claim processing functions for freestanding Home Health Agency (HHA) claims. We refer to these organizations as Regional Home Health Intermediaries (RHHIs). See § 421.117 and the final rule published in the **Federal Register** on May 19, 1988 (53 FR 17936) for more details about the RHHIs.

The evaluation of intermediary performance is part of our contract management process. These evaluations need not be limited to the current fiscal year (FY), other fixed term basis, or agreement term.

B. Part B Medical Insurance

Under section 1842 of the Act, we are authorized to enter into contracts with carriers to fulfill various functions in the administration of Part B, Supplementary Medical Insurance of the Medicare program. Beneficiaries, physicians, and suppliers of services submit claims to these carriers. The carriers determine whether the services are covered under Medicare and the amount payable for the services or supplies, and then make payment to the appropriate party.

Under section 1842(b)(2) of the Act, we are required to develop criteria, standards, and procedures to evaluate a carrier's performance of its functions under its contract. Evaluations of Medicare fee-for-service contractor performance need not be limited to the current FY, other fixed term basis, or contract term. The evaluation of carrier performance is part of our contract management process.

C. Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Regional Carriers

In accordance with section 1834(a)(12) of the Act, we have entered into contracts with four DMEPOS regional carriers to perform all of the duties associated with the processing of claims for DMEPOS, under Part B of the Medicare program. These DMEPOS regional carriers process claims based on a Medicare beneficiary's principal residence by State. Section 1842(a) of the Act authorizes contracts with carriers for the payment of Part B claims for Medicare covered services and items. Section 1842(b)(2) of the Act requires us to publish in the **Federal Register** criteria and standards for the efficient and effective performance of carrier contract obligations. Evaluation of Medicare fee-for-service contractor performance need not be limited to the current FY, other fixed term basis, or contract term. The evaluation of DMEPOS regional carrier performance is part of our contract management process.

D. Development and Publication of Criteria and Standards

In addition to the statutory requirements, §§ 421.120 and 421.122 provide for publication of a **Federal Register** notice to announce criteria and standards for intermediaries before implementation. Section 421.201 provides for publication of a **Federal Register** notice to announce criteria and standards for carriers before implementation. The current criteria and standards for intermediaries, carriers, and DMEPOS regional carriers were published in the February 28, 2003 final rule (68 FR 9681).

To the extent possible, we make every effort to publish the criteria and standards before the beginning of the Federal FY, which is October 1. If we do not publish a **Federal Register** notice before the new FY begins, readers may presume that until and unless notified otherwise, the criteria and standards that were in effect for the previous FY remain in effect.

In those instances in which we are unable to meet our goal of publishing the subject **Federal Register** notice before the beginning of the FY, we may publish the criteria and standards notice at any subsequent time during the year. If we publish a notice in this manner, the evaluation period for the criteria and standards that are the subject of the notice will be effective on the first day of the first month following publication. Any revised criteria and standards will measure performance prospectively; that is, we will not apply new measurements to assess performance on a retroactive basis.

It is not our intention to revise the criteria and standards that will be used during the evaluation period once this information has been published in a **Federal Register** notice. However, on occasion, either because of administrative action or congressional mandate, there may be a need for changes that have a direct impact on the criteria and standards previously published, or that require the addition of new criteria or standards, or that cause the deletion of previously published criteria and standards. If we must make these changes, we will publish an amended **Federal Register** notice before implementation of the changes. In all instances, necessary manual issuances will be published to ensure that the criteria and standards are applied uniformly and accurately. Also, as in previous years, this **Federal Register** notice will be republished and the effective date revised if changes are warranted as a result of the public comments received on the criteria and standards.

II. Analysis of and Response to Public Comments Received on FY 2003 Criteria and Standards

We received no comments in response to the February 28, 2003 **Federal Register** general notice with comment.

III. Criteria and Standards—General

Basic principles of the Medicare program are to pay claims promptly and accurately and to foster good beneficiary and provider relations. Contractors must administer the Medicare program efficiently and economically. The goal of performance evaluation is to ensure that contractors meet their contractual obligations. We measure contractor performance to ensure that contractors do what is required of them by statute, law, regulation, contract, and our directives.

We have developed a contractor oversight program for FY 2004 that outlines expectations of the contractor; measures the performance of the contractor; evaluates the performance against the expectations; and provides for appropriate contract action based upon the evaluation of the contractor's performance.

As a means to monitor the accuracy of Medicare FFS payments, we have established the Comprehensive Error Rate Testing (CERT) program—which produces error rates for claims payment decisions made carriers, DMERCs, and FIs. Beginning in November 2003, the CERT program produced claims payment error rates for each individual carrier and DMERC. (FI—specific rates will be available the following year.) These rates measure not only how well contractors are doing at implementing automated review edits and identifying which claims to subject to manual medical review but also measure the impact of the contractor's provider outreach/education and effectiveness of the contractor's provider call centers. As such, we will utilize these contractor-specific error rates as a means to evaluate a contractor's performance.

Several times throughout this notice, we refer to the ''readability'' of letters, decisions, or correspondence that are going to Medicare beneficiaries from intermediaries or carriers. In those instances, ''readability'' is defined as being below the 8th grade reading level unless it is obvious that an incoming request from the beneficiary contains language written at a higher level. In these cases, the readability level is tailored to the capacities and circumstances of the intended recipient.

In addition to evaluating performance based upon expectations for FY 2004, we may also conduct follow-up evaluations throughout FY 2004 of areas in which contractor performance was out of compliance with statute, regulations, and our performance expectations during prior review years and thus required the contractor to submit a Performance Improvement Plan (PIP).

We may also utilize Statement of Auditing Standards–70 (SAS–70) reviews as a means to evaluate contractors in some or all business functions.

In FY 2001, we established the Contractor Rebuttal Process as a commitment to continual improvement of contractor performance evaluation (CPE). We will continue the use of this process in FY 2004. The Contractor Rebuttal Process provides the contractors an opportunity to submit a written rebuttal of CPE findings of fact. Whenever we conduct an evaluation of contractor operations, contractors have 7 calendar days from the date of the CPE review exit conference to submit a written rebuttal. The CPE review team or, if appropriate, the individual reviewer will consider the contents of the rebuttal before the issuance of the final CPE report to the contractor.

The FY 2004 CPE for intermediaries and carriers is structured into five criteria designed to meet the stated objectives. The first criterion is ''Claims Processing'' which measures contractual performance against claims processing accuracy and timeliness requirements as well as activities in handling appeals. Within the Claims Processing Criterion, we have identified those performance standards that are mandated by legislation, regulation, or judicial decision. These standards include claims processing timeliness, the accuracy of Medicare Summary Notices (MSNs), the appropriateness of determinations reversed by an administrative law judge (ALJ), the timeliness of intermediary reconsiderations, reviews and hearings and the timeliness of carrier reviews and hearings, and the readability of carrier reviews. Further evaluation in the Claims Processing Criterion may include, but is not limited to, the accuracy of claims processing, the percent of claims paid with interest, and the accuracy of reconsiderations, reviews, and hearings.

The second criterion is ''Customer Service'' which assesses the adequacy of the service provided to customers by the contractor in its administration of the Medicare program. The mandated standard in the Customer Service Criterion is the need to provide beneficiaries with written replies that are responsive, that is, provide in detail the reasons for a determination when a beneficiary requests this information, have a customer-friendly tone and clarity, and are at the appropriate reading level. Further evaluation of services under this criterion may include, but is not limited to, the timeliness and accuracy of all correspondence both to beneficiaries and providers; monitoring of the quality of replies provided by the contractor's customer service representatives (quality call monitoring); beneficiary and provider education, training, and outreach activities; and service by the contractor's customer service representatives to beneficiaries who come to the contractor's facility (walk-in inquiry service).

The third criterion is ''Payment Safeguards'' that evaluates whether the Medicare Trust Fund is safeguarded against inappropriate program expenditures. Intermediary and carrier performance may be evaluated in the areas of Medical Review (MR), Medicare Secondary Payer (MSP), Overpayments (OP), and Provider Enrollment (PE). In addition, intermediary performance may be evaluated in the area of Audit and Reimbursement (A&R).

In FY 1996 the Congress enacted the Health Insurance Portability Act, Medicare Integrity Program giving us the authority to contract with other than, but not excluding, Medicare carriers and intermediaries to perform certain program safeguard functions. In situations where one or more program safeguard functions have been contracted to another entity, we may evaluate the flow of communication and information between a Medicare fee-for-service contractor and the Payment Safeguard Contractor. All Benefit Integrity functions have been transitioned from intermediaries and carriers to the Program Safeguard Contractors, but three DMERCs will continue to handle this work in FY 2004. Because some of the DMERC contractors still conduct Benefit Integrity activities, we may evaluate their performance of that function.

Mandated performance standards for intermediaries in the Payment Safeguards criterion are the accuracy of decisions on SNF demand bills, and the timeliness of processing Tax Equity and Fiscal Responsibility Act (TEFRA) target rate adjustments, exceptions, and exemptions. There are no mandated performance standards for carriers in the Payment Safeguards criterion. Intermediaries and carriers may also be evaluated on any Medicare Integrity Program (MIP) activities if performed under their agreement or contract.

The fourth criterion is ''Fiscal Responsibility'' which evaluates the contractor's efforts to protect the Medicare program and the public interest. Contractors must effectively manage Federal funds for both the payment of benefits and costs of administration under the Medicare program. Proper financial and budgetary controls, including internal controls, must be in place to ensure contractor compliance with its agreement with HHS and CMS.

Additional functions reviewed under this criterion may include, but are not limited to, adherence to approved budget, compliance with the Budget and Performance Requirements (BPRs), and compliance with financial reporting requirements.

The fifth and final criterion is ''Administrative Activities'' which measures a contractor's administrative management of the Medicare program. A contractor must efficiently and effectively manage its operations. Proper systems security (general and application controls), Automated Data Processing (ADP) maintenance, and disaster recovery plans must be in place. A contractor's evaluation under the Administrative Activities criterion may include, but is not limited to, establishment, application, documentation, and effectiveness of internal controls that are essential in all aspects of a contractor's operation, and the degree to which the contractor cooperates with us in complying with the Federal Managers' Financial Integrity Act of 1982 (FMFIA). Administrative Activities evaluations may also include reviews related to contractor implementation of our general instructions and data and reporting requirements.

We have developed separate measures for RHHIs in order to evaluate the distinct RHHI functions. These functions include the processing of claims from freestanding HHAs, hospital-affiliated HHAs, and hospices. Through an evaluation using these criteria and standards, we may determine whether the RHHI is effectively and efficiently administering the program benefit or whether the functions should be moved from one intermediary to another in order to gain that assurance.

Below, we list the criteria and standards to be used for evaluating the performance of intermediaries, RHHIs, carriers, and DMEPOS regional carriers.

IV. Criteria and Standards for Intermediaries

A. Claims Processing Criterion

The Claims Processing criterion contains the following six mandated standards:

Standard 1. Not less than 95.0 percent of clean electronically submitted non-Periodic Interim Payment claims are paid within statutorily specified time frames. Clean claims are defined as claims that do not require Medicare intermediaries to investigate or develop them outside of their Medicare operations on a prepayment basis. Specifically, clean, non-Periodic Interim Payment electronic claims can be paid as early as the 14th day (13 days after the date of receipt) and must be paid by the 31st day (30 days after the date of receipt). Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 2. Not less than 95.0 percent of clean paper non-Periodic Interim Payment claims are paid within specified time frames. Specifically, clean, non-Periodic Interim Payment paper claims can be paid as early as the 27th day (26 days after the date of receipt) and must be paid by the 31st day (30 days after the date of receipt). Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 3. The percentage of reconsideration determinations reversed by ALJs is acceptable. We have defined an acceptable reversal rate by ALJs as one that is at or below 5.0 percent.

Standard 4. 75.0 percent of reconsiderations are processed within 60 days, and 90.0 percent are processed within 90 days. Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 5. 95.0 percent of Part B review determinations are completed within 45 days. Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 6. 90.0 percent of Part B hearing decisions are completed within 120 days. Our expectation is that contractors will meet this percentage on a monthly basis.

Because intermediaries process many claims for benefits under the Part B Medical Insurance portion of the Medicare Program, we also may evaluate how well an intermediary follows the procedures for processing appeals of any Part B claims.

Additional functions that may be evaluated under this criterion include, but are not limited to, the following:

- Accuracy of claims processing.
- Establishment and maintenance of a relationship with Common Working File (CWF) Host.
- Accuracy of processing reconsideration cases.
- Accuracy of reviews and hearings, as well as the appropriateness of the reading level of any review determination letters.
- Accuracy and timeliness of processing appeals under section 521 of the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) and section 940 of the Medicare Prescription Drug, Improvement, and Modernization Act (DIMA). See Note below.

Note: Section 521 of BIPA and section 940 of DIMA amend section 1869 of the Act by requiring major revisions to the Medicare appeals process. Upon implementation of section 521, the first level in a beneficiary's appeal will be a ''redetermination'' that will replace the current reconsideration for Part A appeals and the current review for Part B appeals. Intermediaries will be required to process all requests for redeterminations within 60 days of receipt of the request. Upon implementation of section 521 of BIPA, and section 940 of DIMA, we intend to begin evaluating whether intermediaries are meeting the timeliness and accuracy requirements for processing redeterminations. Because the ability for beneficiaries to request this new first level of appeal will not be initiated until section 521 of BIPA is implemented, there will be a period of time in which intermediaries will not only be processing redeterminations, but will continue to process the reconsideration, review, and hearing workloads that existed prior to the implementation of BIPA. Upon the implementation of section 521 of BIPA and section 940 of DIMA, this 60-day requirement and the processing accuracy will be additional functions that may be evaluated.

B. Customer Service Criterion

Functions that may be evaluated under this criterion include, but are not limited to, the following:

- Providing timely and accurate replies to beneficiary and provider telephone inquiries.
- Quality Call Monitoring.
- Training of Customer Service Representatives.
- Ensuring the validity of the call center performance data that are being reported in the Customer Service Assessment and Management System.
- Providing timely and accurate written replies to beneficiaries and providers that address the concerns raised and are written with an appropriate customer-friendly tone and clarity and that those written to beneficiaries are at the appropriate reading level.
- Walk-in inquiry service.

• Conducting beneficiary and provider education, training, and outreach activities.

• Effectively maintaining an Internet Website dedicated to furnishing providers and physicians timely, accurate, and useful Medicare program information.

C. Payment Safeguards Criterion

The Payment Safeguard criterion contains the following two mandated standards:

Standard 1. Decisions on SNF demand bills are accurate.

Standard 2. TEFRA target rate adjustments, exceptions, and exemptions are processed within mandated time frames. Specifically, applications must be processed to completion within 75 days after receipt by the contractor or returned to the hospitals as incomplete within 60 days of receipt.

Intermediaries may also be evaluated on any MIP activities if performed under their Part A contractual agreement. These functions and activities include, but are not limited to the following:

• Audit and Reimbursement

—Performing the activities specified in our general instructions for conducting audit and settlement of Medicare cost reports.

—Establishing accurate interim payments.

• Benefit Integrity

—Referring allegations of potential fraud that are made by beneficiaries, providers, CMS, Office of Inspector General (OIG), and other sources to the Payment Safeguard Contractor.

—Putting in place effective detection and deterrence programs for potential fraud.

• Medical Review

—Increasing the effectiveness of medical review activities.

—Exercising accurate and defensible decision making on medical reviews.

—Effectively educating and communicating with the provider community.

—Collaborating with other internal components and external entities to ensure the effectiveness of medical review activities.

• Medicare Secondary Payer

—Accurately reporting MSP savings.

—Accurately following MSP claim development and edit procedures.

—Auditing hospital files and claims to determine that claims are being filed to Medicare appropriately.

—Supporting the Coordination of Benefits Contractor's efforts to identify responsible payers primary to Medicare.

—Identifying, recovering, and referring mistaken/conditional Medicare payments in accordance with appropriate Medicare Intermediary Manual instructions and our other pertinent general instructions, in the specified order of priority.

• Overpayments

—Collecting and referring Medicare debts timely.

—Accurately reporting and collecting overpayments.

—Adhering to our instructions for management of Medicare Trust Fund debts.

• Provider Enrollment

—Complying with assignment of staff to the provider enrollment function and training the staff in procedures and verification techniques.

—Complying with the operational standards relevant to the process for enrolling providers.

D. Fiscal Responsibility Criterion

We may review the intermediary's efforts to establish and maintain appropriate financial and budgetary internal controls over benefit payments and administrative costs. Proper internal controls must be in place to ensure that contractors comply with their agreements with us.

Additional functions that may be reviewed under the Fiscal Responsibility criterion include, but are not limited to, the following:

• Adherence to approved program management and MIP budgets.

• Compliance with the BPRs.

• Compliance with financial reporting requirements.

• Control of administrative cost and benefit payments.

E. Administrative Activities Criterion

We may measure an intermediary's administrative ability to manage the Medicare program. We may evaluate the efficiency and effectiveness of its operations, its system of internal controls, and its compliance with our directives and initiatives.

We may measure an intermediary's efficiency and effectiveness in managing its operations. Proper systems security (general and application controls), automated data processing (ADP) maintenance, and disaster recovery plans must be in place. An intermediary must also test system changes to ensure the accurate implementation of our instructions.

Our evaluation of an intermediary under the Administrative Activities criterion may include, but is not limited to, reviews of the following:

• Systems security.

• ADP maintenance (configuration management, testing, change management, and security).

• Disaster recovery plan/systems contingency plan.

• Implementation of our general instructions.

• Data and reporting requirements implementation.

• Internal controls establishment and use, including the degree to which the contractor cooperates with the Secretary in complying with the FMFIA.

V. Criteria and Standards for Regional Home Health Intermediaries (RHHIs)

The following three standards are mandated for the RHHI criterion:

Standard 1. Not less than 95.0 percent of clean electronically submitted non-Periodic Interim Payment hospice claims are paid within statutorily specified time frames. Clean claims are defined as claims that do not require Medicare intermediaries to investigate or develop them outside of their Medicare operations on a prepayment basis. Specifically, clean, non-Periodic Interim Payment electronic claims can be paid as early as the 14th day (13 days after the date of receipt) and must be paid by the 31st day (30 days after the date of receipt). Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 2. Not less than 95.0 percent of clean paper non-Periodic Interim Payment hospice claims are paid within specified time frames. Specifically, clean, non-Periodic Interim Payment paper claims can be paid as early as the 27th day (26 days after the date of receipt) and must be paid by the 31st day (30 days after the date of receipt). Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 3. 75.0 percent of HHA and hospice reconsiderations are processed within 60 days and 90.0 percent are processed within 90 days. Our expectation is that contractors will meet this percentage on a monthly basis.

We may use this criterion to review an RHHI's performance for handling the HHA and hospice workload. This includes processing HHA and hospice claims timely and accurately; properly paying and settling HHA cost reports; and timely and accurately processing reconsiderations and BIPA section 521 redeterminations from beneficiaries, HHAs, and hospices.

Note: Section 521 of BIPA and section 940 of DIMA amend section 1869 of the Act by requiring major revisions to the Medicare appeals process. Upon implementation of section 521 of BIPA, the first level in a beneficiary's appeal will be a ''redetermination'' that will replace the current reconsideration for Part A appeals and the current review for Part B appeals. RHHIs will be required to process all requests

for redeterminations within 60 days of receipt of the request. Upon implementation of section 521 of BIPA and section 940 of DIMA, we intend to begin evaluating whether RHHIs are meeting the timeliness and accuracy requirements for processing redeterminations. Because the ability for beneficiaries to request this new first level of appeal will not be initiated until section 521 of BIPA are implemented, RHHIs will not only be processing redeterminations, but will continue to process the reconsideration, review, and hearing workloads that existed prior to the implementation of BIPA. Upon the implementation of section 521 of BIPA and section 940 of DIMA this 60-day requirement and the processing accuracy will be additional functions that may be evaluated.

VI. Criteria and Standards for Carriers

A. Claims Processing Criterion

The Claims Processing criterion contains the following six mandated standards:

Standard 1. Not less than 95.0 percent of clean electronically submitted claims are processed within statutorily specified time frames. Clean claims are defined as claims that do not require Medicare carriers to investigate or develop them outside of their Medicare operations on a prepayment basis. Specifically, clean electronic claims can be paid as early as the 14th day (13 days after the date of receipt) and must be paid by the 31st day (30 days after the date of receipt). Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 2. Not less than 95.0 percent of clean paper claims are processed within specified time frames. Specifically, clean paper claims can be paid as early as the 27th day (26 days after the date of receipt) and must be paid by the 31st day (30 days after the date of receipt). Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 3. 98.0 percent of MSNs are properly generated. Our expectation is that MSN messages are accurately reflecting the services provided.

Standard 4. 95.0 percent of review determinations are completed within 45 days. Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 5. 90.0 percent of carrier hearing decisions are completed within 120 days. Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 6. Review determination letters prepared in response to beneficiary initiated appeal requests are written at an appropriate reading level.

Additional functions that may be evaluated under this criterion includes, but are not limited to, the following:

- Claims Processing accuracy.
- Establishment and maintenance of relationship with the CWF Host.
- Accuracy of processing review determination cases.
- Accuracy of processing hearing cases with decision letters that are clear and have an appropriate customer-friendly tone.
- Accuracy and timeliness of processing appeals under BIPA.

Note: Section 521 of BIPA and section 940 of DIMA amend section 1869 of the Act by requiring major revisions to the Medicare appeals process. Upon implementation of section 521 of BIPA, the first level in a beneficiary's appeal will be a ''redetermination'' that will replace the current review for Part B appeals. Carriers will be required to process all requests for redeterminations within 60 days of receipt of the request. Upon implementation of section 521 of BIPA and section 940 of DIMA, we intend to begin evaluating whether carriers are meeting the timeliness and accuracy requirements for processing redeterminations. Because the ability for beneficiaries to request this new first level of appeal will not be initiated until section 521 of BIPA is implemented, there will be a period of time in which carriers will not only be processing redeterminations, but will continue to process the review and hearing workloads that existed prior to the implementation of BIPA. Upon the implementation of section 521 of BIPA and section 940 of DIMA, this 60-day requirement and the processing accuracy will be additional functions that may be evaluated.

B. Customer Service Criterion

Customer Service criterion contains the following mandated standard:

Standard. Replies to beneficiary correspondence address the beneficiary's concerns, are written with an appropriate customer-friendly tone and clarity, and are at the appropriate reading level.

Contractors must meet our performance expectations that beneficiaries and providers are served by prompt and accurate administration of the program in accordance with all applicable laws, regulations, and our general instructions.

Additional functions that may be evaluated under this criterion include, but are not limited to, the following:

- Providing timely and accurate replies to beneficiary and provider telephone inquiries.
- Quality call monitoring.
- Training of customer service representatives.
- Providing timely and accurate written replies to beneficiary and provider inquiries.
- Ensuring the validity of the call center performance data that are being reported in the Customer Service Assessment and Management System.
- Walk-in inquiry service.
- Conducting beneficiary and provider education, training, and outreach activities.
- Effectively maintaining an Internet Website dedicated to furnishing providers timely, accurate, and useful Medicare program information.

C. Payment Safeguards Criterion

Carriers may be evaluated on any MIP activities if performed under their contracts. In addition, other carrier functions and activities that may be reviewed under this criterion include, but are not limited to the following:

- Benefit Integrity

—Referring allegations of potential fraud that are made by beneficiaries, providers, CMS, OIG, and other sources to the Payment Safeguard Contractor.

—Putting in place effective detection and deterrence programs for potential fraud.

- Medical Review

—Increasing the effectiveness of medical review activities.

—Exercising accurate and defensible decision making on medical reviews.

—Effectively educating and communicating with the provider community.

—Collaborating with other internal components and external entities to ensure the effectiveness of medical review activities.

- Medicare Secondary Payer

—Accurately reporting MSP savings.

—Accurately following MSP claim development/edit procedures.

—Supporting the Coordination of Benefits Contractor's efforts to identify responsible payers primary to Medicare.

—Identifying, recovering, and referring mistaken/conditional Medicare payments in accordance with the appropriate Medicare Carriers Manual instructions, and our other pertinent general instructions.

- Overpayments

—Collecting and referring Medicare debts timely.

—Accurately reporting and collecting overpayments.

—Compliance with our instructions for management of Medicare Trust Fund debts.

- Provider Enrollment

—Complying with assignment of staff to the provider enrollment function and training staff in procedures and verification techniques.

—Complying with the operational standards relevant to the process for enrolling suppliers.

D. Fiscal Responsibility Criterion

We may review the carrier's efforts to establish and maintain appropriate financial and budgetary internal controls over benefit payments and administrative costs. Proper internal controls must be in place to ensure that contractors comply with their contracts.

Additional functions that may be reviewed under the Fiscal Responsibility criterion include, but are not limited to, the following:

- Adherence to approved program management and MIP budgets.
- Compliance with the BPRs.
- Compliance with financial reporting requirements.
- Control of administrative cost and benefit payments.

E. Administrative Activities Criterion

We may measure a carrier's administrative ability to manage the Medicare program. We may evaluate the efficiency and effectiveness of its operations, its system of internal controls, and its compliance with our directives and initiatives.

We may measure a carrier's efficiency and effectiveness in managing its operations. Proper systems security (general and application controls), ADP maintenance, and disaster recovery plans must be in place. Also, a carrier must test system changes to ensure accurate implementation of our instructions.

Our evaluation of a carrier under this criterion may include, but is not limited to, reviews of the following:

- Systems security.
- ADP maintenance (configuration management, testing, change management, and security).
- Disaster recovery plan/systems contingency plan.
- Implementation of our general instructions.
- Data and reporting requirements implementation.
- Internal controls establishment and use, including the degree to which the contractor cooperates with the Secretary in complying with the FMFIA.

VII. Criteria and Standards for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Regional Carriers

The five criteria for DMEPOS regional carriers contain a total of seven mandated standards against which all DMEPOS regional carriers must be evaluated.

There also are examples of other activities for which the DMEPOS regional carriers may be evaluated. The mandated standards are in the Claims Processing and Customer Service Criteria. In addition to being described in these criteria, the mandated standards are also described in Attachment J–37 to the DMEPOS regional carrier statement of work (SOW).

A. Claims Processing Criterion

The Claims Processing criterion contains the following six mandated standards:

Standard 1. Not less than 95.0 percent of clean electronically submitted claims are processed within statutorily specified time frames. Clean claims are defined as claims that do not require Medicare DMEPOS regional carriers to investigate or develop them outside of their Medicare operations on a prepayment basis. Specifically, clean electronic claims can be paid as early as the 14th day (13 days after the date of receipt) and must be paid by the 31st day (30 days after the date of receipt). Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 2. Not less than 95.0 percent of clean paper claims are processed within specified time frames. Specifically, clean paper claims can be paid as early as the 27th day (26 days after the date of receipt) and must be paid by the 31st day (30 days after the date of receipt). Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 3. Properly generated 98.0 percent of MSNs. Our expectation is that MSN messages are accurately reflecting the services provided.

Standard 4. 95.0 percent of DMEPOS regional carrier review determinations are completed within 45 days. Our expectation is that contractors will meet this percentage on a monthly basis.

Standard 5. 90.0 percent of DMEPOS regional carrier hearing decisions are completed within 120 days. CMS's expectation is that contractors will meet this percentage on a monthly basis.

Standard 6. Review determination letters prepared in response to beneficiary initiated appeal requests are written at an appropriate reading level.

Additional functions that may be evaluated under this criterion include, but are not limited to, the following:

- Claims processing accuracy.
- Review determinations and hearing decisions are written accurately, clearly, and in a customer friendly tone.
- Telephone reviews are appropriately documented and adjudicated timely.
- Requests for ALJ hearings are forwarded timely.
- Accuracy and timeliness of processing appeals under BIPA.

Note: Section 521 of BIPA and section 940 of DIMA amend section 1869 of the Act by requiring major revisions to the Medicare appeals process. Upon implementation of section 521 of BIPA, the first level in a beneficiary's appeal will be a ''redetermination'' which will replace the current review for Part B appeals. DMEPOS regional carriers will be required to process all requests for redeterminations within 60 days of receipt of the request. Upon implementation of section 521 of BIPA and section 940 of DIMA, we intend to begin evaluating whether DMEPOS regional carriers are meeting the timeliness and accuracy requirements for processing redeterminations. Because the ability for beneficiaries to request this new first level of appeal will not be initiated until section 521 of BIPA is implemented, there will be a period of time in which DMEPOS regional carriers will not only be processing redeterminations, but will continue to process the review and hearing workloads that existed prior to the implementation of BIPA. Upon the implementation of section 521 of BIPA and section 940 of DIMA, this 60-day requirement and the processing accuracy will be additional functions that may be evaluated.

B. Customer Service Criterion

The Customer Service Criterion contains the following mandated standard:

Standard. Replies to beneficiary correspondence, addresses concerns raised, writes with an appropriate customer-friendly tone and clarity at the appropriate reading level.

Contractors must meet our performance expectations that beneficiaries and suppliers are served by prompt and accurate administration of the program in accordance with all applicable laws, regulations, the DMEPOS regional carrier SOW, and our general instructions.

Additional functions that may be evaluated under this criterion include, but are not limited to, the following:

- Providing timely and accurate replies to beneficiary and supplier telephone inquiries.
- Monitoring calls for quality.
- Training of Customer Service Representatives.

Ensuring the validity of the call center performance data that are being reported in the Customer Service Assessment and Management System.

- Providing timely and accurate replies to beneficiaries, providers, and suppliers.
- Maintaining walk-in inquiry service.
- Conducting beneficiary and supplier education, training, and outreach activities.
- Effectively maintaining an Internet Website dedicated to furnishing suppliers timely, accurate, and useful Medicare program information.
- Ensuring that communications are made to interested supplier organizations for the purpose of developing and maintaining collaborative supplier education and training activities and programs.

C. Payment Safeguards Criterion

DMEPOS regional carriers may be evaluated on any MIP activities if performed under their contracts. The DMEPOS regional carriers must undertake actions to promote an effective program administration for DMEPOS regional carrier claims. These functions and activities include, but are not limited to the following:

- Benefit Integrity

—Identifying potential fraud cases that exist within the DMEPOS regional carrier's service area and taking appropriate actions to resolve these cases.

—Investigating allegations of potential fraud made by beneficiaries, suppliers, CMS, OIG, and other sources.

—Putting in place effective detection and deterrence programs for potential fraud.

- Medical Review

—Reducing the error rate by identifying patterns of inappropriate billing.

—Educating suppliers concerning Medicare coverage and coding requirements.

- Medicare Secondary Payer

—Accurately reporting MSP savings.

—Accurately following MSP claim development/edit procedures.

—Supporting the Coordination of Benefits Contractor's efforts to identify responsible payers primary to Medicare.

—Identifying, recovering, and referring mistaken/conditional Medicare payments in accordance with the appropriate program instructions in the specified order of priority.

- Overpayments

—Determining that the DMEPOS regional carrier completely, accurately, timely, and aggressively pursued all outstanding overpayments in adherence with the Medicare Carriers Manual and CMS Program Memoranda resulting from the Debt Collection Improvement Act (DCIA).

—Verifying that all overpayments were timely and accurately recorded.

D. Fiscal Responsibility Criterion

We may review the DMEPOS regional carrier's efforts to establish and maintain

appropriate financial and budgetary internal controls over benefit payments and administrative costs. Proper internal controls must be in place to ensure that contractors comply with their contracts. Additional matters that may be reviewed under this criterion include, but are not limited to the following:

- Compliance with financial reporting requirements.
- Adherence to approved program management and MIP budgets.
- Control of administrative cost and benefit payments.

E. Administrative Activities

We may measure a DMEPOS regional carrier's administrative ability to manage the Medicare program. We may evaluate the efficiency and effectiveness of its operations, its system of internal controls, and its compliance with our directives and initiatives. Our evaluation of a DMEPOS regional carrier under this criterion may include, but is not limited to review of the following:

- Systems Security.
- Disaster recovery plan/systems contingency plan.
- Internal controls establishment and use, including the degree to which the contractor cooperates with the Secretary in complying with the FMFIA.

VIII. Action Based on Performance Evaluations

We evaluate a contractor's performance against applicable program requirements for each criterion. Each contractor must certify that all information submitted to us relating to the contract management process, including, without limitation, all files, records, documents and data, whether in written, electronic, or other form, is accurate and complete to the best of the contractor's knowledge and belief. A contractor is required to certify that its files, records, documents, and data have not been manipulated or falsified in an effort to receive a more favorable performance evaluation. A contractor must further certify that, to the best of its knowledge and belief, the contractor has submitted, without withholding any relevant information, all information required to be submitted for the contract management process under the authority of applicable law(s), regulation(s), contract(s), or our manual provision(s). Any contractor that makes a false, fictitious, or fraudulent certification may be subject to criminal and/or civil prosecution, as well as appropriate administrative action. This administrative action may include debarment or suspension of the contractor, as well as the termination or nonrenewal of a contract.

If a contractor meets the level of performance required by operational instructions, it meets the requirements of that criterion. When we determine a contractor is not meeting performance requirements, we will use the terms ''major nonconformance'' or ''minor nonconformance'' to classify our findings. A major nonconformance is a nonconformance that is likely to result in failure of the supplies or services, or to materially reduce the usability of the supplies or services for their intended purpose. A minor nonconformance is a nonconformance that is not likely to materially reduce the usability of the supplies or services for their intended purpose, or is a departure from established standards having little bearing on the effective use or operation of the supplies or services. The contractor will be required to develop and implement a PIP for findings determined to be either a major or minor nonconformance. The contractor will be monitored to ensure effective and efficient compliance with the PIP, and to ensure improved performance when requirements are not met.

The results of performance evaluations and assessments under all criteria applying to intermediaries, carriers, RHHIs, and DMEPOS regional carriers will be used for contract management activities and will be published in the contractor's annual Report of Contractor Performance (RCP). We may initiate administrative actions as a result of the evaluation of contractor performance based on these performance criteria. Under sections 1816 and 1842 of the Act, we consider the results of the evaluation in our determinations when—

- Entering into, renewing, or terminating agreements or contracts with contractors, and
- Deciding other contract actions for intermediaries and carriers (such as deletion of an automatic renewal clause). These decisions are made on a case-by-case basis and depend primarily on the nature and degree of performance. More specifically, these decisions depend on the following:

—Relative overall performance compared to other contractors.

—Number of criteria in which nonconformance occurs.

—Extent of each nonconformance.

—Relative significance of the requirement for which nonconformance occurs within the overall evaluation program.

—Efforts to improve program quality, service, and efficiency.

—Deciding the assignment or reassignment of providers and designation of regional or national intermediaries for classes of providers.

We make individual contract action decisions after considering these factors in terms of their relative significance and impact on the effective and efficient administration of the Medicare program.

In addition, if the cost incurred by the intermediary, RHHI, carrier, or DMEPOS regional carrier to meet its contractual requirements exceeds the amount that we find to be reasonable and adequate to meet the cost that must be incurred by an efficiently and economically operated intermediary or carrier, these high costs may also be grounds for adverse action.

IX. Regulatory Impact Statement

We have examined the impacts of this notice as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million in any one year). Since this notice only describes criteria and standards for evaluating FIs (including RHHIs), carriers, and DMEPOS regional carriers and has no significant economic impact on the program, its beneficiaries, providers or suppliers, this is not a major notice.

The RFA requires agencies to analyze options for regulatory relief of small businesses, but intermediaries, RHHIs, carriers and DMEPOS regional carriers are not small businesses.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This notice does not affect small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. In accordance with section 202, we have determined that the notice does not impose any unfunded mandates on States, local or tribal governments, or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a notice that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have determined that the notice does not significantly affect the rights, roles, and responsibilities of States.

We have not prepared a Regulatory Impact Analysis for this notice, in accordance with Executive Order 12866, because it will not have a significant economic impact, nor does it impose any unfunded mandates on State, local, or tribal governments or the private sector. Furthermore, we certify that the notice will not have a significant impact on a substantial number of small entities or small rural hospitals.

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

X. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Authority: Sections 1816(f), 1834(a)(12), and 1842(b) of the Social Security Act (42 U.S.C. 1395h(f), 1395m(a)(12), and 1395u(b)).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital

Insurance, and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: June 5, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Editorial Note. This document was received at the Office of the Federal Register on December 17, 2003.

[FR Doc. 03–31468 Filed 12–23–03; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1254–N]

Medicare Program; Meeting of the Advisory Panel on Ambulatory Payment Classification Groups—February 18, 19, and 20, 2004

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix 2), this notice announces the first biannual meeting of the Advisory Panel on Ambulatory Payment Classification (APC) Groups (the Panel) for 2004.

The purpose of the Panel is to review the APC groups and their associated weights and to advise the Secretary of Health and Human Services (the Secretary) and the Administrator of the Centers for Medicare & Medicaid Services (CMS) (the Administrator) concerning the clinical integrity of the APC groups and their associated weights. The Secretary and Administrator consider the Panel's advice as CMS prepares its annual updates of the hospital outpatient prospective payment system (OPPS) through rulemaking.

DATES: The first biannual meeting for 2004 is scheduled for February 18, 19, and 20, 2004, from 8 a.m. to 5 p.m. (EST).

ADDRESSES: The meeting will be held in the Multipurpose Room, 1st Floor, at the CMS Central Office, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

FOR FURTHER INFORMATION CONTACT: For copies of the charter, inquiries regarding these meetings, meeting registration, and submission of oral presentations or written agenda items, contact Shirl Ackerman-Ross, the meeting coordinator and Designated Federal Official, FACA; CMS, Center for Medicare Management, Hospital Ambulatory Policy Group, Division of Outpatient Care; 7500 Security Boulevard, Mail Stop C4–05–17; Baltimore, MD 21244–1850 or phone (410) 786–4474. Also, please refer to the CMS Advisory Committees' Information Line at 1–877–449–5659 (toll free) and (410) 786–9379 (local).

For additional information on the APC meeting agenda topics and/or updates to the Panel's activities, search our Internet Web site: *http://www.cms.hhs.gov/faca/apc/default.asp*.

To submit a request for a copy of the charter, search the Internet at *http://www.cms.hhs.gov/faca* or e-mail *SAckermannross@cms.hhs.gov*.

Written materials may also be sent electronically to *outpatientpps@cms.hhs.gov*.

News media representatives should contact our Public Affairs Office at (202) 690–6145.

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Department of Health and Human Services (the Secretary) is required by section 1833(t)(9)(A) of the Social Security Act (the Act) to establish and consult with an expert, outside advisory panel on Ambulatory Payment Classification (APC) groups. The Advisory Panel on Ambulatory Payment Classification Groups (the Panel) meets up to three times annually to review the APC groups and to provide technical advice to the Secretary and to the Administrator of the Centers for Medicare & Medicaid Services (CMS) (the Administrator) concerning the clinical integrity of the groups and their associated weights. We will consider the technical advice provided by the Panel as we prepare the proposed rule that proposes changes to the Outpatient Prospective Payment System (OPPS) for the next calendar year.

The Panel may consist of a chair up to 15 members. These members must be representatives of Medicare Providers who are subject to OPPS and they may not be consultants. Panel members must have technical expertise that will enable them to participate fully in the work of the panel and must be currently employed full-time in their area of expertise. The Administrator selected the Panel membership based upon either self-nominations or nominations submitted by providers or organizations.

The Panel presently consists of the following members and a Chair (Vacant):

- Marilyn Bedell, M.S., R.N., O.C.N.
- Geneva Craig, R.N., M.A.
- Lora DeWald, M.Ed.
- Albert Brooks Einstein, Jr., M.D.
- Robert E. Henkin, M.D.
- Lee H. Hilborne, M.D., M.P.H.
- Stephen T. House, M.D.
- Frank G. Opelka, M.D., F.A.C.S.
- Kathleen Kinslow, C.R.N.A., Ed.D.
- Mike Metro, R.N., B.S.
- Gerald V. Naccarelli, M.D.
- Beverly K. Philip, M.D.
- Lynn R. Tomascik, R.N., M.S.N., C.N.A.A.
- Timothy Gene Tyler, Pharm.D.
- William Van Decker, M.D.

The agenda for the February 2004 meeting will provide for discussion and comment on the following topics:

- Reconfiguration of APCs (for example, splitting of APCs, moving Healthcare Common Procedure Coding System (HCPCS) codes from one APC to another and moving HCPCS codes from New Technology APCs to Clinical APCs).
- Evaluation of APC weights.
- Packaging devices and drug costs into APCs: methodology, effect on APCs, and need for reconfiguring APCs based upon device and drug packaging.
- Removal of procedures from the inpatient list for payment under the OPPS.
- Use of single and multiple procedure claims data.
- Packaging of HCPCS codes.
- Other technical issues concerning APC structure.

We are soliciting comments from the public on specific agenda items falling within these agenda topics for the February 2004 Panel meeting. We will consider specific agenda items for this meeting if they are submitted in writing and fall within the agenda topics listed above. We urge those who wish to comment to send comments as soon as possible but no later than 5 p.m. (EST), Friday, February 6, 2004.

The meeting is open to the public, but attendance is limited to the space available. Individuals or organizations wishing to make 5-minute oral presentations should contact the meeting coordinator by 5 p.m. (EST), Friday, February 6, 2004, in order to be scheduled. The number of oral presentations may be limited by the time available. Oral presentations must not exceed 5 minutes and may be further limited by the Chair due to quantity of presentations.

Persons wishing to make oral presentations must submit a copy of the presentation and the name, address, and telephone number of the presenter. In addition, all presentations must contain, at a minimum, the following supporting information and data:

• The presenter's financial relationship(s), if any, with any company whose products, services, or procedures are under consideration.
• Physicians' Current Procedural Terminology (CPT) codes involved.
• APC(s) affected.
• Description of the issue(s).
• Clinical description of the service under discussion (with comparison to other services within the APC).
• Recommendations and rationale for change.
• Expected outcome of change and potential consequences of not making the change.

Submit a written copy of the oral presentation or written agenda items to the meeting coordinator listed above or electronically to the following address: *outpatientpps@cms.hhs.gov*. Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission and cannot acknowledge or respond individually to comments that we receive.

In addition to formal presentations, there will be an opportunity during the meeting for public comment, limited to 1 minute for each individual or a total of 5 minutes per organization.

Persons wishing to attend this meeting, which is located on Federal property, must call the meeting coordinator, Shirl Ackerman-Ross, at (410) 786–4474, to register in advance no later than 5 p.m. (EST), Wednesday, February 4, 2004. Persons attending must present a photographic identification to the Federal Protective Service or Guard Service personnel before they will be allowed to enter the building.

Persons who are not registered in advance will not be permitted into the building and will not be permitted to attend the meeting.

A member of our staff will be stationed at the Central Building, first-floor lobby, to provide assistance to attendees. Please remember that all visitors must be escorted if they have business in areas other than the lower and first floor levels in the Central Building. Parking permits and instructions are issued upon arrival by the guards at the main entrance.

Special Accommodations: Individuals requiring sign-language interpretation or other special accommodations should send a written request for these services to the meeting coordinator, Shirl Ackerman-Ross, at Center for Medicare Management, Hospital Ambulatory Policy Group, Division of Outpatient Care; 7500 Security Boulevard, Mail Stop C4–05–17; Baltimore, MD 21244–1850 by 5 p.m. (EST), Wednesday, February 4, 2003.

Authority: Section 1833(t) of the Act (42 U.S.C. 1395l(t), as amended by section 201(h) of the BBRA of 1999 (Pub. L. 106–113) and section 10(a) of Pub. L. 92–463 (5 U.S.C. Appendix 2). The Panel is governed by the provisions of Pub. L. 92–463, as amended (5 U.S.C. Appendix 2).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 9, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 03–31045 Filed 12–23–03; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1247–N]

Medicare Program; Town Hall Meeting in Calendar Year 2004 for Ambulance Condition Codes

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces a town hall meeting to provide a forum for all interested individuals to discuss and/or submit written comments on the establishment and implementation of Ambulance Condition Codes. Ambulance Condition Codes would be included in Chapter 15 of the CMS Manual System. Development of new ICD–9–CM codes for those Ambulance Condition Codes that do not currently have a satisfactory corresponding ICD–9–CM code will be a separate process that the ambulance industry must address with the National Center for Health Statistics (NCHS).

DATES: The town hall meeting announced in this notice will be held on Wednesday, February 4, 2004, from 10 a.m. to 4 p.m., e.s.t.

ADDRESSES: The town hall meeting will be held in the auditorium at the Centers for Medicare & Medicaid Services (CMS), 7500 Security Boulevard, Baltimore, Maryland 21244.

FOR FURTHER INFORMATION CONTACT: Anne Tayloe, (410) 786–4546.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, the Congress passed the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (the BIPA) (Pub. L. 106–554). Section 1833(h) of the Social Security Act (the Act) and section 531(b) of the BIPA mandated procedures that permit public consultation on clinical laboratory services and durable medical equipment (DME) payment policy issues. We are applying this public consultation procedure to ambulance service policy issues for the purpose of this town hall meeting. This town hall meeting is intended to provide a forum for all interested parties to comment on and discuss the Ambulance Condition Codes. The Ambulance Condition Code information may be reviewed prior to the public meeting by accessing *http://www.cms.hhs.gov/paymentsystems* on the Internet. This information will be available for review beginning January 5, 2003.

II. Presentations

Registered persons from the public may discuss and make recommendations concerning the Ambulance Condition Codes. Individuals who wish to make formal presentations must include that information when registering. Presentations must be brief, and three written copies must be submitted to accompany the oral presentation. Presenters may also make copies available for approximately 50 meeting participants.

III. Registration Instructions

Beginning January 5, 2004, you may complete your registration on-line at *http://www.cms.hhs.gov/paymentsystems*. Please submit the following information when registering: name, company name, address, telephone number, and e-mail address and an indication of whether you wish to make a formal presentation. A confirmation will be sent upon receipt of the registration.

Because this meeting will be located on Federal property, for security reasons, any persons wishing to attend this meeting must register by close of business on January 23, 2004. In order to gain access to the building and grounds, participants must show to the Federal Protective Service or Guard Service personnel a government-issued photo identification and a copy of their registration confirmation. Individuals who have not registered in advance will not be allowed to enter the building to attend the meeting. Seating capacity is limited to the first 250 registrants.

The on-site check-in for visitors will be held from 9 a.m. until 10 a.m., followed by opening remarks. Please allow sufficient time to arrive to go through the security checkpoints. It is

suggested that you arrive at 7500 Security Boulevard no later than 8:40 a.m. so that you will be able to arrive promptly at the meeting by 9 a.m. All items brought to CMS, whether personal or for the purpose of demonstration or to support a presentation, are subject to inspection.

Individuals requiring sign language interpretation for the hearing impaired or other special accommodations must provide that information upon registering for the meeting.

Authority: Sections 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 9, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 03–31044 Filed 12–23–03; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Grants for Coordinated HIV Services and Research for Women, Infants, Children, and Youth

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Correction.

SUMMARY: In notice document FR Doc. 03–22427, Vol. 68, No. 171, Thursday, September 4, 2003, make the correction:

On page 52658, in the third column under ''Limited Competition:'' Correct the areas of limited competition to add: LA—Baton Rouge.

Dated: December 17, 2003.

Elizabeth M. Duke,

Administrator.

[FR Doc. 03–31771 Filed 12–23–03; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on the National Health Service Corps; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following Federal advisory committee meeting. The meeting will be open to the public.

Name: National Advisory Council on the National Health Service Corps.

Date and Time: March 18, 2004; 5 p.m.–7 p.m.; March 19, 2004; 8:30 a.m.–5 p.m.; March 20, 2004; 9 a.m.–5:30 p.m.; March 21, 2004; 8 a.m.–10:30 a.m.

Place: Embassy Suites Hotel Raleigh/Crabtree, 4700 Creedmoor Road, Raleigh, NC 27612, 919–881–0000.

Agenda: The Council will be meeting in Raleigh, North Carolina, to focus on rural implementation issues of the National Health Service Corps (NHSC). Members will meet with local scholars, loan re-payers and program alumni. State Officials will also address council, including communities which have used NHSC services.

FOR FURTHER INFORMATION CONTACT: Tira Robinson, Division of National Health Service Corps, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8A–55, 5600 Fishers Lane, Rockville, Maryland 20857, telephone (301) 594–4140.

Dated: December 17, 2003.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 03–31769 Filed 12–23–03; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Training in Primary Care Medicine and Dentistry; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), notice is hereby given of the following meeting:

Name: Advisory Committee on Training in Primary Care Medicine and Dentistry.

Date and Time: February 12, 2004, 8:30 a.m.–4:30 p.m. and February 13, 2004, 8 a.m.–2 p.m.

Place: The Holiday Inn Select, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.

Status: The meeting will be open to the public.

Purpose: The Advisory Committee provides advice and recommendations on a broad range of issues dealing with programs and activities authorized under section 747 of the Public Health Service Act as amended by The Health Professions Education Partnership Act of 1998, Public Law 105–392. At this meeting the Advisory Committee will work on its fourth report which will be submitted to Congress and the Secretary of the Department of Health and Human Services in November 2004. The fourth report focuses on the role of primary care in health care delivery in the future and the implications for training health professionals. This meeting also will devote time for a discussion of outcomes of Title VII, section 747 programs.

Agenda: The meeting on Thursday, February 12, will begin with opening comments from the Chair of the Advisory Committee. A plenary session will follow in which Advisory Committee members will discuss various sections of the fourth report. The Advisory Committee will divide into workgroups to further develop the fourth report. An opportunity will be provided for public comment.

On Friday, February 13, the Advisory Committee will meet in plenary session to continue its work on the fourth report. There will be a discussion of a subcommittee report on how to measure outcomes of Title VII, section 747 training programs. An opportunity will be provided for public comment.

FOR FURTHER INFORMATION CONTACT: Anyone interested in obtaining a roster of members or other relevant information should write or contact Jerilyn K. Glass, M.D., Ph.D., Division of Medicine and Dentistry, Bureau of Health Professions, Health Resources and Services Administration, Room 9A–27, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–6326. The web address for information on the Advisory Committee is *http://bhpr.hrsa.gov/medicine-dentistry/actpcmd.*

Dated: December 17, 2003.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 03–31770 Filed 12–23–03; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Notice of Filing of Annual Report of Federal Advisory Committee

Notice is hereby given that pursuant to section 13 of Public Law 92–463, the fiscal year 2003 annual report for the following Health Resources and Services Administration's (HRSA) Federal advisory committee has been

filed with the Library of Congress: Health Professions and Nurse Education Special Emphasis Panel.

Copies are available to the public for inspection at the Library of Congress, Newspaper and Current Periodical Reading Room in the James Madison Memorial Building, Room LM–133 (entrance on Independence Avenue, between First and Second Streets, SE., Washington, DC).

Copies may be obtained from: Ms. Wilma Johnson, Deputy Director, Division of Independent Review, Office of Management and Program Support, HRSA, Parklawn Building, Room 11A–22, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–3019.

Dated: December 19, 2003.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 03–31772 Filed 12–23–03; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Notice of Filing of Annual Report of Federal Advisory Committee

Notice is hereby given that pursuant to section 13 of Public Law 92–463, the fiscal year 2003 annual report for the following Health Resources and Services Administration's (HRSA) Federal advisory committee has been filed with the Library of Congress: Maternal and Child Health Research Grants Review Committee.

Copies are available to the public for inspection at the Library of Congress, Newspaper and Current Periodical Reading Room in the James Madison Memorial Building, Room LM–133 (entrance on Independence Avenue, between First and Second Streets, SE., Washington, DC).

Copies may be obtained from: Ms. Stella M. Yu, Division of Research, Training and Education, Maternal and Child Health Bureau, HRSA, Parklawn Building, Room 18A–55, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone 301–443–2340.

Dated: December 19, 2003.

Tina M. Cheatham,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. 03–31773 Filed 12–23–03; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Directorate of Information Analysis and Infrastructure Protection (IAIP); Open Meeting of National Infrastructure Advisory Council (NIAC)

AGENCY: Directorate of Information Analysis and Infrastructure Protection, Department of Homeland Security.

ACTION: Notice.

SUMMARY: The National Infrastructure Advisory Council (NIAC) will meet on Tuesday, January 13, 2004, from 3 p.m. until 6 p.m. in Room 207 of the Washington Convention Center, 801 Mount Vernon Place, NW., Washington, DC. The meeting will be open to the public. Limited seating will be available. Reservations are not accepted.

The NIAC advises the President of the United States on the security of information systems for critical infrastructure supporting other sectors of the economy, including banking and finance, transportation, energy, manufacturing, and emergency government services. At this meeting, the NIAC will be briefed on the status of several Working Group activities that the Council undertook at its last meeting.

DATES: The NIAC will meet Tuesday, January 13, 2004, from 3 p.m. until 6 p.m.

ADDRESSES: The NIAC will meet in Room 207 of the Washington Convention Center, 801 Mount Vernon Place, NW., Washington, DC. Written comments may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to NIAC members, the Council suggests that presenters forward the public presentation materials, ten days prior to the meeting date, to the following address: Ms. Nancy J. Wong, Infrastructure Coordination Division, Directorate of Information Analysis and Infrastructure Protection, U.S. Department of Homeland Security, 14th Street & Constitution Avenue, NW., Room 6073, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Nancy J. Wong, NIAC Designated Federal Officer, telephone 202–482–7488.

SUPPLEMENTARY INFORMATION: Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agenda of Subcommittee Meeting on January 13, 2004

I. Opening of Meeting: Nancy J. Wong, U.S. Department of Homeland Security (DHS)/Designated Federal Officer, NIAC.

II. Roll Call of Members: NIAC Staff.

III. Conflict of Interest and the Special Council Government Employee Ethics Training Session: Robert Coyle; and Nancy Baumgartner, DHS/Office of General Counsel.

IV. Opening Remarks: Lt. Gen. Frank Libutti (USMC, ret.), Under Secretary for Information Analysis and Infrastructure Protection, DHS, Homeland Security for Infrastructure Protection; Richard K. Davidson, Chairman, President & CEO, Union Pacific Corporation; Chairman, NIAC; and John T. Chambers, President & CEO, Cisco Systems, Inc.; Vice Chairman, NIAC.

V. Report of the Working Group on Cyber Vulnerability Disclosure Guidelines: Vice Chairman Chambers; and John W. Thompson, Chairman & CEO, Symantec Corporation; NIAC Member.

VI. Status Reports on Pending Initiatives:

a. Evaluation and Enhancement of Information Sharing and Analysis: Thomas E. Noonan, Chairman, President & CEO, Internet Security Systems, Inc.; NIAC Member.

b. Regulatory Guidance/Best Practices for Enhancing Security of Critical Infrastructure Industries: Karen L. Katen, President, Pfizer Global Pharmaceuticals and Exec. V.P., Pfizer Inc.; NIAC Member.

c. Hardening the Internet: George H. Conrades, Chairman & CEO, Akamai Technologies; NIAC Member.

d. Prioritization of Cyber Vulnerabilities: Martin G. McGuinn, Chairman & CEO, Mellon Financial Corporation; NIAC Member.

VII. Discussion of NIAC on the Draft of the Sector Interdependencies/Risk Assessment Guidance Working Report: Martin G. McGuinn, Chairman & CEO, Mellon Financial Corporation; NIAC Member.

VIII. Adoption of NIAC Comments: NIAC Members.

IX. New Business: Chairman Davidson; NIAC Members.

X. Adjournment.

Procedural

These meetings are open to the public. Please note that the meetings may close early if all business is finished. At the discretion of the Chair, members of the public may make oral presentations during the meetings. If you would like to make an oral

presentation at a meeting, please notify the Designated Federal Officer and submit written material. If you would like a copy of your material distributed to each member of the Committee in advance of a meeting, please submit 25 copies to the Designed Federal Officer (*see* **ADDRESSES** and **DATES**).

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, telephone the Designated Federal Officer as soon as possible.

Dated: December 17, 2003.

Nancy J. Wong,

Designated Federal Officer for NIAC.

[FR Doc. 03–31656 Filed 12–23–03; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2003–16730]

Recreational Boating Safety Projects, Programs and Activities Funded Under Provisions of the Transportation Equity Act for the 21st Century; Accounting of

AGENCY: Coast Guard, DHS.

ACTION: Notice.

SUMMARY: For each of 5 fiscal years starting in 1999, the Transportation Equity Act for the 21st Century has made $5 million available to the Secretary of Transportation for payments of Coast Guard expenses for personnel and activities directly related to coordinating and carrying out the national recreational boating safety program. This notice is being published to satisfy a requirement of the Act that a detailed accounting of the projects, programs, and activities funded under the national recreational boating safety program provision of the Act be published annually in the **Federal Register**. In this notice, we have specified the amount of monies the Coast Guard has committed, obligated or expended as of September 30, 2003.

FOR FURTHER INFORMATION CONTACT: Captain Scott Evans, USCG, Chief, Office of Boating Safety, telephone 202–267–1077, fax 202–267–4285, or Mr. Jeffrey N. Hoedt, Chief, Program Management Division, telephone 202–267–0950, fax 202–267–4285.

SUPPLEMENTARY INFORMATION: The Transportation Equity Act for the 21st Century became law on June 9, 1998 (Pub. L. 105–178; 112 Stat. 107). The Act required that of the $5 million made available to carry out the national recreational boating safety program each year, $2 million shall be available only to ensure compliance with Chapter 43 of title 46, U.S. Code—Recreational Vessels. The responsibility to administer these funds was delegated to the Commandant of the United States Coast Guard. With the transfer of the Coast Guard to the Department of Homeland Security (DHS), this authority in the Transportation Equity Act for the 21st Century has been transferred to the Secretary of the DHS from the Secretary of the Department of Transportation (Sec. 888 of the Homeland Security Act of 2002), and redelegated to the Coast Guard (Department of Homeland Security Delegation No. 0170.1.).

Subsection (c) of sec. 7405 of the Act directs that no funds available to the Secretary under this subsection may be used to replace funding traditionally provided through general appropriations, nor for any purposes except those purposes authorized; namely, for personnel and activities directly related to coordinating and carrying out the national recreational boating safety program. Amounts made available each fiscal year 1999 through 2003 shall remain available until expended.

Use of these funds requires compliance with standard Federal contracting rules with associated lead and processing times resulting in a lag time between available funds and spending. The following activities have been initiated using fiscal year 1999 through 2003 funds transferred to the Coast Guard from the Aquatic Resources (Wallop-Breaux) Trust Fund. The total amount of fiscal year 1999, 2000, 2001, 2002 and 2003 funding committed, obligated and/or expended for each activity is shown.

Factory Visit Program: An initial contract was awarded to establish a national recreational boat factory visit program using contractor personnel. The contract included the development of a plan of action and an 18-month pilot program to validate the elements of the plan and the concept of the program. The pilot program commenced in the summer of 2000. ''Compliance associates'' (inspectors) were trained and formal factory visits were initiated in January 2001. The factory visit program currently allows contractor personnel, acting on behalf of the Coast Guard, to visit approximately 2,000 recreational boat manufacturers each year to inspect for compliance with the Federal regulations, communicate with the manufacturers as to why they need to comply with the Federal regulations, and educate them, as necessary, on how to comply with the Federal regulations. ($6,284,665)

Boat Compliance Testing: Funding is provided for expansion of the boat compliance testing program whereby new manually propelled and outboard recreational boats are purchased in the open market and tested for compliance with the Federal flotation standards. The expanded program includes inboard/sterndrive boats and used boats. ($651,381)

Associated Equipment Compliance Testing: A contract was awarded to buy recreational boat ''associated equipment'' (*e.g.*, starters, alternators, fuel pumps, and bilge pumps) and test this equipment for compliance with Federal safety regulations. This new initiative complements the boat compliance testing program. ($426,220)

Compliance Associated Travel: Travel by employees of the Office of Boating Safety is being performed to carry out additional compliance actions and to gather background and planning information for new compliance initiatives. ($108,395)

New Boat Manufacturer Outreach Package: A contract was awarded to design and develop a comprehensive and user-friendly outreach package for distribution to new recreational boat manufacturers. Included in the package are a brochure and video that outline the many facets of the recreational boat manufacturing business, including Federal regulations, voluntary standards, self-certification, financial aspects, insurance concerns, liability issues, points of contact and the steps necessary to become a new recreational boat manufacturer. The package also includes plain language guidelines that help clarify Federal requirements. The outreach package is aimed at increasing the level of new recreational boat manufacturer compliance with applicable Federal regulations. ($433,995)

National Recreational Boating Survey: The national recreational boating survey was completed on November 30, 2003. The purpose of this project was to obtain up-to-date statistical estimates on recreational boating. Over 25,000 surveys were completed with individuals who boated between September 2001 and September 2002. Survey findings were extrapolated to produce national, regional and State estimates of boat use as well as the characteristics of boat operators, passengers, boats, safety equipment, and

the boating environment. The final report is available upon request to the U.S. Coast Guard Infoline at 1–800–368–5647. ($1,809,144).

Boating Accident Report Database (BARD): A contract has been awarded to enhance the capability of all States and the Coast Guard for the successful electronic exchange, management, and reporting of recreational boating accident report data using the BARD software application. This contract provides for software module development, software module testing, applicable rework, implementation, maintenance, and technical support for the user community in the 50 States, five Territories, and the District of Columbia. ($2,953,755)

State Incident Notification: The Coast Guard Search and Rescue Management Information System (SARMIS) software has been modified to electronically notify the relevant State boating law administrators regarding any fatal recreational boating incident cases to which the Coast Guard responds. The intent of this notification is to ensure that these cases are captured in the accident report data submitted by the State boating law administrators to the Boating Accident Report Database (BARD). ($12,678)

Articulated Mannequins/Computer Simulation Model: The objective of this contracted program is to improve the safety of recreational boaters by fostering developmental technology for improved personal flotation devices (PFDs). This program is furthering development of flotation mannequins and a water forces computer simulation program to promote the rapid, objective evaluation of different PFD designs on various body types that are representative of the recreational boating population. The computer simulation program will be validated through the use of a family of anthropomorphic, articulated mannequins. Under the contract to develop the articulated mannequins and computer simulation model, a male model has been built and is almost perfected. Currently, a female and a child mannequin are being developed. The development of a computer simulation program will facilitate evaluation of the effectiveness of new and unique PFD designs. ($814,341)

Risk-Based Personal Flotation Device Approval Process: This ongoing effort will improve the approval process for personal flotation devices (PFDs) by developing a risk-based compliance system that is based on an objective Life Saving Index. This index will provide a formal structure and consistency to the process for accepting new approaches to designing devices for drowning prevention. The risk-based process identifies critical factors for evaluating PFD lifesaving potential and defines the minimum level of performance necessary for approval. ($421,509)

Carbon Monoxide Research: The Office of Boating Safety has entered into a Memorandum of Agreement with the Department of Health and Human Services, U.S. Public Health Service, Federal Occupational Health Program, to continue investigation into identifying and classifying additional recreational boating carbon monoxide related deaths and injuries. ($573,475)

Houseboat Manufacturers Workshop/ Conference Support: Funding provided support services for a Coast Guard-sponsored gathering of the houseboat industry to explore potential design solutions to the carbon monoxide poisonings that have occurred on recreational houseboats. ($17,030)

Hull Identification Number (HIN) Economic Analysis: This contracted effort provided the Coast Guard with a cost/benefit analysis on the effects of expanding the current 12-character HIN to a 17-character HIN for all newly constructed recreational boats. ($47,626)

Virtual Reality Personal Watercraft (PWC): A virtual reality PWC was developed under contract to provide a platform to gather objective data on operator reactions to various scenarios. This information would otherwise be unobtainable or would require more costly methods and sources, due to the risk of injury to the operator as well as due to the difficulty of accurately replicating conditions for all operators. The virtual reality PWC is being used in various test scenarios to collect human factors data including the measurement of reactive movements and reaction time that will assist in making decisions or taking action to improve personal watercraft safety. The data from this effort will give greater insight into the human-machine interface related to PWC operation and will assist in the effort to attempt to reduce PWC accidents. ($407,638)

Knowledge Management System: The first phase of a proposed three-phase contracted effort to develop a comprehensive Knowledge Management plan for automating office processes within the Office of Boating Safety was successfully completed. This phase provided the system requirements, potential applications and over-arching possible utility of the knowledge management system. Upon review of phase one analysis it was determined that the project should be terminated. This decision was based upon information obtained while performing this segment. In addition, it was determined that with projected changing software systems within the federal government that it was in our best interest to wait until the new federal system was made available. The second and third phases will not be implemented until further federal direction is obtained. Phases two and three, if implemented, would install document imaging software to capture and fully automate product assurance and consumer files and provide support that will ultimately enhance efficiency in supporting customers, partners and stakeholders. This would provide quicker, more effective and efficient program oversight while providing customers with the ability to do business with the Coast Guard via web-based technology, thus enabling the Coast Guard to reduce the amount of paper transactions involved in servicing external customers. This system will assist in the electronic monitoring, storage and daily use of information and materials within the Office of Boating Safety. ($431,890)

Coast Guard Infoline/Office of Boating Safety Web Site: Funding has been provided for both technological and educational enhancements to the toll-free Coast Guard Infoline and the Office of Boating Safety Web site to create a one-stop customer service center. The Infoline provides information about safety, regulations, communications, Coast Guard policy, and available material related to boating safety issues. Additionally, this effort provides a complete interactive recreational boating safety Web site that offers the public and boating safety agencies and organizations real-time information on every aspect of recreational boating safety. One of the goals of this program is to create a one-stop customer service center for all users. ($859,798)

Federal Requirements Publication: A customer-friendly ''Federal Requirements and Safety Tips for Recreational Boats'' publication was developed based on easy-to-read, high visibility graphics, and with subject-specific safety tips that promote high retention by the reader. Both hard copy and electronic interactive versions have been created for the public. The enhanced Federal Requirements brochure is being widely distributed, and in addition, can be downloaded from the Office of Boating Safety Web site (*http://www.uscgboating.org*). ($427,000)

Emergency Radio Call Procedures Decal: An emergency radio call procedures decal was produced and disseminated that provides the recreational boater with the proper

procedures to use in making an emergency or distress call via VHF–FM Channel 16. This decal will be distributed via the Coast Guard Auxiliary, U.S. Power Squadrons, and State boating offices, as well as U.S. Army Corps of Engineers, Tennessee Valley Authority, and the Bureau of Land Management. This item also supports the Vessel Safety Check (VSC) program provided by the Coast Guard Auxiliary, U.S. Power Squadrons and States. The VSC program is a free service provided by these organizations offering a safety check of recreational boats 65′ or less in length. ($25,810)

Aids to Navigation Booklet: A full-color booklet, ''U.S. Aids to Navigation System,'' was produced to assist recreational boaters in better understanding the use and identification of navigational aids. This booklet is now used as an educational adjunct to the safe boating classes taught by the Coast Guard Auxiliary, U.S. Power Squadrons, and many of the States. It is also distributed in conjunction with the Vessel Safety Check program. ($135,327)

''Operation BoatSmart'' Support: Funding support was provided to this initiative which coordinated Coast Guard and other boating safety organizations aims to energize recreational boating safety programs by strengthening and extending partnerships at the national, State and local levels. Through combined and coordinated efforts, the BoatSmart partners targeted those activities and behaviors that presented the greatest risk for the recreational boater. ''Operation BoatSmart'' brought together these organizations to work in tandem to promote a positive change in boater awareness and behavior, with special emphasis on inland waters where most recreational boating takes place. Special emphasis was focused on encouraging life jacket wear, boater education, and scrupulous enforcement of boating under the influence laws by appropriate authorities. ($273,586)

Recreational Boating Safety Program Marketing Support: A national marketing, awareness and education campaign in support of ''Operation BoatSmart,'' as well as America's Boating Course, Boating Under the Influence Campaign, and the Vessel Safety Check (VSC) Program, has been funded. America's Boating Course is a joint boating safety education course developed by the U.S. Coast Guard Auxiliary and the U.S. Power Squadrons, supported by the Coast Guard. This course, available via CD–Rom or Internet will set the standard for recreational boating safety in our country. The Boating Under the Influence (BUI) campaign, ''It's a Different World on the Water,'' is a multi-year effort to educate the recreational boater about the hazards of boating under the influence of alcohol or drugs. The marketing plan utilizes nationally recognized cartoon characters, Popeye and Olive Oyl, to advertise the VSC program to the boating public at marinas, yacht clubs, boat storage facilities, retail outlets and other recreational outlets. ($98,956)

Recreational Boating Safety (RBS) Outreach Program: This program provides full marketing, media, public information, and program strategy support to the RBS effort. The goal is to coordinate the RBS outreach campaigns some of which include: National Boating Under the Influence Campaign (BUI), Operation BoatSmart, PFD Wear, Vessel Safety Check Program (VSC), America's Boating Course, and other recreational boating safety issues on an as needed basis. ($2,189,254)

Kayak/Canoe Sponson Study: Study completed on the efficacy of the use of sponsons on canoes and kayaks. ($26,171)

Field Support—District Funded Projects

Seventeenth Coast Guard District Boating Safety Detachment: Funding was provided on a one-time, non-recurring basis to the Seventeenth Coast Guard District in support of a Coast Guard Boating Safety Detachment to assist in the transition of the State of Alaska's assumption of Recreational Boating Safety Program responsibilities. ($25,000)

Seventeenth Coast Guard District Boating Education and Safety (BEST)Teams: A 3-year effort, the BEST teams operated in the 17th District in 16 separate locations, with more than 30 team members providing educational benefits to the boaters of that district. ($150,000)

Eighth Coast Guard District Western Rivers Strike Team: Similar to the 17th District program these strike teams operated in the western rivers in the 8th District conducting safety education and providing waterway management assistance to various state RBS related activities within the Eighth Coast Guard District on an as needed basis. ($190,000)

National Boating Registration System: As a service for States/Territories that currently have inadequate (or no) computer software program to maintain their vessel numbering system information, funding was provided to the U.S. Coast Guard Operations Systems Center (OSC) to develop a National Boating Registration System software program that can easily be adapted by any State/Territory for their own use. The software that has been provided to States/Territories at no cost includes a function to automatically generate the annual report on numbered vessels that must be submitted to the Coast Guard each year. ($25,000)

Marine Dealer Literature Display Racks: Display racks for U.S. Coast Guard and U.S. Coast Guard Auxiliary literature were purchased to improve distribution of boating safety literature. These display racks are intended to be used at retail outlets and marine dealers. ($23,725)

Personnel Support: Funding is providing for personnel to support the development of new regulations, to support new contracting activities associated with the additional funding, and to monitor and manage the contracts awarded. ($905,791)

Marine Accident Investigating and Reporting: An initial contract was awarded to investigate and provide reports on marine accidents. The contractor also provides statistical analysis on causes. ($95,000)

A total of $20,844,160 of the $25,000,000 made available to the Coast Guard through annual transfers of $5 million in fiscal years 1999, 2000, 2001, 2002 and 2003 has been committed, obligated or expended as of September 30, 2003.

Dated: December 17, 2003.

Jeffrey J. Hathaway,

Rear Admiral, U.S. Coast Guard, Director of Operations Policy.

[FR Doc. 03–31729 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

[CBP Decision 03–36]

Customs Accreditation of SEA, Ltd. as a Commercial Laboratory

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation of SEA, Ltd., of Columbus, Ohio, as a commercial laboratory.

SUMMARY: SEA, Ltd. of Columbus, Ohio has applied to Customs and Border Protection under § 151.12 of the Customs Regulations for accreditation as a commercial laboratory to analyze paraffin wax in candles under chapter 34 of the Harmonized Tariff Schedule of the United States (HTSUS). Customs has determined that this company meets all

of the requirements for accreditation as a commercial laboratory. Specifically, SEA, Ltd. has been granted accreditation to perform the following test methods at their Columbus, Ohio site: (1) Quantitation of Paraffin in Beeswax and Other Waxes by High Temperature Capillary Gas Chromatography, USCL (United States Customs Laboratory) test method 34–07; and (2) Quantitative Analysis of Paraffin in Beeswax by Column Chromatography, USCL (United States Customs Laboratory) test method 34–08. Therefore, in accordance with § 151.12 of the Customs Regulations, SEA, Ltd. of Columbus, Ohio is hereby accredited to analyze the products named above.

Location: SEA, Ltd.'s accredited site is located at: 7349 Worthington—Galena Rd., Columbus, Ohio 43085.

EFFECTIVE DATE: December 16, 2003.

FOR FURTHER INFORMATION CONTACT: Arlene Faustermann, Science Officer, Laboratories and Scientific Services, Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Suite 1500 North, Washington, DC 20229, (202) 344–1060.

Dated: December 16, 2003.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. 03–31759 Filed 12–23–03; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

[CBP Decision 03–35]

Customs Accreditation of SGS North America, Inc. as a Commercial Laboratory

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation of SGS North America, Inc. of Sulfur, Louisiana, as a commercial laboratory.

SUMMARY: SGS North America, Inc. of Sulfur, Louisiana has applied to Customs and Border Protection under § 151.12 of the Customs Regulations for accreditation as a commercial laboratory to analyze petroleum products under chapter 27 and chapter 29 of the Harmonized Tariff Schedule of the United States (HTSUS). Customs has determined that this company meets all of the requirements for accreditation as a commercial laboratory. Specifically, SGS North America, Inc. has been granted accreditation to perform the following test methods at their Sulfur, Louisiana site: (1) Water in Petroleum Products and Bituminous Materials by Distillation, ASTM D95; (2) API Gravity of Crude Petroleum and Petroleum Products by Hydrometer, ASTM D287; (3) Sediment in Crude Oils by Extraction, ASTM D473; (4) Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer, ASTM D1298; (5) Water in Crude Oil by Distillation, ASTM D4006; (6) Water and Sediment in Crude Oil by the Centrifuge Method, ASTM D4007; and (7) Sulfur in Petroleum and Petroleum Products by Energy-Dispersive X-Ray Fluorescence Spectroscopy, ASTM D4294. Therefore, in accordance with § 151.12 of the Customs Regulations, SGS North America, Inc. of Sulfur, Louisiana is hereby accredited to analyze the products named above.

Location: SGS North America, Inc. accredited site is located at: 4701 East Napoleon (Hwy 90), Sulfur, LA 70663.

EFFECTIVE DATE: December 16, 2003.

FOR FURTHER INFORMATION CONTACT: Arlene Faustermann, Science Officer, Laboratories and Scientific Services, Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500 North, Washington, DC 20229, (202) 344–1060.

Dated: December 16, 2003.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. 03–31760 Filed 12–23–03; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4820–N–51]

Notice of Proposed Information Collection: Comment Request; Mortgage Insurance Application for Multifamily Housing Projects

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be 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.

DATES: *Comments Due Date:* February 23, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number (2502–0029) and should be sent to: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8003, Washington, DC 20410 or *Wayne_Eddins@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Michael McCullough, Director, Office of Multifamily Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–1142 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This Notice informs the public that the Department of Housing and Urban Development (HUD) intends to submit to OMB an information collection package with respect to requiring professional liability insurance for the Section 232 program. The requirements are found in the Notice ''Professional Liability Insurance for Section 232 Programs.''

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Mortgage Insurance Application for Multifamily Housing Projects.

OMB Control Number, if applicable: 2502–0029.

Description of the need for the information and proposed use: Requirements for Professional Liability Insurance for Section 232 Programs. This information collection is the

application for HUD/FHA multifamily mortgage insurance. The information from sponsors and general contractors, and submitted by a HUD-approved mortgagee, is needed to determine project feasibility, and mortgagor/contractor acceptability. In addition, documentation from operators/managers of health care facilities is also required as part of the application for firm commitment for mortgage insurance. HUD analyzes financial data, cost data, drawings, specifications and other documentation to determine whether the proposed project meets program requirements for mortgage insurance. This is a revision to include changes and additional Exhibits to Section K of Form HUD–92013–NHICF.

Agency form numbers, if applicable: HUD–92013, HUD–92013–SUPP, HUD–92013–NHICF and HUD–92013–E.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of burden hours needed to prepare the information collection is 188,680; the number of respondents is 6,350 generating approximately 6,350 annual responses, the frequency of response is on occasion, required with each project application and annually for health care facilities. The estimated time to prepare the response varies from 36 minutes to 84 hours.

Status of the proposed information collection: Revision of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 16, 2003.

Sean G. Cassidy,

General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. 03–31628 Filed 12–23–03; 8:45 am]

BILLING CODE 4210–27–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4818–N–16]

Notice of Proposed Information Collection for Public Comment: Notice of Funding Availability for the Historically Black Colleges and Universities

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be 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.

DATES: *Comments Due Date: February 23, 2004.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8226, Washington, DC 20410–6000.

FOR FURTHER INFORMATION CONTACT: Susan Brunson, 202–708–3061, ext. 3852 (this is not a toll-free number), for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department of Housing and Urban Development will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluated whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Notice of Funding Availability for the Historically Black Colleges and Universities (HBCU) Program.

OMB Control Number: 2506–0122.

Description of the Need for the Information and Proposed Use: The information is being collected to select applicants for awards in this statutorily created competitive grant program and to monitor performance of grantees to ensure they meet statutory and program goals and requirements.

Agency Form Numbers: HUD 424, HUD 424B, HUD–424C, HUD–424–CB, SFLLL, HUD 2880, HUD 2991, HUD 2990, HUD 2993, HUD40076, HUD96010–I, and HUD 2994.

Members of the Affected Public: Historically Black Colleges and Universities (HBCU).

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: Information pursuant to grant award will be submitted once a year. The following chart details the respondent burden on an quarterly, semi-annual and annual basis:

	Number of respondents	Total annual responses	Hours per response	Total hours
Applicants	105	105	200	21,000
Quarterly Reports	75	300	24	7,200
Semi-Annual Reports	60	120	48	5,760
Final Reports	15	15	60	900
Recordkeeping	135	135	24	3,240
Total	390	675	356	38,100

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, as amended.

Dated: December 11, 2003.

Darlene F. Williams,

General Deputy, Assistant Secretary for Policy Development and Research.

[FR Doc. 03–31629 Filed 12–23–03; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4818–N–17]

Notice of Proposed Information Collection for Public Comment: Notice of Funding Availability for the Doctoral Dissertation Research Grant Program

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be 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.

DATES: *Comments Due Date: February 23, 2004.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8226, Washington, DC 20410–6000.

FOR FURTHER INFORMATION CONTACT: Susan Brunson, 202–708–3061, ext. 3852 (this is not a toll-free number), for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department of Housing and Urban Development will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Notice of Funding Availability for the Doctoral Dissertation Research Grant Program.

OMB Control Number: 2528–0213.

Description of the Need for the Information and Proposed Use: The information is being collected to select applicants for awards in this statutorily created competitive grant program and to monitor performance of grantees to ensure they meet statutory and program goals and requirements.

Agency Form Numbers: HUD 424, HUD 424B, SFLLL, HUD 2880, HUD 2993, HUD 96010–I, and HUD 2994.

Members of the Affected Public: Ph.D. students preparing their dissertations on HUD-related topics.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: Information pursuant to grant award will be submitted once a year. The following chart details the respondent burden on a quarterly, semi-annual and annual basis:

	Number of respondents	Total annual responses	Hours per response	Total hours
Applicants	80	80	32	2560
Semi-Annual Reports	15	30	4	120
Final Reports	15	15	2	30
Recordkeeping	15	15	4	60
Total	125	140	42	2770

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, as amended.

Dated: December 11, 2003.

Darlene F. Williams,

General Deputy, Assistant Secretary for Policy, Development and Research.

[FR Doc. 03–31630 Filed 12–23–03; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4818–N–18]

Notice of Proposed Information Collection for Public Comment: Notice of Funding Availability for the Early Doctoral Student Research Program

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be 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.

DATES: *Comments Due Date:* February 23, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Lffice of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8226, Washington, DC 20410–6000.

FOR FURTHER INFORMATION CONTACT: Susan Brunson, 202–708–3061, ext. 3852 (this is not a toll-free number), for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department of Housing and Urban Development will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35 as amended).

This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Notice of Funding Availability for the Early Doctoral Student Research Grant Program.

OMB Control Number: 2528–0216.

Description of the Need for the Information and Proposed Use: The information is being collected to select applicants for awards in this statutorily created competitive grant program and to monitor performance of grantees to ensure they meet statutory and program goals and requirements.

Agency Form Numbers: HUD 424, HUD 424B, SFLLL, HUD 2880, HUD 2993, HUD 96010–I, and HUD 2994.

Members of the Affected Public: Ph.D. students early in their doctoral studies preparing research papers on HUD-related topics.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: Information pursuant to grant award will be submitted once a year. The following chart details the respondent burden on a quarterly, semi-annual and annual basis:

	Number of respondents	Total annual responses	Hours per response	Total hours
Applicants	80	80	32	2560
Semi-Annual Reports	15	30	4	120
Final Reports	15	15	2	30
Recordkeeping	15	15	4	60
Total	125	140	42	2770

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, as amended.

Dated: December 11, 2003.

Darlene F. Williams,

General Deputy, Assistant Secretary for Policy, Development and Research.

[FR Doc. 03–31632 Filed12–23–03; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4815–N–104]

Notice of Submission of Proposed Information Collection to OMB: Quality Control for Rental Assistance Subsidy Determinations

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.

HUD is requesting approval to conduct a study to update its estimates of the extent and type of errors associated with income, rent, and subsidy determinations for the 4.4 million households covered by Public Housing and Section 8 housing subsidies.

DATES: *Comments Due Date:* January 23, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and OMB approval number (2528–0203) 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: Quality Control for Rental Assistance Subsidy Determinations.

OMB Approval Number: 2528–0203.

Description of the Need for the Information and Its Proposed Use: The Department is conducting, under contract, a study to update its estimates of the extent and type of errors associated with income, rent, and subsidy determinations for the 4.4 million households covered by Public Housing and Section 8 housing

subsidies. The Quality Control process involves selecting a nationally representative sample of assisted households to measure the extent and types of errors in rent and income determinations, which in turn cause subsidy errors. On-site tenant interviews, file reviews, third-party income verifications, and income matching with other Federal data are conducted. The data obtained are used to identify the most serious problems and their associated costs. HUD program offices are then responsible for designing and implementing corrective actions. In addition to providing current estimates of error, results will be compared with those from the 2000 study. These comparisons will indicate whether corrective actions initiated since the 2000 study have been effective and if changes in priorities are needed.

The first QC study found that about one-half of the errors measured using on-site tenant interviews and file reviews could not be detected with the 500\58/50059 form data collected by the Department, which is why HUD and other agencies with means-tested programs have determined that on-site reviews and interviews are an essential complement to remote monitoring measures. The 2000 study showed that the calculation errors detectable with 50058/50059 data had further decreased, probably because this data was increasingly subject to automated computational checks.

This study will provide current information on the quality of tenant interviewing (*e.g.*, whether they are they being asked about all sources of income) and the reliability of eligibility determinations and income verification. Legislation passed in 2002 requires that the Department report on the error measurements annually. A 2003 study is being completed, and this proposed data collection approval is for the next three studies.

Respondents: Recipients of Public Housing and Section 8 Housing Assistance subsidies.

Reporting Burden: The Department will survey approximately 550 PHA/program sponsor staff about (re)certification procedures, training, interview procedures, and problems encountered in conducting (re)certifications. Although more than one staff member may need to be contacted to obtain answers to all questions, the questionnaire will be administered once at each participating project and the interviews are expected to take less than 35 minutes. Researchers will survey approximately 3,000 program participants to obtain information on household composition, expenses, and income. the time required for these interviews will vary, but is estimated to require an average of about 50 minutes per interview.

The time estimates provided are based on the 2000 QC survey. This survey will again make use of Computer Assisted Interviewing (CAI) questionnaires and equipment, which are being used in part because they are known to reduce interview times. This software also provides for consistency checks and ensures that all needed data have been collected, thereby reducing the need for follow-up contacts.

Total Estimated Burden Hours: 2,742.

Status: Reinstatement, without change, of previously approved collection for which approval has expired.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 17, 2003.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 03–31633 Filed 12–23–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4815–N–105]

Notice of Submission of Proposed Information Collection to OMB: Late Request for Endorsement Procedures

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.

DATES: Comments Due Date: January 23, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name 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 or on HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm*.

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: Late Request for Endorsement Procedures.

OMB Approval Number: 2502–Pending.

Description of the Need for the Information and Its Proposed Use: Section 203.255(b) of the National Housing Act requires Direct Endorsement mortgagees to submit properly documented loans for endorsement within 60 days of loan closing. Further, lenders submitting a loan after this 60-day window must certify that the loan complies with all underwriting requirements. This information is necessary to endorse a loan being submitted for endorsement beyond the 60-day limit following closing.

Respondents: Not-for-profit institutions, State, local or tribal government.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per responses	=	Burden hours
Reporting Burden:	12,000	300,000		0.40		120,000

Total Estimated Burden Hours: 120,000.

Status: Existing collection in use without an OMB control number.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 17, 2003.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 03–31634 Filed 12–23–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4815–N–106]

Notice of Submission of Proposed Information Collection to OMB: Owner of Record and Re-sale Data To Preclude Predatory Lending Practices (Property Flipping) on FHA Insured Mortgages

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.

To prevent predatory sales practices, HUD will not insure mortgages on properties re-sold within 90 days, and only the owner-of-record is permitted to sell the property if FHA is to insure the subsequent mortgage. Lenders are required to provide evidence of the date of the last resale and the date it occurred.

DATES: *Comments Due Date:* January 23, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and OMB approval number (2502–0547) 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 or on HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

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: Owner of Record and Re-sale Data to Preclude Predatory Lending Practices (Property Flipping) on FHA Insured Mortgages.

OMB Approval Number: 2502–0547.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: To prevent predatory sales practices, HUD will not insure mortgages on properties re-sold within 90 days, and only the owner-of-record is permitted to sell the property if FHA is to insure the subsequent mortgage. Lenders are required to provide evidence of the date of the last resale and the date it occurred.

Respondents: Individuals or households, Business or other for-profit, Not-for-profit institutions.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden:	750,000	750,000		0.036		27,500

Total Estimated Burden Hours: 7,500.

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: December 17, 2003.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 03–31756 Filed 12–23–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Limited English Proficiency Guidance to Recipients of Federal Financial Assistance—Request for Comments

AGENCY: Office of the Secretary, Interior.

ACTION: Limited English Proficiency Guidance—request for comments.

SUMMARY: The Department of the Interior (DOI or Department) publishes for public comment Interim Final Guidance to Federal Financial Assistance Recipients Regarding Title VI *Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (DOI Recipient LEP Guidance). The DOI Recipient LEP Guidance is issued pursuant to Title VI of the Civil Rights Act of 1964 and its implementing regulations and Executive Order 13166.

DATES: Written comments are invited from interested persons and organizations. Comments should be submitted to DOI on or before January 23, 2004. DOI's Recipient LEP Guidance will become final after the comment period. However, DOI will review all timely submitted comments, and determine what modifications, if any, are necessary to the policy guidance, and issue modifications if necessary.

ADDRESSES: Comments should be sent to: E. Melodee Stith, Director, Office for Equal Opportunity, U.S. Department of the Interior, 1849 C Street, NW., Mail Stop 5221, Washington, DC 20240, E-mail: *melodee_stith@ios.doi.gov,* Phone: (202) 208–5693, FAX: (202) 208–6112.

FOR FURTHER INFORMATION CONTACT: Melvin C. Fowler, Civil Rights Staff Assistant, Office for Equal Opportunity, U.S. Department of the Interior, 1849 C Street, NW., Mail Stop 5221, Washington, DC 20240, E-mail: *Melvin_C_Fowler@ios.doi.gov,* Phone: (202) 208–3455, FAX: (202) 208–6112.

SUPPLEMENTARY INFORMATION: Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.* (Title VI), and Title VI regulations, recipients of Federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency (LEP). Executive Order 13166, reprinted at 65 FR 50121 (August 16, 2000), directs each Federal Agency that extends assistance subject to the requirements of Title VI to publish guidance for its respective recipients clarifying that obligation. Executive Order 13166 further directs that all such guidance documents be consistent with the compliance standards and framework detailed in Department of Justice Policy Guidance entitled ''Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency.'' *See* 65 FR 50123 (August 16, 2000).

Because this Guidance also must adhere to the Federal-wide compliance standards and framework detailed in the model Department of Justice LEP Guidance issued on June 18, 2002, DOI specifically solicits comments on the nature, scope, and appropriateness of the DOI-specific examples set out in this guidance explaining and/or highlighting how those Federal-wide guidelines are applicable to recipients of DOI financial assistance.

It has been determined that this guidance does not constitute a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553.

Department of the Interior

Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons

I. Introduction

Most individuals living in the United States read, write, speak, and understand English. There are many individuals, however, for whom English is not their primary language. For instance, based on the 2000 census, over 26 million individuals speak Spanish, and almost 7 million individuals speak an Asian or Pacific Island language at home. If these individuals have a limited ability to read, write, speak, or understand English, they are limited English proficient, or ''LEP.''

Language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided by federally funded programs and activities. The Federal Government funds an array of programs and activities that can be made accessible to otherwise eligible LEP persons. The Federal Government is committed to improving the accessibility of these programs and activities to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. Recipients should not overlook the long-term positive impacts of incorporating or offering English as Second Language (ESL) programs in parallel with language assistance services. ESL courses can serve as an important adjunct to a proper LEP plan. However, the fact that ESL classes are made available does not obviate the statutory and regulatory requirement to provide meaningful access for those who are not yet English proficient. Recipients of Federal financial assistance have an obligation to reduce language barriers that can preclude meaningful access by LEP persons to important government assisted programs and activities.[1]

In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Title VI regulations against national origin discrimination. The purpose of this policy guidance is to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law. This policy guidance clarifies existing legal requirements for LEP persons by providing a description of the factors recipients should consider in fulfilling their responsibilities to LEP persons.[2] These are the same criteria DOI will use in evaluating whether recipients are in compliance with Title VI and Title VI regulations.

There are many productive steps that the Federal government, either collectively or as individual grant agencies, can take to help recipients reduce the costs of language services without sacrificing meaningful access for LEP persons. Without these steps, certain smaller grantees may well choose not to participate in federally assisted programs, threatening the critical functions that the programs strive to provide. To that end, the Department plans to work with the Department of Justice to continue to provide assistance and guidance in this important area and to identify and share model plans, examples of best practices, and cost-saving approaches. An interagency working group on LEP has developed a Web site, *http://www.lep.gov*, to assist in disseminating this information to recipients, Federal agencies, and the communities being served.

Many commentators have noted that some have interpreted the case of *Alexander* v. *Sandoval*, 532 U.S. 275

[1] The Department of the Interior recognizes that many recipients had language assistance programs in place prior to the issuance of Executive Order 13166. This policy guidance provides a uniform framework for a recipient to integrate, formalize and assess the continued vitality of these existing programs and identify additional reasonable efforts based on the nature of its program or activity, the current needs of the LEP populations it encounters, and its prior experience in providing language services in the community it serves.

[2] The policy guidance is not a regulation but rather a guide. Title VI and its implementing regulations require that recipients take reasonable steps to ensure meaningful access by LEP persons. This guidance provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations to provide meaningful access to the benefits, services, information, and other important portions of their programs and activities for individuals who are limited English proficient.

(2001), as implicitly striking down the regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to federally assisted programs and activities. We have taken the position that this is not the case, and will continue to do so. Accordingly, we will strive to ensure that federally assisted programs and activities work in a way that is effective for all eligible beneficiaries, including those with limited English proficiency.

II. Legal Authority

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides that no person shall ''on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'' Section 602 authorizes and directs Federal agencies that are empowered to extend Federal financial assistance to any program or activity ''to effectuate the provisions of [section 601] by issuing rules, regulations, or orders of general applicability.'' 42 U.S.C. 2000d–1. This guidance document is thus published pursuant to Title VI, Title VI regulations, and Executive Order 13166, and is consistent with the Department of Justice model guidance.

Department of the Interior regulations promulgated pursuant to section 602 forbid recipients from ''utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect to individuals of a particular race, color, or national origin.'' 43 CFR 17.3(b)(2).

The Supreme Court, in *Lau* v. *Nichols*, 414 U.S. 563 (1974), interpreted regulations promulgated by the former Department of Health, Education, and Welfare, including a regulation similar to that of the DOI, 43 CFR 17.3(b)(2), to hold that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national-origin discrimination. In *Lau*, a San Francisco school district that had a significant number of non-English speaking students of Chinese origin was required to take reasonable steps to provide them with a meaningful opportunity to participate in federally funded educational programs.

On August 11, 2000, Executive Order 13166 was issued.[3] Under that Order, every Federal Agency that provides financial assistance to non-Federal entities must publish guidance on how their recipients can provide meaningful access to LEP persons and thus comply with Title VI regulations forbidding funding recipients from ''restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program'' or from ''utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.''

On that same day, the Department of Justice (DOJ) issued a general guidance document addressed to ''Executive Agency Civil Rights Officers'' setting forth general principles for agencies to apply in developing guidance documents for recipients pursuant to the Executive Order. [*Enforcement of Title VI of the Civil Rights Act of 1964 National Origin Discrimination Against Persons with Limited English Proficiency*, 65 FR 50123 (August 16, 2000) (''DOJ LEP Guidance'')].

Subsequently, Federal agencies raised questions regarding the requirements of the Executive Order, especially in light of the Supreme Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). On October 26, 2001, the Assistant Attorney General for the Civil Rights Division, issued a memorandum for ''Heads of Departments and Agencies, General Counsels and Civil Rights Directors.'' This memorandum clarified and reaffirmed the DOJ LEP Guidance in light of *Sandoval*.[4] The Assistant Attorney General stated that because *Sandoval* did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups—the types of regulations that form the legal basis for the part of Executive Order 13166 that applies to federally assisted programs and activities—the Executive Order remains in force.

Pursuant to Executive Order 13166, DOJ developed its own guidance document for recipients (''LEP Guidance for DOJ Recipients'') and initially issued it in final on June 18, 2002 (67 FR 41455, also available at *http://www.lep.gov*). Consistency among departments of the Federal government is particularly important. Inconsistency or contradictory guidance could confuse recipients of Federal funds and needlessly increase costs without rendering the meaningful access for LEP persons that this Guidance is designed to address. As with most government initiatives, this requires balancing several principles. While this Guidance discusses that balance in some detail, it is important to note the basic principles behind that balance. First, we must ensure that federally-assisted programs aimed at the American public do not leave some behind simply because they face challenges communicating in English. This is of particular importance because, in many cases, LEP individuals form a substantial portion of those encountered in federally assisted programs. Second, we must achieve this goal while finding constructive methods to reduce the costs of LEP requirements on small businesses, small local governments, or small non-profits that receive Federal financial assistance.

III. Who Is Covered?

Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* and implementing regulations, recipients of Federal financial assistance are required to provide meaningful access to LEP persons.[5] Federal financial assistance includes grants, cooperative agreements, training, use of equipment, donations of surplus property, and other assistance.

[3] *Improving Access to Services for Persons with Limited English Proficiency*, 65 FR 50121 (August 16, 2000).

[4] The memorandum noted that some commentators have interpreted *Sandoval* as impliedly striking down the disparate-impact regulations promulgated under Title VI that form the basis for the part of Executive Order 13166 that applies to federally assisted programs and activities. *See, e.g., Sandoval*, 532 U.S. at 286, 286 n.6 (''[DOJ] assumes for purposes of this decision that section 602 confers the authority to promulgate disparate-impact regulations; * * * We cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' Sec. 601 * * * when Sec. 601 permits the very behavior that the regulations forbid.'') According to DOJ, ''the memorandum, however, made clear that DOJ disagreed with the commentators' interpretation. Sandoval holds principally that there is no private right of action to enforce Title VI disparate-impact regulations. It did not address the validity of those regulations or Executive Order 13166 or otherwise limit the authority and responsibility of Federal assistance agencies to enforce their own implementing regulations.''

[5] Pursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations and the four-factor analysis set forth in this guidance also apply to the programs and activities of Federal agencies, including DOI's programs and activities. Examples include, but are not limited to, schools and other programs operated by the Bureau of Indian Affairs, environmental impact research and surveys, land management, national parks, fish and wildlife programs and activities, power plants run by DOI, and others.

Examples of recipients that receive DOI assistance include the following:

- State fish and wildlife agencies;
- State and local park and recreation departments;
- State and local park police departments including fish and wildlife conservation law enforcement agencies;
- State geological survey agencies;
- State and local historic preservation agencies including historical sites and places; and
- Irrigation districts and other public entities providing water and power services.

Sub-recipients are covered when Federal funds are passed through from one recipient to a Sub-recipient. Sub-recipients of DOI assistance include, for example:

- County and city park and recreation agencies;
- State and local government agencies; and
- Public and/or private organizations.

Coverage extends to a recipient's entire program or activity, *i.e.,* to all parts of a recipient's operations. This is true even if only one of the recipient's programs or activities receives the Federal assistance.[6]

Example: DOI provides assistance to a city parks and recreation department to develop or improve one particular park. All aspects of the city parks and recreation department's operations—not just the particular park slated for development or improvement—are covered.

Finally, some recipients operate in jurisdiction in which English has been declared the official language. Nonetheless, these recipients continue to be subject to Federal non-discrimination requirements, including those applicable to the provision of federally assisted programs and activities to persons with limited English proficiency.

IV. Who Is a Limited English Proficient Individual?

Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient (LEP) and therefore entitled to language assistance with respect to a particular type of service, benefit, or encounter. Examples of populations likely to include LEP persons that DOI recipients serve or encounter and accordingly, should consider when planning language services include, but are not limited to:

- Persons who are actual or potential program beneficiaries of recreation or education programs including those applying for fishing and hunting licenses, or desiring information regarding program availability;
- Persons visiting historical sites and places;
- Persons who encounter natural resources conservation law enforcement officers or other law enforcement recipients of DOI assistance;
- Persons needing information on health, environmental impact, safety, or other warnings or information from recipients of DOI assistance; and
- Parents and family members of the above.

V. How Does a Recipient Determine the Extent of Its Obligations To Provide LEP Services?

Recipients are required to take reasonable steps to ensure that LEP persons have meaningful access to their programs and activities. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs. As indicated above, DOI's guidance is intended to strike a balance between ensuring LEP persons have meaningful access to critical services, benefits, and information while not imposing an undue burden on small business, small local governments, or small nonprofits.

After applying the above four-factor analysis, a recipient may conclude that different language assistance measures are sufficient for the different types of programs or activities in which it engages. For instance, some of a recipient's activities will be more important than others and/or have greater impact on or contact with LEP persons, and thus may require more in the way of language assistance. The flexibility that recipients have in addressing the needs of the LEP populations they serve does not diminish, and should not be used to minimize, the obligation that those needs be addressed. DOI recipients should apply the following four factors to the various kinds of contacts they have with the public to assess language needs and decide what reasonable steps they should take to ensure meaningful access for LEP persons.

(1) The Number or Proportion of LEP Persons Served or Encountered in the Eligible Service Population

One factor in determining what language services recipients should provide is the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population. The greater the number or proportion of these LEP persons, the more likely language services are needed. Ordinarily, persons eligible to be served or likely to be directly affected by a recipient's program or activity are those who are served or encountered in the eligible service population. This population will be program-specific, and includes persons who are in the geographic area that has been approved by a Federal grant Agency as the recipient's service area. However, where, for instance, a precinct serves a large LEP population, the appropriate service area is most likely the precinct, and not the entire population served by the department. Where no service area previously has been approved, the relevant service area may be that which is approved by state or local authorities or designated by the recipient itself, provided that these designations do not themselves discriminatorily exclude certain populations.

Recipients should first examine their prior experience with LEP encounters and determine the breadth and scope of language services that are needed. In conducting this analysis, it is important to include language minority populations that are eligible for their programs or activities but may be underserved because of existing language barriers. Other data should be consulted to refine or validate a recipient's prior experience, including the latest census data for the area served, data from school systems and from community organizations, and data from state and local governments.[7] Community agencies, school systems, religious organizations, legal aid entities, and others can often assist in

[6] If DOI decided, however, to terminate Federal assistance to a recipient based upon noncompliance with its Title VI regulations, only funds directed to the particular program or activity that is out of compliance would be terminated. 42 U.S.C. 2000d–1.

[7] The focus on the analysis is on the lack of English proficiency, not the ability to speak more than one language. Note that demographic data may indicate the most frequently spoken languages other than English and the percentage of people who speak that language but are not proficient in English. Some of the most commonly spoken languages other than English may be spoken by people who are also overwhelmingly proficient in English. Thus, they may not be the languages spoken most frequently by limited English proficient individuals. When using demographic data, it is important to focus upon the language spoken by those who are not proficient in English.

identifying populations for whom outreach is needed and who would benefit from the recipient's programs and activities were language services provided.

(2) The Frequency With Which LEP Individuals Come in Contact With the Program

Recipients should assess, as accurately as possible, the frequency with which they have or should have contact with a LEP individual from different language groups seeking assistance. The more frequent the contact with a particular language group, the more likely that enhanced language services in that language are needed. The steps that are reasonable for a recipient that serves a LEP person on a one-time basis will be very different than those expected from a recipient that serves LEP persons daily. It is also advisable to consider the frequency of different types of language contacts. For example, frequent contacts with Spanish-speaking people who are LEP may require certain assistance in Spanish. Less frequent contact with different language groups may suggest a different and less intense solution. If a LEP individual accesses a program or service on a daily basis, a recipient has greater duties than if the same individual's program or activity contact is unpredictable or infrequent. But even recipients that serve LEP persons on an unpredictable or infrequent basis should use this balancing analysis to determine what to do if a LEP individual seeks services, benefits, or information under the program in question. This plan need not be intricate. It may be as simple as being prepared to use one of the commercially available telephonic interpretation services to obtain immediate interpreter services. In applying this standard, recipients should take care to consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups.

(3) The Nature and Importance of the Program Activity, or Service Provided by the Program

The more important the activity, information, service, or program or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed. The obligations to provide language assistance services to residents of a community near a raging wildfire or other environmental emergency, to a person who is suspected of a crime committed in a park, or to an ill or injured park visitor, differ from obligations to individuals seeking to enroll in a voluntary conservation class. A recipient needs to determine whether denial or delay of access to benefits, services, warnings, or information could have serious or even life-threatening implications for the LEP individual. Decisions by a Federal, State, or local entity to make an activity compulsory, such as particular educational programs, essential licenses, or the communication of *Miranda* rights, can serve as strong evidence of the program's importance.

(4) The Resources Available to the Recipient and Costs

A recipient's level of resources and the costs that would be imposed on it may have an impact on the nature of the steps it should take. Smaller recipients with more limited budgets are not expected to provide the same level of language services as larger recipients with larger budgets. In addition, ''reasonable steps'' may cease to be reasonable where the costs imposed substantially exceed the benefits.

Resource and cost issues, however, can often be reduced by technological advances; the sharing of language assistance materials and services among and between recipients, advocacy groups, and Federal assistance agencies; and reasonable business practices. Where appropriate, training bilingual staff to act as interpreters and translators, information sharing through industry groups, telephonic and video conferencing interpretation services, pooling resources and standardizing documents to reduce translation needs, using qualified translators and interpreters to ensure that documents need not be ''fixed'' later and that inaccurate interpretations do not cause delay or other costs, centralizing interpreter and translator services to achieve economies of scale, using universally understood pectoral signs, or the formalized use of qualified community volunteers, for example, may help reduce costs.[8] Recipients should carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns. Large entities and those entities serving a significant number or proportion of LEP persons should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance. Such recipients may find it useful to be able to articulate, through documentation or in some other reasonable manner, their process for determining that language services would be limited based on resources or costs.

[8] Small recipients with limited resources may find that entering into a bulk telephonic interpretation service contract will prove cost effective.

VI. How Language Assistance Services Should Be Provided

This four-factor analysis necessarily implicates the ''mix'' of LEP services required. Recipients have two main ways to provide language services: Oral interpretation either in person or via telephone interpretation service (hereinafter ''interpretation'') and written translation (hereinafter ''translation''). Oral interpretation can range from on-site interpreters for critical services provided to a high volume of LEP persons to access through commercially available telephonic interpretation services. Written translation, likewise, can range from translation of an entire document to translation of a short description of the document. In some cases, language services should be made available on an expedited basis while in other cases, the LEP individual may be referred to another office of the recipient for language assistance.

The correct mix should be based on what is both necessary and reasonable in light of the four-factor analysis. For instance, fire departments or other emergency services located near an Indian reservation may need immediate oral interpreters available and should give serious consideration to hiring some bilingual staff. (Of course, many fire departments may have already made such arrangements.) In contrast, there may be circumstances where the importance and nature of the activity and number or proportion and frequency of contact with LEP persons may be low and the costs and resources needed to provide language services may be high—such as in the case of a voluntary general public tour of a park—in which pre-arranged language services for the particular service may not be necessary. Regardless of the type of language service provided, quality and accuracy of those services can be critical in order to avoid serious consequences to the LEP person and to the recipient. Recipients have substantial flexibility in determining the appropriate mix.

VII. Selecting Language Assistance Services

When selecting a language service, it is important to consider the quality and accuracy of such service in order to avoid serious consequences to the LEP person and the recipient.

A. Oral Language Services (Interpretation)

Interpretation is the act of listening to something in one language (source language) and orally translating it into another language (target language). Where interpretation is needed and is reasonable, recipients should consider some or all of the following options for providing competent interpreters in a timely manner:

Competence of Interpreters. When providing oral assistance, recipients should ensure competency of the language service provider, no matter which of the strategies outlined below are used. Competency requires more than identifying oneself as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret into and out of English. Likewise, they may not be able to do written translations.

Competency to interpret, however, does not necessarily mean formal certification as an interpreter, although certification is helpful. When using interpreters, recipients should ensure that they:

- Demonstrate proficiency and the ability to communicate information accurately in both English and the other language and identify and employ the appropriate mode of interpreting;
- Have knowledge in both languages of any specialized terms or concepts peculiar to the entity's program or activity and of any particularized vocabulary and phraseology that the LEP person uses; [9]
- Understand and follow confidentiality and impartiality rules to the same extent the recipient employee for whom they are interpreting and/or to the extent their position requires; and
- Understand and adhere to their role as interpreters without deviating into a role as counselor, legal advisor, or other roles (particularly in administrative hearings or law enforcement activities).

Some recipients, such as those offering educational or instructional programs, or public utility services, may have additional self-imposed requirements for interpreters. Where individual rights depend on precise, complete, and accurate interpretation or translations, particularly in the context of public safety and law enforcement activities, the use of certified interpreters is strongly encouraged.[10] Where proceedings are lengthy, the interpreter will likely need breaks and team interpreting may be appropriate to ensure accuracy and to prevent errors caused by mental fatigue.

While quality and accuracy of language services is critical, the standards for such services vary depending on the service, program or benefit the recipient provides. For example, the quality and accuracy of language services in a hunter education and safety class, an interrogation of a suspect by park police, or environmental hazard warnings must be extraordinarily high, while the quality and accuracy of language services in a lighthouse tour need not meet the same exacting standards.

Finally, when interpretation is needed and is reasonable, it should be provided in a timely manner. The language assistance should be provided at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person. For example, when the timeliness of services is important, such as certain activities in law enforcement, health, environmental, and safety services, or when important legal rights are at issue, a recipient probably would not be providing meaningful access if it only had one bilingual staffer available one day a week to provide the service. Such conduct would likely result in delays for LEP persons that would be significantly greater than those for English proficient persons. Conversely, where access to or exercise of a service, benefit, or right is not effectively precluded by a reasonable delay, language assistance can be delayed for a reasonable period.

Hiring Bilingual Staff. When particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical, options. For example, recipients can fill public contact positions such as lifeguards, park ranger, conservation law enforcement officers, or recreation program directors, with staff that are bilingual and competent to communicate directly with LEP persons in their language. If bilingual staff is also used to interpret between English speakers and LEP persons, or to orally interpret written documents from English into another language, they should be competent in the skill of interpreting. Being bilingual does not necessarily mean that a person has the ability to interpret. In addition, there may be times when the role of the bilingual employee may conflict with the role of an interpreter. Effective management strategies, including any appropriate adjustments in assignments and protocols for using bilingual staff, can ensure that bilingual staff is fully and appropriately utilized. When bilingual staff cannot meet all of the language service obligations of the recipient, the recipient should turn to other options.

Hiring Staff Interpreters. Hiring interpreters may be most helpful where there is a frequent need for interpreting services in one or more languages. Depending on the facts, sometimes it may be necessary and reasonable to provide on-site interpreters to provide accurate and meaningful communication with a LEP person.

Contracting for Interpreters. Contract interpreters may be a cost-effective option when there is no regular need for a particular language skill. In addition to commercial and other private providers, many community-based organizations and mutual assistance associations provide interpretation services for particular languages. Contracting with and providing training regarding the recipient's programs and processes to these organizations can be a cost-effective option for providing language services to LEP persons from those language groups.

Using Telephone Interpreter Lines. Telephone interpreter service lines often offer speedy interpreting assistance in many different languages. They may be particularly appropriate where the mode of communicating with an English proficient person would also be over the phone. Although telephonic interpretation services are useful in many situations, it is important to ensure that the interpreters used are competent to interpret any technical or legal terms specific to a particular program. Often an interpreter relies on non-verbal communication and nuances in language to accurately translate the source language into the target language. Video teleconferencing may sometimes help to resolve this issue where necessary. In addition, where documents are being discussed, it is important to give telephonic interpreters an opportunity to review the document prior to the discussion and address any logistical problems.

[9] Many languages have ''regionalisms,'' or differences in usage. For instance, a word that may be understood to mean something in Spanish for someone from Cuba may not be so understood by someone from Mexico. In addition, there may be languages which do not have an appropriate interpretation of certain legal or technical terms. The interpreter should make the recipient aware of the issue and the interpreter and recipient can then work to develop a consistent and appropriate set of written translations in that language that can be used again, when appropriate.

[10] For those languages in which no formal accrediation or certification currently exists, recipients should consider a formal process for establishing the credentials of the interpreter.

Using Community Volunteers. In addition to considering bilingual staff, staff interpreters, or contract interpreters (either in-person or by telephone) as options to ensure that LEP persons have meaningful access, recipient-coordinated community volunteers working with community-based organizations also may provide a cost-effective supplemental language assistance strategy under appropriate circumstances. They may be particularly useful in providing language access for a recipient's less critical programs and activities. To the extent the recipient relies on community volunteers, it is often best to use volunteers who are trained in the information or services of the program and can communicate directly with LEP persons in their language. Just as with all interpreters, community volunteers used to interpret between English speakers and LEP persons, or to orally translate documents, should be competent in the skill of interpreting and knowledgeable about applicable confidentiality and impartiality rules. Recipients should consider formal arrangements with community-based organizations that provide volunteers to address these concerns and to help ensure that services are regularly available.

Use of Family Members, Friends, Other Program Participants, or Acquaintances as Interpreters. Although recipients should not plan to rely on a LEP person's family members, friends, or other informal interpreters to provide meaningful access to important programs and activities, where LEP persons so desire, they should be permitted to use, at their own expense, an interpreter of their own choosing (whether a professional interpreter, family member, friend, or other informal interpreter) in lieu of or to supplement the free language services the recipient offers. LEP persons may feel more comfortable when a trusted family member, friend, or other informal interpreter of their choice acts as an interpreter. In addition, in exigent circumstances that are not reasonably foreseeable, temporary use of interpreters not provided by the recipient may be necessary. However, with proper planning and implementation, recipients should be able to avoid such situations.

Recipients, however, should take special care to ensure that family, legal guardians, caretakers, and other informal interpreters are appropriate in light of the circumstances and subject matter of the program, service or activity, including protection of the recipient's own administrative or enforcement interest in accurate interpretation. In many circumstances, family members (especially children), friends, or other informal interpreters are not competent to provide quality and accurate interpretations. Issues of confidentiality, privacy, or conflict of interest may also arise. LEP individuals may feel uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement, family, or financial information to a family member, friend, or member of the local community. In addition, such informal interpreters may have a personal connection to the LEP person or an undisclosed conflict of interest, such as the desire to protect themselves or another individual in a criminal matter. For these reasons, when oral language services are necessary, recipients should generally offer competent interpreter services free of cost to the LCP person. For DOI recipient programs and activities, this is particularly true in law enforcement settings, administrative hearings, situations in which health, safety, or access to important benefits, services, or information are at stake, or when credibility and accuracy are important to protect an individual's rights or access to important services or information.

An example of such a case is when conservation law enforcement officers respond to a hunting or fishing infraction. In such a cases, use of family members or friends to interpret for the alleged person cited for the hunting or fishing violation may raise serious issues of competency, confidentiality, and conflict of interest and is thus inappropriate. While issues of competency, confidentiality, and conflict of interest in the use of family members (especially children), friends, or other program participants often make their use inappropriate, the use of these individuals as interpreters may be an appropriate option where proper application of the four factors indicates that recipient-provided services are not necessary. An example of this is a voluntary educational tour of a park offered to the public. There, the importance and nature of the activity may be relatively low and unlikely to implicate issues of confidentiality, conflict of interest, or the need for accuracy. In addition, the resources needed and costs of providing language services may be high. In such a setting, a LEP person's use of family, friends, or others may be appropriate.

If the LEP person voluntarily chooses to provide his or her own interpreter, a recipient should consider whether to document the recipient's offer to provide language assistance services and the LEP person's response. Where precise, complete and accurate interpretations or translations of information and/or testimony are critical for law enforcement, adjudicatory, health, safety, or legal reasons, or where the competency of the LEP person's interpreter is not established, a recipient might decide to provide its own independent interpreter, even if a LEP person wants to use his or her own interpreter as well. Extra caution should be exercised when the LEP person chooses to use a minor as the interpreter. While the LEP person's decision should be respected, there may be additional issues of competency, confidentiality, or conflict of interest when the choice involves using children as interpreters. The recipient should take care to ensure that the LEP person's choice is voluntary, that the LEP person is aware of the possible problems if the preferred interpreter is a minor child, and that the LEP person knows that a competent interpreter could be provided by the recipient at no cost.

B. Written Language Services (Translation)

Translation is the replacement of a written text from one language (source language) into an equivalent written text in another language (target language).

What Documents Should be Translated? After applying the four-factor analysis, a recipient may determine that an effective LEP plan for its particular program or activity includes the translation of vital written materials into the language of each frequently-encountered LEP group eligible to be served or likely to be affected by the recipient's program.

Such written materials could include, for example:

- Consent and complaint forms;
- Program materials describing program availability;
- Geological maps and informational publications, under certain circumstances;
- Written notices of rights, denial, loss, or decreases in benefits or services, or of public hearings that impact the community;
- Hunter and aquatics safety education materials;
- Vital portions of websites describing an Agency's mission, organization, programs, activities and services;
- Notices advising LEP persons of free language assistance;
- Prohibit and warning signs, brochures, or other informational material, including information on dangerous wildlife, natural hazards,

environmental hazards, and other health and safety-related information;

• Written tests that do not assess English language competency, but test competency for a particular license, job, or skill for which knowing English is not required; and

• Applications to participate in a recipient's program or activity or to receive recipient benefits, services, licenses, permits, *etc.*

Whether or not a document (or the information it solicits) is ''vital'' may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. For instance, applications for bicycle safety courses generally should not be considered vital, whereas applications for drug and alcohol counseling in prison should be considered vital. Where appropriate, recipients are encouraged to create a plan for consistently determining, over time and across various activities, what documents are ''vital'' to the meaningful access of the LEP populations they serve.

Classifying a document as vital or non-vital is sometimes difficult, especially in the case of outreach materials like brochures or other general information on rights and services. Awareness of rights or services is an important part of ''meaningful access.'' Lack of awareness that a particular program, right, or service exists may effectively deny LEP individuals meaningful access. Thus, where a recipient is engaged in community outreach activities in furtherance of its activities, it should regularly assess the needs of the populations frequently encountered or affected by the program or activity to determine whether certain critical outreach materials should be translated. Community organizations may be helpful in determining what outreach materials may be most helpful to translate. In addition, the recipient should consider whether translations of outreach materials may be made more effective when done in tandem with other outreach methods, including utilizing the appropriate non-English language speaking media, schools, religious and community organizations to spread a message.

Sometimes a document includes both vital and non-vital information. This may be the case when the document is very large. It may also be the case when the title and a phone number for obtaining more information concerning the contents of the document in frequently-encountered languages other than English is critical, but the document is sent out to the general public and reasonably cannot be translated into many languages. Thus, vital information may include, for instance, the provision of information in appropriate languages other than English regarding where a LEP person might obtain language assistance services to interpret or translate a document.

Into What Languages Should Documents Be Translated? The languages spoken by the LEP individuals with whom the recipient has contact determine the languages into which vital documents should be translated. A distinction should be made, however, between languages that are frequently encountered by a recipient and less commonly encountered languages. Many recipients serve communities in large cities or across the country. They regularly serve LEP persons who speak numerous different languages. To translate all written materials into all of those languages is unrealistic. Although recent technological advances have made it easier for recipients to store and share translated documents, such an undertaking would incur substantial costs and require substantial resources. Nevertheless, well-substantiated claims of lack of resources to translate all vital documents into dozens of languages do not necessarily relieve the recipient of the obligation to translate those documents into at least several of the more frequently-encountered languages and to set benchmarks for continued translations into the remaining languages over time. As a result, the recipient should determine its obligation to provide written translations of documents on a case-by-case basis, looking at the totality of the circumstances in light of the four-factor analysis. Because translation is a one-time expense, consideration should be given to whether the upfront cost of translating a document (as opposed to oral interpretation) should be amortized over the likely lifespan of the document when applying this four-factor analysis.

Safe Harbor. Many recipients would like to ensure with greater certainty that they comply with their obligations to provide written translations in languages other than English. Paragraphs (a) and (b), (see the next section of this document entitled *Safe Harbor Guidelines*), outline the circumstances that can provide a ''safe harbor'' for recipients regarding the requirements for translation of written materials. A ''safe harbor'' means that if a recipient provides written translations under these circumstances, such action will be considered strong evidence of compliance with the recipient's written-translation obligations.

The failure to provide written translations under the circumstances outlined in the Department's *Safe Harbor Guidelines* at paragraphs (a) and (b) does not mean there is non-compliance. Rather, they provide a common starting point for recipients to consider whether and at what point the importance of the service, benefit, or activity involved; the nature of the information sought; and the number or proportion of LEP persons served call for written translations of commonly-used forms into frequently-encountered languages other than English. Thus, these paragraphs merely provide a guide for recipients that are interested in specific examples of safe harbor guidelines. However, even if the safe harbors are not used, if written translation of a certain document(s) would be so burdensome as to defeat the legitimate objectives of its program, the translation of the written materials is not necessary. Other ways of providing meaningful access, such as effective oral interpretation of certain vital documents, might be acceptable under such circumstances.

Safe Harbor Guidelines. The following actions will be considered strong evidence of compliance with the recipient's written-translation obligations:

(a) The DOI recipient provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or

(b) If there are fewer than 50 persons in a language group that reaches the five-percent trigger in (a), the recipient does not translate vital written materials but provides written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

These safe harbor provisions apply to the translation of written documents only. They do not affect the requirement to provide meaningful access to LEP individuals through competent oral interpreters where oral language services are needed and are reasonable. For example, even where the safe harbor numbers are not met for a particular language, a LEP person speaking that language should be given appropriate oral interpretation of important information.

Competence of Translators. As with oral interpreters, translators of written

documents should be competent. Many of the same considerations apply. However, the skill of translating is very different from the skill of interpreting, and a person who is competent interpreter may or may not be competent to translate.

Particularly where legal or other vital documents are being translated, competence can be often be achieved by use of certified translators. Certification or accreditation may not always be possible or necessary.[11] Having a second, independent translator check the work of the primary translator can often ensure competence. Alternatively, one translator can translate the document, and a second, independent translator could translate it back into English to check that the appropriate meaning has been conveyed. This is called ''back translation.''

Translators should understand the expected reading level of the audience and, where appropriate, have fundamental knowledge about the target language group's vocabulary and phraseology. Sometimes direct translation of materials results in a translation that is written at a much more difficult level than the English language version or has no relevant equivalent meaning.[12]

While quality and accuracy of translation services is critical, the quality and accuracy of translation services is nonetheless part of the appropriate mix of LEP services required. For instance, a recipient may use less-skilled translators to translate simple documents that have no legal, health, access to benefits and services, or safety consequences. However, to the extent documents contain this type of critical information, recipients should consider using highly skilled translators to translate their contents (including, *e.g.,* information or documents regarding certain law enforcement, health and safety services and certain legal rights, applications, warnings, or prohibitions). The permanent nature of written translations, however, imposes additional responsibility on the recipient to ensure that LEP persons have meaningful access.

[11] For those languages in which no formal accreditation currently exists, a particular level of membership in a professional translation association can provide some indicator of professionalism.

[12] For instance, there may be languages which do not have an appropriate direct translation of some natural resources terms or historic references. The translator should be able to provide an appropriate translation and make the recipient aware that an appropriate direct translation does not exist. Recipients can then work with translators to develop a consistent and appropriate set of descriptions of these terms in that language that can be used again, when appropriate. Recipients will find it more effective and less costly if they try to maintain consistency in the words and phrases used to translate historic references, geological terms or other technical concepts. Creating or using already created glossaries of commonly used terms may be useful for LEP persons and translators and cost effective for the recipient. Providing translators with examples of the recipient's previous translations of similar material may be helpful. In addition to the translator's assessment of the material, community organizations may be able to help consider whether a document is written at a good level for the audience.

VII. Elements of an Effective Plan on Language Assistance for LEP Persons

After completing the four-factor analysis and deciding what language assistance services are appropriate, a recipient should develop an implementation plan to address the identified needs of the LEP populations they serve. Recipients have considerable flexibility in developing this plan. The development and maintenance of a periodically-updated written plan on language assistance for LEP persons (''LEP plan'') for use by recipient employees serving the public will likely be the most appropriate and cost-effective means of documenting compliance and providing a framework for the provision of timely and reasonable language assistance. Moreover, such written plans would likely provide additional benefits to a recipient's managers in the areas of training, administration, planning, and budgeting. The LEP Plan should lead most recipients to document their language assistance services, and how staff and LEP persons can access those services.

Despite the benefits associated with a written plan, certain DOI recipients, such as recipients serving very few LEP persons or recipients with very limited resources, may choose not to develop a written LEP plan. However, the absence of a written LEP plan does not obviate the recipient's obligation to ensure that LEP persons have meaningful access to its program or activities. Accordingly, in the event that a recipient elects not to develop a written plan, it should consider alternative ways to articulate its plan for providing meaningful access. Entities having significant contact with LEP persons, such as schools, religious organizations, community groups, and groups working with new immigrants can be very helpful in providing important input into this planning process.

The following five steps may be helpful in designing a LEP plan and are typically part of effective implementation plans.

(1) Identifying LEP Individuals Who Need Language Assistance

The first two factors in the four-factor analysis require an assessment of the number or proportion of LEP individuals eligible to be served or encountered and the frequency of encounters. This requires a recipient to identify LEP persons with whom it has contact.

One way to determine the language of communication is to use language identification cards (or ''I speak cards''), which invite LEP persons to identify their language needs. Such cards, for instance, might say, ''I speak Spanish'' in both Spanish and English, ''I speak Vietnamese'' in both English and Vietnamese, etc. To reduce costs of compliance, the Federal government has made a set of these cards available on the Internet. At *http://www.usdoj.gov/crt/cor/13166.htm* or *http://www.lep.gov* the Census Bureau ''I speak card'' can be found and downloaded. When records are normally kept of past interactions with members of the public, the language of the LEP person can be included as part of the record. In addition to helping employees identify the language of LEP persons they encounter, this process will help in future applications of the first two factors of the four-factor analysis. In addition, posting notices in commonly encountered languages notifying LEP persons of language assistance will encourage them to identify themselves as requiring language assistance services.

(2) Identifying Language Assistance Measures

An effective LEP plan would likely include information about the ways in which language assistance will be provided. For instance, recipients may want to include information on at least the following:

- Types of language services available;
- How staff can obtain those services;
- How to respond to LEP callers;
- How to respond to written communications from LEP persons;
- How to respond to LEP individuals who have in-person contact with recipient staff; and
- How to ensure competency of interpreters and translation services.

(3) Training Staff

Staff should know their obligation to provide meaningful access to information and services for LEP persons. An effective LEP plan would likely include training to ensure that:

- Staff knows about LEP policies and procedures; and,

• Staff that have contact with the public are trained to work effectively with in-person and telephone interpreters and make materials that have been translated readily available.

Recipients may want to include this training as part of its orientation for new employees. It is important to ensure that all employees in public contact positions (or having contact with those in a recipient's custody) are properly trained. Recipients have flexibility in deciding the manner in which the training is provided. The more frequent the contact with LEP persons, the greater the need will be for in-depth training. Staff with little or no contact with LEP persons may only have to be aware of a LEP plan. However, management staff, even if they do not interact regularly with LEP persons, should be fully aware of and understand the plan so they can implement and reinforce its terms.

(4) Providing Notice to LEP Persons

Once an Agency has decided that it will provide language services based on the four factors, it is important for the recipient to let LEP persons know that those services are available and that they are free of charge. Recipients should provide this notice in a language LEP persons will understand. Examples of such notice include:

• *Posting signs in intake areas and other entry points.* When language assistance is needed to ensure meaningful access to information, benefits, and services, it is important to provide notice in appropriate languages in intake areas or initial points of contact so that LEP persons can learn how to access those language services.[13] For instance, signs in intake offices could state that free language assistance is available. The signs should be translated into the most common languages encountered. They should explain how to get the language help.[14] This is particularly true in areas with high volumes of LEP persons seeking access to the DOI recipient's recreational areas, historical sites, and fishing or hunting activities. Appropriate notice to LEP persons also is important to ensure their access to information about environmental concerns.

• *Stating in outreach documents that language services are available from the Agency.* Announcements could be published in brochures, booklets, and in outreach and recruitment information. These statements should be translated into the most common languages and could be put on the front of common documents.

• *Community organizations.* The recipient could work with community-based organizations and other stakeholders to inform LEP individuals of the recipient's services, including the availability of language assistance services.

• *Using a telephone voice mail menu.* The menu could be in the most common languages encountered. It should provide information about available language assistance services and how to get them.

• *Printed media.* The recipient could publish notices in local newspapers in languages other than English.

• *Broadcasts.* The recipient could provide notices on non-English-language radio and television stations about the available language assistance services and how to get them.

• *Schools.* The recipient could inform LEP persons of the availability of language services through presentations and/or by providing notices at schools and religious organizations.

(5) Monitoring and Updating the LEP Plan

Recipients should, where appropriate, have a process for determining whether new documents, programs, services, and activities need to be made accessible for LEP individuals, and informing employees and LEP persons of any changes in services. In addition, recipients should consider whether changes in demographics, types of services, or other needs require annual reevaluation of their LEP plan. Less frequent reevaluation may be more appropriate where demographics, services, and needs are more static. One good way to evaluate the LEP plan is to seek feedback from the community.

In their reviews, recipients may want to consider assessing changes in:

• Current LEP populations in certain service areas or populations affected or encountered;

• Frequency of encounters with LEP language groups;

• Nature and importance of activities to LEP persons;

• Availability of resources, including technological advances, additional resources and the costs imposed;

• Whether existing assistance is meeting the needs of LEP persons;

• Whether staff knows about and understands the LEP plan how to implement it; and

• Whether identified sources for assistance are still available and viable.

In addition to the five elements typically found in effective implementation plans, such plans set clear goals, management accountability, and opportunities for community input and planning throughout the process.

VIII. Voluntary Compliance Effort

The goal for Title VI and Title VI regulatory enforcement is to achieve voluntary compliance. The requirement to provide meaningful access to LEP persons is enforced and implemented by DOI through the procedures identified in the Title VI regulations. These procedures include complaint investigations, compliance reviews, efforts to secure voluntary compliance, and technical assistance.

The Title VI regulations provide that DOI will investigate whenever it receives a complaint, report, or other information that alleges or indicates possible noncompliance with Title VI or its regulations. If the investigation results in a finding of compliance, DOI will inform the recipient in writing of this determination, including the basis for the determination. DOI uses voluntary mediation to resolve most complaints. However, if a case is fully investigated and results in a finding of noncompliance, DOI will attempt to secure voluntary compliance through informal means. If the matter cannot be resolved informally, DOI must secure compliance through the termination of Federal assistance after the DOI recipient has been given an opportunity for an administrative hearing, by referring the matter to a Department of Justice litigation section to seek injunctive relief or by pursuing other enforcement proceedings. DOI engages in voluntary compliance efforts and provides technical assistance to recipients at all stages of an investigation. During these efforts, DOI proposes reasonable timetables for achieving compliance and consults with and assists recipients in exploring cost-effective ways of coming into compliance. In determining a recipient's compliance with the Title VI regulations, DOI's primary concern is to ensure that the recipient's policies and procedures provide meaningful access for LEP persons to the recipient's programs and activities.

While all recipients must work toward building systems that will ensure access for LEP individuals, DOI acknowledges that the implementation of a comprehensive system to serve LEP

[13] For instance, signs in intake offices could state that free language assistance is available. The signs should be translated into the most common languages encountered and should explain how to get language assistance service.

[14] The Social Security Administration has made such signs available at its Web site, (see *http://www.ssa.gov/multilanguage/langlist1.htm*). The signs could be modified for recipient use.

individuals is a process and that a system will evolve over time as it is implemented and periodically reevaluated. As recipients take reasonable steps to provide meaningful access to federally assisted programs and activities for LEP persons, DOI will look favorably on any intermediate steps the recipients take that are consistent with this Guidance, and that, as part of a broader implementation plan or schedule, move their service delivery system toward providing full access to LEP persons. This does not excuse noncompliance but instead recognizes that full compliance in all activities of recipients and for all potential language minority groups reasonably may require a series of implementing actions over a period of time. However, in developing any phased implementation schedule, DOI recipients should ensure that they first provide appropriate assistance for significant LEP populations and activities having a significant impact on the health, safety, legal rights, or livelihood of beneficiaries. Recipients are encouraged to document their efforts to provide LEP persons with meaningful access to federally assisted programs and activities.

Dated: December 17, 2003.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management, and Budget.

[FR Doc. 03–31693 Filed 12–23–03; 8:45 am]

BILLING CODE 4310–RE–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–020–03–1320–EL]

Notice of Availability of Draft Land Use Analysis/Environmental Assessment, Public Comment Period and Public Hearing

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management's Eastern States, Jackson Field Office, has prepared a Draft Land Use Analysis/Environmental Assessment (LUA/EA) to address coal lease application ALES–51589.

DATES: Written comments must be post-marked on or before January 31, 2004 and provided to the below address.

ADDRESSES: Written comments must be provided to the Bureau of Land Management, Jackson Field Office, 411 Briarwood, Suite 404; Jackson, MS 39206.

Public Hearing: The public hearing will be held on January 8, 2004 at 7 p.m. in the Berry Community Center located at 104 Barnes Avenue, Berry, Alabama. Written comments may be provided by members of the public regardless if they attend the hearing.

FOR FURTHER INFORMATION CONTACT: Lars Johnson, Bureau of Land Management, Jackson, Mississippi, at (601) 977–5400.

SUPPLEMENTARY INFORMATION: The LUA/EA has been prepared in cooperation with the Office of Surface Mining and the Alabama Surface Mining Commission. Public comments are requested on the LUA/EA and fair market value (FMV) and maximum economic recovery (MER) of the tracts included in the lease application proposed to be offered for competitive lease sale. The coal in the tracts would be mined by underground methods. The tracts located in Sections 14, 15, 21, 22, 27, 28, 31, and 33, T 16 S, R 10 W, Huntsville Meridian in Fayette County, Alabama; encompass 2,887.2 acres.

Estimated recoverable federal reserves from the Pratt Seam are 10.789 million tons of federal coal. The proximate analysis of the coal is as follows: moisture—2.8%, ash—10%, volatiles—36.1%, fixed carbon—51.3%, Btu/lb—13,000 and sulfur—2.1%.

The public is invited to comment on the FMV and MER of the tracts proposed to be offered for lease and on factors that may affect FMV and MER. In addition, the LUA/EA is available on request from the below-listed contact person and address. A public hearing will be held on the FMV, MER and LUA/EA.

Comments that address the effect of mining the coal (underground methods) on the environment, as presented in the LUA/EA, are solicited. The public review period for the LUA/EA will be from December 23, 2003 to January 31, 2004. A public hearing will be held, as indicated below.

Procedures for leasing federal coal are provided by 43 CFR 1600 and 3400. The notice to prepare this LUA/EA was published in the **Federal Register** on June 20, 2003 (Volume 68, Number 119; pages 37017–37018). This notice of availability of the LUA/EA, public comment period and public hearing are required by 43 CFR 3422.1 and 43 CFR 3425.3.

As provided by 43 CFR 3422.1(a), proprietary data marked as confidential may be provided in response to this solicitation of public comments. Data so marked shall be treated in accordance with the laws and regulations governing the confidentiality of such information. A copy of the comments submitted by the public on FMV and MER, except those portions identified as proprietary and meeting exemptions stated in the Freedom of Information Act, will be available for public inspection at the Bureau of Land Management office noted above.

Comments on FMV and MER should address, but are not limited to the following factors:

1. The method of mining to be employed in order to obtain MER,

2. The method of determining FMV for the coal to be offered.

If you wish to withhold your name or address from public review or from disclosure under the Freedom of Information Act (FOIA), you must state this prominently at the beginning of your written comments. Such requests will be honored to the extent allowed by FOIA. All submissions from organizations, businesses and individuals identifying themselves as representatives or officials of organizations or businesses will be available for public inspection in entirety.

Dated: October 10, 2003.

Sid Vogelpohl,

Acting Field Manager, Jackson Field Office.

[FR Doc. 03–31837 Filed 12–23–03; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–060–1320–EL) WYW150210, WYW150318, WYW151134, WYW151643, WYW154001]

Notice of Availability of South Powder River Basin Coal Final Environmental Impact Statement, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability (NOA) of a Final Environmental Impact Statement (FEIS) on four maintenance lease applications received for five Federal coal tracts in the decertified Powder River Federal Coal Production Region, Wyoming.

SUMMARY: Under the National Environmental Policy Act (NEPA), implementing regulations and other applicable statutes the Bureau of Land Management (BLM) announces the availability of the South Powder River Basin Coal FEIS.

The FEIS analyzes the impacts of issuing five Federal coal leases in the Wyoming portion of the Powder River Basin. The tracts are being considered for sale as a result of coal lease applications received from existing

companies operating mines in the Wyoming Powder River Basin.

DATES: Written comments on the FEIS will be accepted for 30 days following the date that the Environmental Protection Agency (EPA) publishes their NOA of the FEIS in the **Federal Register**. The BLM will notify all parties on this project's mailing list of the dates when comments will be accepted.

ADDRESSES: Please address questions, comments, or concerns to the Casper Field Office, Bureau of Land Management, Attn: Nancy Doelger, 2987 Prospector Drive, Casper, Wyoming 82604, fax them to (307) 261–7587, or send e-mail comments to the attention of Nancy Doelger at *wymail@blm.gov.* Copies of the FEIS are available for public inspection at the following BLM office locations: Bureau of Land Management, Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009; Bureau of Land Management, Casper Field Office, 2987 Prospector Lane, Casper, Wyoming 82604.

FOR FURTHER INFORMATION CONTACT: Nancy Doelger or Mike Karbs at the above address, or telephone: (307) 261–7600.

SUPPLEMENTARY INFORMATION: The five Federal coal tracts being considered for leasing are adjacent to four mines located south and east of Wright, Wyoming. The operators of these mines applied to lease the tracts as maintenance tracts to extend the life of their existing mining operations under the provisions of the Leasing on Application regulations at 43 CFR 3425. The following paragraphs provide descriptions of the tracts as they were applied for.

On March 10, 2000, Powder River Coal Company applied for a maintenance coal lease for approximately 4,500 acres (approximately 564 million tons of recoverable coal) in two tracts adjacent to the North Antelope/Rochelle Mine Complex in Campbell County, Wyoming. The tracts, which are referred to as the NARO North Lease by Application (LBA) Tract and the NARO South LBA Tract, were assigned case numbers WYW150210 and WYW154001, respectively:

NARO North—WYW150210

T. 42 N., R. 70 W., 6th PM, Wyoming,
Sec. 28: Lots 5 thru 16;
Sec. 29: Lots 5 thru 16;
Sec. 30: Lots 9 thru 20;
T. 42 N., R. 71 W., 6th PM, Wyoming,
Sec. 25: Lots 5 thru 15;
Sec. 26: Lots 7 thru 10;
Sec. 35: Lots 1, 2, 7 thru 10, 15, 16.
Containing 2,369.38 acres, more or less.

NARO South—WYW 154001

T. 41 N., R. 70 W., 6th PM, Wyoming,
Sec. 19: Lots 6 thru 11, 12 (S½), 13 thru 20;
Sec. 20: Lots 5 (S½, 6 (S½), 7 (S½), 6 (S½), 8 (S½), 9 thru 16;
Sec. 21: Lots 5 (S½), 12, 13;
Sec. 28: Lots 3 thru 6, 11, NE¼SW¼;
Sec. 29: Lots 1 thru 12;
Sec. 30: Lots 5 thru 12;
Containing 2,133.635 acres, more or less.

On March 23, 2000, Ark Land Company applied for a maintenance coal lease for approximately 2,799.5 acres (approximately 383.6 million in-place tons of coal) adjacent to the Black Thunder Mine in Campbell County, Wyoming. The tract, which is referred to as the Little Thunder LBA Tract, was assigned case number WYW150318. According to the application, the coal is needed to maintain existing mining operations at the Black Thunder Mine and would be used for electric power generation. On June 14, 2001, Ark Land Company filed an application to modify the Little Thunder LBA Tract. As currently filed, the tract includes approximately 3449.3 acres and 440 million tons of recoverable coal reserves.

Little Thunder—WYW150318

T. 43 N., R. 71 W., 6th PM, Wyoming,
Sec. 2: Lots 5, 6, 11 thru 14, 19, 20;
Sec. 11: Lots 1, 2, 7 thru 10, 15, 16;
Sec. 12: Lots 2 (W½ & SE¼), 3 thru 16;
Sec. 13: Lots 1 thru 16;
Sec. 14: Lots 1, 2, 6 thru 9, 14, 15;
Sec. 24: Lots 1 thru 16;
Sec. 25: Lots 1, 2, 7 thru 10, 15, 16.
T. 44 N., R. 71 W., 6th PM, Wyoming,
Sec. 35: Lots 1, 2, 7 thru 10, 15, 16.
Containing 3,449.317 acres, more or less.

On July 28, 2000, Triton Coal Company applied for a maintenance coal lease for approximately 1870.6 acres (approximately 173.2 million in-place tons of coal) adjacent to the North Rochelle Mine in Campbell County, Wyoming. The tract, which is referred to as the West Roundup LBA Tract, was assigned case number WYW151134.

West Roundup—WYW151134

T. 42 N., R. 70 W., 6th PM, Wyoming,
Sec. 6: Lots 8–19, 20 (N½), 21 (N½), 22 (N½), 23 (N½);
Sec. 7. Lots 5 (S½), 6 (S½), 7 (S½), 8 (S½), 9 thru 14;
Sec. 8: Lots 1 (SW¼), 2 (S½), 3 (S½), 4 (S½), 5 thru 12;
Sec. 9: Lots 5 (SW¼), 11, 12, 14;
T. 43 N., R. 70 W., 6th PM, Wyoming,
Sec. 31: Lots 13 thru 20.
T. 42 N., R. 71 W., 6th PM, Wyoming,
Sec. 1: Lots 5, 6, 11 thru 13.
Containing 1,870.638 acres more or less.

On September 12, 2000, Antelope Coal Company applied for a maintenance coal lease for approximately 3,500 acres (approximately 292.5 million in-place tons of coal) adjacent to the Antelope Mine in Campbell and Converse Counties, Wyoming. The tract, which is referred to as the West Antelope LBA Tract, was assigned case number WYW151643. On June 27, 2001, Antelope Coal Company filed an application to modify the West Antelope LBA Tract. As currently filed, the tract includes approximately 3,542 acres and 293.9 million tons of in place coal reserves. According to the application, mining this coal would extend the life of the existing mine and the coal would be mined for sale to electrical power generating plants.

West Antelope—WYW151643

T. 40 N., R. 71 W., 6th PM, Wyoming,
Sec. 3: Lots 15 thru 18;
Sec. 4: Lots 5 thru 20;
Sec. 5: Lots 5 thru 7, 10 thru 15, 19, 20;
Sec. 9: Lot 1;
Sec. 10: Lots 3, 4;
T. 41 N., R. 71 W., 6th PM, Wyoming,
Sec. 28: Lots 1 thru 16;
Sec. 29: Lots 1 thru 16;
Sec. 32: Lots 1 thru 3, 6 thru 11, 14 thru 16;
Sec. 33: Lots 1 thru 16.
Containing 3,542.19 acres more or less.

Each of the mines adjacent to the LBA tracts described above (the North Antelope/Rochelle, Black Thunder, North Rochelle, and Antelope mines, respectively) has an approved mining and reclamation plan from the Land Quality Division of the Wyoming Department of Environmental Quality and an approved air quality permit from the Air Quality Division of the Wyoming Department of Environmental Quality. Each of these mines has previously acquired one or more maintenance coal leases using the LBA process.

The Powder River Regional Coal Team (RCT) reviewed these competitive applications at public meetings held on October 25, 2000, in Cheyenne, Wyoming, and May 30, 2002, in Casper, Wyoming. At the most recent meeting, the RCT recommended that BLM continue to process these LBAs.

The Draft Environmental Impact Statement (DEIS) was mailed to the public in February 2003. The EPA and the BLM each published a Notice of Availability in the **Federal Register** on February 7 and February 20, 2003, respectively. A formal public hearing on these applications was held, pursuant to 43 CFR 3425.4 at 7:00 P.M. MDT on March 4, 2003, at the Best Western Tower West Lodge, 109 N. U.S. Highway 14–16, Gillette, Wyoming. The

purpose of the hearing was to solicit public comments on the DEIS, the fair market value, the maximum economic recovery, and the proposed competitive sale of the coal included in each of the proposed five tracts. The 60-day comment period on the DEIS ended on April 11, 2003.

The draft and final EIS analyze leasing each of the five tracts as applied for (described above) as a separate Proposed Actions. As part of the coal leasing process, BLM has identified and is evaluating other tract configurations for these tracts which add or subtract Federal coal to avoid bypassing coal or to increase competitive interest in the unleased Federal coal in this area. The tract configurations that BLM has identified for each tract are described and analyzed as alternatives in the EIS. The EIS also analyzes the alternative of rejecting each application to lease Federal coal s the No Action Alternative for each tract.

The agency-preferred alternatives are identified in the FEIS. The agency-preferred alternative varies for each tract, depending on which tract configuration is determined to best advance the public interest in avoiding bypassing Federal coal and increasing competitive interest in obtaining the fair market value of the Federal coal. The Proposed Actions and Alternatives that are considered in the EIS are in conformance with the ''Approved Resource Management Plan for Public Lands Administered by the Bureau of Land Management Buffalo Field Office'' (April 2001), the USDA Forest Service ''Final EIS for the Northern Great Plains Revision'' (May 2001) and the BLM ''Platte River Resource Area Resource Management Plan'' (1985).

The USDA Forest Service (Forest Service) is a cooperating agency in the preparation of the EIS. The surface of some of the land included for consideration for leasing in three of the tracts (NARO North, Little Thunder, and West Roundup) is National Forest System land administered by the Forest Service as part of the Thunder Basin National Grasslands.

The Office of Surface Mining Reclamation and Enforcement (OSM) is a cooperating agency in the preparation of this EIS. If the tracts are leased as maintenance tracts, each new lease must be incorporated into the existing mining and reclamation plan for the adjacent mine and the Secretary of the Interior must approve each revision to the MLA (Mineral Leasing Act) mining plan for each mine before the Federal coal in each tract can be mined. OSM is the Federal agency that would be responsible for recommending approval, approval with conditions, or disapproval of the revised MLA mining plans to the office of the Secretary of the Interior if any or all of these tracts are leased.

Eleven written comments were received during the comment period on the Draft EIS, and four were recorded at the public hearing. The issues that were identified in the comment letters and at the hearing included potential conflicts with existing conventional oil and gas coalbed methane development; potential cumulative impacts of increasing mineral development in the Powder River Basin; validity and currency of resource data; public access; potential impacts to threatened and endangered species and other species of concern; potential cumulative air quality impacts; and potential impacts of nitrogen oxide emissions resulting from blasting of coal and overburden.

A separate Record of Decision (ROD) will be prepared for each of the five LBA tracts being considered for leasing. Comments received on the FEIS will be considered during preparation of the RODs.

Comments, including names and street addresses of respondents, will be available for public review at the Bureau of Land Management, Casper Field Office, 2987 Prospector Drive, Casper, Wyoming, during regular business hours (8 a.m. to 4:30 p.m.), Monday through Friday, except holidays. Individual respondents may request confidentiality. If you wish to withhold your name or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Dated: October 23, 2003.

Alan L. Kesterke,

Associate State Director.

[FR Doc. 03–31836 Filed 12–23–03; 8:45 am]

BILLING CODE 4310–22–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of extension of an information collection (1010–0043).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), MMS is inviting comments on a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) concerns the paperwork requirements in the regulations under 30 CFR 250, Subpart F, ''Oil and Gas Well-Workover Operations.''

DATES: Submit written comments by February 23, 2004.

ADDRESSES: Mail or hand carry comments to the Department of the Interior; Minerals Management Service; Attention: Rules Processing Team; Mail Stop 4024; 381 Elden Street; Herndon, Virginia 20170–4817. If you wish to e-mail comments, the address is: *rules.comments@mms.gov.* Reference ''Information Collection 1010–0043'' in your e-mail subject line and mark your message for return receipt. Include your name and return address in your message.

FOR FURTHER INFORMATION CONTACT: Arlene Bajusz, Rules Processing Team at (703) 787–1600. You may also contact Arlene Bajusz to obtain a copy, at no cost, of the regulations that require the subject collection of information.

SUPPLEMENTARY INFORMATION:

Title: 30 CFR 250, Subpart F, Oil and Gas Well-Workover Operations.

OMB Control Number: 1010–0043.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition.

Section 5(a) of the OCS Lands Act requires the Secretary to prescribe rules and regulations ''to provide for the prevention of waste, and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein'' and to include provisions ''for the prompt and

efficient exploration and development of a lease area.'' These authorities and responsibilities are among those delegated to MMS under which we issue regulations to ensure that operations in the OCS will meet statutory requirements; provide for safety and protection of the environment; and result in diligent exploration, development, and production of OCS leases. This information collection request addresses the regulations at 30 CFR 250, subpart F, Oil and Gas Well-Workover Operations and the associated supplementary notices to lessees and operators intended to provide clarification, description, or explanation of these regulations.

MMS District Supervisors use the information collected to analyze and evaluate planned well-workover operations to ensure that operations result in personnel safety and protection of the environment. They use this evaluation in making decisions to approve, disapprove, or to require modification to the proposed well-workover operations. For example, MMS uses the information to:

- Review log entries of crew meetings to verify that safety procedures have been properly reviewed.
- Review well-workover procedures relating to hydrogen sulfide (H_2S) to ensure the safety of the crew in the event of encountering H_2S.
- Review well-workover diagrams and procedures to ensure the safety of well-workover operations.
- Verify that the crown block safety device is operating and can be expected to function and avoid accidents.
- Verify that the proposed operation of the annular preventer is technically correct and will provide adequate protection for personnel, property, and natural resources.
- Verify the reasons for postponing blowout preventer (BOP) tests, verify the state of readiness of the equipment and to ascertain that the equipment meets safety standards and requirements, ensure that BOP tests have been conducted in the manner and frequency to promote personnel safety and protect natural resources. Specific testing information must be recorded to verify that the proper test procedures were followed.
- Assure that the well-workover operations are conducted on well casing that is structurally competent.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2) and under regulations at 30 CFR 250.196, ''Data and information to be made available to the public.'' No items of a sensitive nature are collected. Responses are mandatory.

Frequency: The frequency varies by section, but is primarily monthly or on occasion.

Estimated Number and Description of Respondents: Approximately 130 Federal OCS oil and gas or sulphur lessees.

Estimated Reporting and Recordkeeping ''Hour'' Burden: The currently approved annual reporting burden for this collection is 19,205 hours. The following chart details the individual components and respective hour burden estimates of this ICR. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Citation 30 CFR 250 subpart F	Reporting or recordkeeping requirement	Hour burden
	Reporting Requirements	
602	Request exceptions prior to moving well-workover equipment	1.
602	Notify MMS of any rig movement within Gulf of Mexico (form MMS–144)	Burden included in 1010–0150.
605; 613; 615(a)	Request approval to begin subsea well-workover operations; submit forms MMS–124 and MMS–125.	Burden included in 1010–0045 and 1010–0046.
612	Request establishment/amendment/cancellation of field well-workover rules	1.
614	Post number of stands of drill pipe or workover string and drill collars that may be pulled prior to filling the hole and equivalent well-control fluid volume.	.25.
616(a)	Request exception to rated working pressure of the BOP equipment; request exception to annular-type BOP testing.	2.
617(b)	Pressure test, caliper, or otherwise evaluate tubing & wellhead equipment casing; submit results (every 30 days during prolonged operations).	6.
617(c)	Notify MMS if sustained casing pressure is observed on a well	.25.
600–618	General departure and alternative compliance requests not specifically covered elsewhere in subpart F regulations.	2.
	Recordkeeping Requirements	
606	Instruct crew members in safety requirements of operations to be performed; document meeting (weekly for 2 crews × 2 weeks per workover = 4).	1.
611	Perform operational check of traveling-block safety device; document results (weekly × 2 weeks per workover = 2).	1.
616(a), (b), (d), (e)	Perform BOP pressure tests, actuations, inspections & certifications; record results; retain records 2 years following completion of workover activities (when installed; at a minimum every 7 days × 2 weeks per workover = 2).	8.
616(b)(2)	Test blind or blind-shear rams; document results (every 30 days during operations). (Note: this is part of BOP test when BOP test is conducted.).	1.
616(b)(2)	Record reason for postponing BOP system tests	.5.
616(c)	Perform crew drills; record results (weekly for 2 crews × 2 weeks per workover = 4)	1.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have identified no ''non-hour cost'' burdens.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an

agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *''.

Agencies must specifically solicit comments to: (a) evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the ''non-hour cost'' burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this notice and address them in our submission for OMB approval. As a result of your comments, we will make any necessary adjustments to the burden in our submission to OMB.

Public Comment Policy: MMS's practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. If you wish your name and/or address to be withheld, you must state this prominently at the beginning of your comment. MMS will honor this request to the extent allowable by law; however, anonymous comments will not be considered. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

MMS Federal Register Liaison Officer: Denise Johnson (202) 208–3976.

Dated: December 16, 2003.

E.P. Danenberger,

Chief, Engineering and Operations Division.

[FR Doc. 03–31626 Filed 12–23–03; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of new information collection.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), MMS is inviting comments on a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) concerns four new forms to collect information required under 30 CFR 256, ''Leasing of Sulphur or Oil and Gas in the Outer Continental Shelf.'' The below forms will be used by all MMS Regional Offices:

- MMS–149, Assignment of Interest in Federal Pipeline Right-of-Way.
- MMS–150, Assignment of Record Title Interest in Federal OCS Oil & Gas Lease.
- MMS–151, Assignment of Operating Rights Interest in Federal OCS Oil & Gas Lease.
- MMS–152, Relinquishment of Federal OCS Oil & Gas Lease.

DATES: Submit written comments by February 23, 2004.

ADDRESSES: Mail or hand carry comments to the Department of the Interior; Minerals Management Service; Attention: Rules Processing Team; Mail Stop 4024; 381 Elden Street; Herndon, Virginia 20170–4817. If you wish to e-mail comments, the address is: *rules.comments@mms.gov*. Reference ''Information Collection 1010–NEW—Assignment Forms'' in your e-mail subject line and mark your message for return receipt. Include your name and return address in your message.

FOR FURTHER INFORMATION CONTACT: Arlene Bajusz, Rules Processing Team at (703) 787–1600 to obtain a copy, at no cost, of the forms or regulations that require the subject collection of information. You may also print a copy of these forms from the MMS Web site: *http://www.gomr.mms.gov/homepg/lsesale/proposed_forms.html* under the heading ''Leasing.'' For more information on the forms themselves, contact Steven K. Waddell, Supervisor, Adjudication Unit, (504) 736–1710.

SUPPLEMENTARY INFORMATION:

Title: Assignment of Pipeline Right-of-Way, Record Title, Operating Rights Forms and Relinquishment of Oil and Gas Lease Form.

OMB Control Number: 1010–NEW.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition. Also, the Energy Policy and Conservation Act of 1975 (EPCA) prohibits certain lease bidding arrangements (42 U.S.C. 6213(c)).

These authorities and responsibilities are among those delegated to the Minerals Management Service (MMS), under which MMS issues regulations governing oil and gas and sulphur operations in the OCS. This request concerns forms used to collect assignment, transfer, extension, and termination of lease information required under 30 CFR 256, ''Leasing of Sulphur or Oil and Gas in the Outer Continental Shelf.'' The Federal Government has been receiving and approving transfers of ownership interest in leases since the inception of the OCS Lands Act, as amended. Currently, owners of Federal offshore leases submit their own forms of Assignment and Relinquishment documents for approval by MMS. Occasionally, the information is

incorrect and the intent of the parties is not clear as to the conveyance of ownership interest in the lease or pipeline right-of-way, causing MMS to return the assignment unapproved. These forms have been created to provide a standardized document that will be accepted in all MMS Regional offices; they can be easily prepared by industry and quickly approved by MMS.

To implement the Government Paperwork Elimination Act and to further streamline data collection, MMS is developing systems to provide electronic options for lessees and operators to use in submitting information and requesting approvals. These forms are part of that effort to allow electronic options for lessees and operators to use in submitting information and requesting approvals. In standardizing the input of this information, MMS is providing a means for rapid preparation by industry and reduced analytical time by MMS staff, therefore approving the transfers quicker.

MMS uses this information to track ownership of all offshore leases as to record title, operating rights, and ownership of pipelines, and whether or not the lease has been relinquished and available for the next lease sale. MMS uses the information to update the corporate database, which is in turn used to determine what leases are available for a lease sale. The information in this database is provided to the public via the internet. Without the information, MMS would not be able to track the ownership of leases and therefore not be able to identify responsible parties for the liabilities of the lease, which could total millions of dollars.

Following the publication of this notice, MMS will hold a public forum on the proposed forms at the Gulf of Mexico Regional Office, 1201 Elmwood Park Boulevard, New Orleans, Louisiana. For further information, contact Steven K. Waddell, Supervisor, Adjudication Unit, (504) 736–1710.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2) and under regulations at 30 CFR 250.196, ''Data and information to be made available to the public.'' No items of a sensitive nature are collected. Responses are mandatory.

Frequency: On occasion.

Estimated Number and Description of Respondents: Approximately 200 Federal OCS oil and gas or sulphur lessees/operators.

Estimated Reporting and Recordkeeping ''Hour'' Burden: The burden for collecting the information and filing the applications for assignment, transfer, extension, or relinquishment of leases is already approved by OMB under 1010–0006 (expiration date of March 31, 2004) for 30 CFR 256. This submission requests approval for only the additional burden of filling out the new forms. We estimate that each proposed form will require approximately 30 minutes for respondents to complete. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have identified no ''non-hour cost'' burdens for this new collection. Application filing fees are already approved by OMB under OMB Control Number 1010–0006 for 30 CFR 256.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency ''* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * * ''. Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the ''non-hour cost'' burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

MMS will summarize written responses to this notice and address them in the submission for OMB approval. As a result of your comments, MMS will make any necessary adjustments to the burden in the submission to OMB.

Public Comment Policy: MMS's practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. If you wish your name and/or address to be withheld, you must state this prominently at the beginning of your comment. MMS will honor this request to the extent allowable by law; however, anonymous comments will not be considered. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

MMS Federal Register Liaison Officer: Denise Johnson (202) 208–3976.

Dated: December 16, 2003.

E.P. Danenberger,

Chief, Engineering and Operations Division.

[FR Doc. 03–31627 Filed 12–23–03; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Prohibited Transaction Exemption (PTE) 2003–38; Exemption Application No. D–11167; Aetna Life Insurance Company (Aetna) and UBS Realty Investors LLC (UBS Realty), Located in Hartford, CT

AGENCY: Employee Benefits Security Administration, Department of Labor (the Department).

ACTION: Notice of technical correction.

On December 17, 2003, the Department published PTE 2003–38 in the **Federal Register** at 68 FR 70315. PTE 2003–38 permits certain transactions that may occur as a result of the sharing of real estate investments among various accounts maintained by Aetna, including Aetna's general account, and the general accounts of Aetna's affiliates which are insurance companies licensed to do business in at least one state, and the ERISA–Covered Accounts with respect to which both Aetna and UBS Realty are fiduciaries.

On page 70315 of the notice granting PTE 2003–38, the prohibited transaction exemption number, appearing in the bracketed text at the beginning of the document, was inadvertently omitted even though the year of publication was specified. Accordingly, the Department hereby corrects the grant notice, in part, to read as follows: ''[Prohibited Transaction Exemption 2003–38;* * *]''

FOR FURTHER INFORMATION CONTACT: Mr. Brian J. Buyniski of the Department at (202) 693–8545. (This is not a toll-free number.)

Signed at Washington, DC this 19th day of December, 2003.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 03–31712 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,564]

Allegheny Ludlum Corporation, Leechburg Works, Leechburg, Pennsylvania; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 14, 2003 in response to a worker petition filed by a company official on behalf of workers at the Allegheny Ludlum Corporation, Leechburg Works, Leechburg, Virginia.

The petitioning group of workers is covered by an earlier petition filed on November 3, 2003 (TA–W–53,538) 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 24th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31678 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,589]

Charmilles Technologies Manufacturing Corporation, a Division of Agie Charmilles Holding Corporation, Owosso, WI; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 19, 2003 in response to a petition filed by a company official on behalf of workers at the Charmilles Technologies Manufacturing Corporation, a division of Agie Charmilles Holding Corporation, Owosso, Wisconsin.

The petition is a copy of the petition filed on November 17, 2003 (TA–W–53,543), that is the subject of an ongoing investigation for which a determination has not yet been issued. Consequently, further investigation in this case would serve no purpose and the investigation is terminated.

Signed at Washington, DC this 24th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31681 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,497]

Eljer Plumbingware, Inc., Salem, OH; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on November 10, 2003, in response to a petition which was filed by a company official on behalf of workers at Eljer Plumbingware, Inc., Salem, Ohio.

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 3rd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31675 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,473]

Farnsworth Fibre Corp., South Boston, MA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 7, 2003, in response to a petition filed by a company official on behalf of workers at Farnsworth Fibre Corporation, South Boston, Massachusetts.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 2nd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31674 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,581]

NW Services, Inc., Hickory, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 19, 2003 in response to a worker petition filed by a company official on behalf of workers at NW Services, Inc., Hickory, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 2nd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31680 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,315B]

OBG Distribution Company, LLC, Oshkosh B'Gosh, Inc., Celina, Tennessee; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 22, 2003, in response to a petition filed by a company official on behalf of workers at Oshkosh B'Gosh, Inc., OBG Distribution Company, LLC, Celina, Tennessee.

The subject worker group is covered by an active certification issued on March 10, 2003 (TA–W–50,662). Consequently, the investigation has been terminated.

Signed at Washington, DC this 24th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31673 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,580]

Piedmont Bottling & Vending, Inc., Hickory, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 19, 2003 in response to a worker petition filed by a company official on behalf of workers at Piedmont Bottling & Vending, Inc., Hickory, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 2nd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31679 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,518]

S. Lichtenberg & Company, Inc., Waynesboro, GA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 13, 2003 in response to a petition filed by a State agency representative on behalf of workers at S. Lichtenberg & Company, Inc., Waynesboro, Georgia.

The petitioning group of workers is covered by an earlier petition filed on October 30, 2003 (TA–W–53,381) 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 24th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31677 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,499]

Supreme Elastic Corporation, Hickory, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 10, 2003 in response to a petition filed by a company official on behalf of workers at Supreme Elastic Corporation, Hickory, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 25th day of November, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31676 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,192]

Telect, Sugar Hill, GA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on October 8, 2003, in response to a worker petition which was filed on behalf of workers at Telect, Sugar Hill, Georgia.

An active certification covering the petitioning group of workers is already in effect (TA-W–41,469D, as amended). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC this 24th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–31672 Filed 12–23–03; 8:45 am]

BILLING CODE 4510–30–P

INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

United States Section; Notice of Availability of Final Environmental Impact Statement for Alternative Vegetation Maintenance Practices for the Lower Rio Grande Flood Control Project in Cameron, Hidalgo, and Willacy Counties, TX

AGENCY: United States Section, International Boundary and Water Commission, United States and Mexico.

ACTION: Notice of availability of Final Environmental Impact Statement.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, as amended, the United States Section, International Boundary and Water Commission (USIBWC) has prepared a Final Environmental Impact Statement (FEIS) on Alternative Vegetation Maintenance Practices for the Lower Rio Grande Flood Control Project in Cameron, Hidalgo, and Willacy counties, Texas. The FEIS analyzes the Continued

Maintenance Alternative (No-Action), comprising the current USIBWC vegetation maintenance program, and the impacts of three vegetation maintenance alternatives that vary from the current USIBWC vegetation maintenance practices along the Lower Rio Grande Valley. No final decision can be made on this proposal during the 30 days following the filing of this FEIS, in accordance with the Council on Environmental regulations, 40 CFR 1506.10(b)(2).

ADDRESSES: Comments should be addressed to: Carolyn Murphy, Chief, Environmental Section, Department of the Army, Galveston District, Corps of Engineers, P.O. Box 1229, Galveston, Texas 77553–1229. Copies of the FEIS are available for inspection and review at the following locations: Brownsville Public Library, 2600 Central Boulevard, Brownsville, Texas; Harlingen Public Library, 410 '76 Drive, Harlingen, Texas; and McAllen Public Library, 601 North Main Street, McAllen, Texas. The FEIS is also available on the USIBWC Home Page at: *http://www.ibwc.state.gov*; and at the United States Army Corps of Engineers, Galveston District, Home Page at: *http://www.swg.usace.army.mil/.*

FOR FURTHER INFORMATION CONTACT: Mr. Douglas Echlin, Environmental Protection Specialist, Environmental Management Division, USIBWC, 4171 North Mesa Street, C–100, El Paso, Texas 79902 or call (915) 832–4741, e-mail: *dougechlin@ibwc.state.gov.*

SUPPLEMENTARY INFORMATION: The USIBWC vegetation maintenance program is performed along the United States portion of the Lower Rio Grande Flood Control Project (LRGFCP). The vegetation maintenance program was established to fulfill the United States Government's obligations under International Boundary and Water Commission (IBWC) Minutes No. 212 and No. 238 and to protect life and properties in the United States and Mexico from Rio Grande flooding events.

Under Minute No. 212, the United States and Mexico agreed to annual concurrent channel bank mowing to reduce heavy brush growth in the river reach and to ensure a river channel capacity of 20,000 cfs at the Brownsville-Matamoros area. This maintenance mowing is considered necessary to prevent flooding in Brownsville and Matamoros for the design flood and to ensure that brush does not deflect river flood flows toward either country, thus altering the international boundary alignment by erosion. Minute No. 238 calls for equally dividing flood flows into interior floodways in each country, thereby ensuring the 20,000 cfs maximum flow at Brownsville and Matamoros.

On November 1, 1989, the Sierra Club *et al.* filed a civil action suit against the USIBWC alleging vegetation maintenance program violations of the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA) (CA No. 89–3005–RCL (1990 WL 116845 (D.D.C.)), Jul. 31, 1990). The plaintiffs alleged that the USIBWC had not prepared an Environmental Assessment or Environmental Impact Statement (EIS) relative to the operation and maintenance activities for the United States portion of the LRGFCP as required by NEPA. The plaintiffs also alleged that the USIBWC had not entered into formal consultation with the USFWS pursuant to Section 7 of the ESA with respect to the impacts of the United States portion of the LRGFCP on federally-listed threatened or endangered species.

In a 1990 Consent Decree, the USIBWC agreed to enter into formal consultation with the USFWS regarding the impacts of all vegetation clearing activities of the LRGFCP on federally listed species. The consultation process resulted in an issuance by the USFWS of a Biological Opinion (BO) on May 6, 1993. The USFWS has recently issued a new BO. In addition to formal consultation with USFWS, USIBWC agreed to the preparation of this EIS, which specifically addresses alternative vegetation maintenance practices.

This FEIS presents and analyzes the impacts of current and alternative USIBWC vegetation maintenance practices to fulfill commitments under the IBWC Minutes, the Consent Decree, and the new BO. The pertinent elements of the LRGFCP vegetation maintenance program are based on the need to:

- Maintain channel banks to provide adequate flood conveyance.
- Equitably divert flood flows into interior floodways.
- Remove brush and other obstructions within floodways.
- Maintain a wildlife corridor per the USFWS BO and the 1994 LRGFCP Off-River Wildlife Travel Corridor Plan.

Four potential vegetation maintenance alternatives, including the current USIBWC maintenance program, are considered and analyzed in the FEIS. The Preferred Alternative is the Continued Maintenance Alternative (No-Action), representing the continuation of the current USIBWC vegetation maintenance program.

A Record of Decision will be issued on this proposal after a minimum of 30 days following the filing of the FEIS. Any comments on the FEIS must be received no later than 30 days after the date of publication of the notice of availability by the Environmental Protection Agency (EPA) in the **Federal Register**. No action will be taken on the proposed action before 30 days following publication of the notice of availability of the FEIS by EPA.

Dated: December 15, 2003.

Mario Lewis,

General Counsel.

[FR Doc. 03–31670 Filed 12–23–03; 8:45 am]

BILLING CODE 4710–03–P

INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

United States Section; Notice of Availability of Draft Environmental Impact Statement, River Management Alternatives for the Rio Grande Canalization Project, Sierra and Doña Ana Counties, NM and El Paso County, TX

AGENCY: United States Section, International Boundary and Water Commission, United States and Mexico.

ACTION: Notice of availability of Draft Environmental Impact Statement.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, as amended, the United States Section, International Boundary and Water Commission (USIBWC), in cooperation with the United States Bureau of Reclamation (USBR), has prepared a Draft Environmental Impact Statement (DEIS) on River Management Alternatives for the Rio Grande Canalization Project (RGCP) located in Sierra and Doña Ana Counties, NM and El Paso County, TX. The DEIS analyzes effects of the No Action Alternative and three action alternatives on the future RGCP operation, maintenance, and implementation of environmental measures. One public hearing will be held to receive oral comments on the DEIS from interested organizations and individuals through transcription by a certified court reporter. Written comments may be submitted at the public hearings or mailed to the USIBWC contact and address below.

DATES: Written comments are requested by February 10, 2004. A public hearing is scheduled for Tuesday, January 27, 2004 in El Paso, Texas. *See* **ADDRESSES** below for location and time.

ADDRESSES: Comments should be addressed to: Mr. Douglas Echlin, Lead

Environmental Protection Specialist, Environmental Management Division, USIBWC, 4171 North Mesa Street, C–310, El Paso, Texas 79902. A public hearing is scheduled from 6:30 to 8:30 p.m. on Tuesday, January 27, 2004 at the USIBWC Headquarters, First Floor Conference Room, 4171 North Mesa Street, El Paso, Texas 79902 to present your verbal or written comments.

Copies of the DEIS are available for inspection and review at the following locations: Branigan Memorial Library, 200 East Picacho Avenue, Las Cruces, New Mexico; El Paso Public Library, 501 North Oregon Street, El Paso, Texas; New Mexico State University Library, Las Cruces, New Mexico; University Library, The University of Texas at El Paso, El Paso, Texas; and United States Section, International Boundary and Water Commission, 4171 North Mesa Street, El Paso, Texas. A copy of the DEIS will also be posted at the USIBWC Web site at *www.ibwc.state.gov* ''IBWC News.''

FOR FURTHER INFORMATION CONTACT: Mr. Douglas Echlin, Lead Environmental Protection Specialist, Environmental Management Division, USIBWC, 4171 North Mesa Street, C–310, El Paso, Texas 79902 or call 915/832–4741. e-mail: *dougechlin@ibwc.state.gov.*

SUPPLEMENTARY INFORMATION: The USIBWC is evaluating long-term river management alternatives for the Rio Grande Canalization Project (RGCP), a narrow river corridor that extends 105.4 river miles along the Rio Grande, from below Percha Dam in Sierra County, New Mexico to American Dam in El Paso, Texas. The RGCP is operated and maintained by the USIBWC and was constructed to facilitate water deliveries to the Rincon and Mesilla Valleys in New Mexico, El Paso Valley in Texas, and Juarez Valley in Mexico. The project also includes a levee system for flood control.

The USIBWC currently implements operation and maintenance procedures to enhance ecosystem functions within the RGCP; however, alterations to the river and floodway from events that pre-date RGCP construction continue to affect the river and floodway. Therefore, USIBWC recognizes the need to accomplish flood control, water delivery, and operations and maintenance activities in a manner that enhances and restores the riparian ecosystem.

River management alternatives were considered and developed over a three-year-long public consultation process that included input from the general public and stakeholders such as regulatory agencies, irrigation districts, and environmental organizations. The No Action Alternative and three potential action alternatives were selected for further evaluation in the DEIS. Levee rehabilitation, changes associated with grazing leases to improve erosion control, floodway management, and river restoration including aquatic habitat diversification and riparian vegetation development are measures considered in the action alternatives. The USIBWC will select a preferred alternative after public comment on the DEIS.

A copy of the DEIS has been filed with the Environmental Protection Agency (EPA) in accordance with 40 CFR parts 1500–1508 and USIBWC procedures. Written comments concerning the DEIS will be accepted at the address provided above until February 10, 2004.

Dated: December 18, 2003.

Mario Lewis,

General Counsel.

[FR Doc. 03–31664 Filed 12–23–03; 8:45 am]

BILLING CODE 4710–03–U

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, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required 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: The National Science Foundation published notices in the **Federal Register** of permit applications received from the following applicants on:

William Gilmore (2004–011), August 19, 2003; Howard Evans (2004–005), September 29, 2003; Paul R. Renne (2004–017), October 27, 2003; and Thomas A. Day (2004–018), November 10, 2003.

Permits were issued to these four applicants on December 15, 2003.

Nadene G. Kennedy,

Permit Officer.

[FR Doc. 03–31617 Filed 12–23–03; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Earthscope Science and Education Advisory Committee; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: EarthScope Science and Education Advisory Committee (#16638).

Dates/Time: 8 p.m.–9:30 p.m. Wednesday, January 21, 2004, 8:30 a.m.–5 p.m. Thursday, January 22 and 23, 2004. 8:30 a.m.–12 p.m. Saturday, January 24, 2004.

Place: Sheraton 4-Points Hotel, 1201 K Street NW., Washington, DC.

Type of Meeting: Part-Open (see agenda below).

FOR FURTHER INFORMATION CONTACT: Dr. James H. Whitcomb, Division of Earth Sciences, National Science Foundation, Suite 785, 4201 Wilson Boulevard, Arlington, VA 22230, Phone 703–292–8553.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To carry out EarthScope proposal and management review, including program evaluation, GPRA assessments, and access to privileged materials; and to provide advice, recommendations, and oversight concerning EarthScope construction, operation, science and education support.

Agenda:

January 21, 2004

8 p.m.–9 p.m. Closed—Discussions regarding proposals and personnel decisions.

January 22, 2004

8:30 a.m.–12:00 p.m. Open—Review of EarthScope Execution Plan.

1 p.m.–5 p.m. Closed—Review of funding decisions for personnel and subcontracts for construction phase of EarthScope.

January 23, 2004

8:30 a.m.–5 p.m. Open—Advise on education and outreach Management structure, and revision of volanic area instrumentation.

January 24, 2004

8:30 a.m.–12 p.m. Closed—Review of proposal actions and discussion of proposals still under review.

Reason for Closing: Session having to do with proposal and awards for specific grants, contracts, or other arrangements may properly be closed to the public under 5 U.S.C. 522b(c)(4), (6),

and (9)(B) of the Government in the Sunshine Act.

Dated: December 19, 2003.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 03–31716 Filed 12–23–03; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR part 50, ''Domestic Licensing of Production and Utilization Facilities'.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* As necessary in order for NRC to meet its responsibilities to conduct a detailed review of applications for licenses and amendments thereto to construct and operate nuclear power plants, preliminary or final design approvals, design certifications, research and test facilities, reprocessing plants and other utilization and production facilities, licensed pursuant to the Atomic Energy Act of 1954, as amended (the Act) and to monitor their activities.

5. *Who will be required or asked to report:* Licensees and applicants for nuclear power plants and research and test facilities.

6. *An estimate of the number of annual responses:* 7,244 (7,069 responses + 175 recordkeepers).

7. *The estimated number of annual respondents:* 175.

8. *An estimate of the total number of hours needed annually to complete the requirement or request:* 5.2M: 1.8M hours reporting (average of 259 hrs/response) + 3.4M hours recordkeeping (average of 19K hrs/recordkeeper).

9. *An indication of whether section 3507(d), Pub. L. 104–13 applies:* N/A.

10. *Abstract:* 10 CFR part 50 of the NRC's regulations ''Domestic Licensing of Production and Utilization Facilities,'' specifies technical information and data to be provided to the NRC or maintained by applicants and licensees so that the NRC may make determinations necessary to protect the health and safety of the public, in accordance with the Act. The reporting and recordkeeping requirements contained in 10 CFR part 50 are mandatory for the affected licensees and applicants.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html*. The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by January 23, 2004. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. OMB Desk Officer, Office of Information and Regulatory Affairs (3150–0011), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395–3087.

The NRC Clearance Officer is Brenda Jo. Shelton, (301) 415–7233.

Dated at Rockville, Maryland, this 18th day of December, 2003.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 03–31687 Filed 12–23–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–143]

Nuclear Fuel Services, Inc.; Notice of Receipt of Amendment Request and Opportunity To Request a Hearing for Oxide Conversion Building and Effluent Processing Building in the Blended Low-Enriched Uranium Complex

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of receipt of amendment request and opportunity to request a hearing.

DATES: A request for a hearing must be filed on or before January 23, 2004.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Michael A. Lamastra, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Mail Stop T–8–A–33, Washington, DC 20555–0001. Telephone (301) 415–8139; fax number: (301) 415–5955; e-mail; *mxl2@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) has received, by letter dated October 23, 2003, a request from Nuclear Fuel Services, Inc. (NFS), to amend its NRC Special Nuclear Materials License SNM–124, to authorize processing operations in the Oxide Conversion Building (OCB) and the Effluent Processing Building (EPB) at the Blended Low-Enriched Uranium (BLEU) Complex. The request is the third of three license amendment requests planned to support operations associated with downblending and conversion of high-enriched uranium materials to low-enriched uranium oxides.

NFS is currently manufacturing high-enriched nuclear reactor fuel at its facility in Erwin, Tennessee. NFS is constructing a new complex at the Erwin site to manufacture low-enriched nuclear reactor fuel. NFS is requesting this amendment to authorize operations that will convert liquid uranyl nitrate solutions into solid uranium oxide powder as part of the process for downblending and conversion of high-enriched uranium materials into low-enriched uraniumoxide. After the material is converted to uranium oxide powder, it will be transferred to another facility for fabrication of reactor fuel assemblies.

The October 23, 2003, amendment application contains a proprietary Integrated Safety Analysis (ISA) Summary for the OCB and EPB operations. By letter dated November 14, 2003, NFS provided a non-proprietary version of the ISA Summary. By letters dated October 24, 2003, NFS provided revisions to its Emergency Plan and its Fundamental Nuclear Material Control Plan to incorporate the new operations. By letter dated November 3, 2003, NFS provided a revision to its Physical Security Plan for Special Nuclear Material of Low Strategic Significance. These submittals comprise the content of the license amendment application.

This application will be reviewed by the staff for conformance with 10 CFR parts 20, 51, 70, 73, and 74, using NUREG–1520, ''Standard Review Plan for the Review of a License Application for a Fuel Cycle Facility'' and other applicable agency regulations and guidance. If NRC approves the request, the approval will be documented in an amendment to NRC Special Nuclear Materials License SNM–124. However, before approving the request, NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC regulations. These findings will be documented in a Safety Evaluation Report and either an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), or an Environmental Impact Statement (EIS).

By letter dated June 28, 2002, the NRC issued an EA/FONSI to support the first amendment request for this project. This action was noticed in the **Federal Register** on July 9, 2002 (67 FR 45555). The NRC staff may use this assessment for additional information in developing the EA/FONSI or EIS for this action.

II. Notice of Opportunity To Request a Hearing

NRC also provides notice that this is a proceeding on an application for an amendment of a license falling within the scope of 10 CFR part 2, Subpart L, ''Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings.'' Pursuant to § 2.1205(a), any person whose interest may be affected by this proceeding may file a request for a hearing. In accordance with § 2.1205(d), a request for hearing must be filed within 30 days of the publication of this notice in the **Federal Register**. The request for a hearing must be filed with the Office of the Secretary, either:

A. By delivery to the Rulemaking and Adjudications Staff of the Office of the Secretary at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738, between 7:45 a.m. and 4:15 p.m., on Federal workdays; or

B. By mail or telegram addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications Staff. Because of continuing disruptions in the delivery of mail to United States Government offices, it is requested that requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101, or by e-mail to *hearingdocket@nrc.gov*.

In accordance with 10 CFR 2.1205(f), each request for a hearing must also be served, by delivering it personally or by mail, to:

A. The applicant, Nuclear Fuel Services, 1205 Banner Hill Road, Erwin, Tennessee 37650–9718. A copy of the request for hearing should also be sent to the attorney for the licensee, Daryl Shapiro, c/o Shaw Pittman, L.L.P., 2300 N Street, NW., Washington, DC 20037; and

B. The NRC staff, by delivery to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738, between 7:45 a.m. and 4:15 p.m., on Federal workdays, or by mail addressed to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Because of continuing disruptions in the delivery of mail to United States Government offices, it is requested that requests for hearing be transmitted to the Office of the General Counsel either by means of facsimile transmission to 301–415–3725, or by e-mail to *OGCMailCenter@nrc.gov*.

In addition to meeting other applicable requirements of 10 CFR part 2 of the NRC's regulations, a request for a hearing filed by a person other than an applicant must describe in detail:

A. The interest of the requestor in the proceeding:

1. How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in § 2.1205(h);

2. The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and

3. The circumstances establishing that the request for a hearing is timely in accordance with § 2.1205(d).

III. Further Information

In accordance with 10 CFR 2.790 of the NRC's ''Rules of Practice,'' details with respect to this action, including the application for the amendment and supporting documentation, are available electronically for public inspection and copying from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html*. These documents may also be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee. The documents include:

A. NFS License Amendment Request dated October 23, 2003.

1. Cover Letter (ADAMS accession number ML033350258).

2. Attachment 1, Page Changes to License SNM–124 (ADAMS accession number ML033420721).

B. Non-proprietary ISA Summary dated November 14, 2003, Cover Letter and Attachment (ADAMS accession number ML033380535).

C. Environmental Assessment for First License Amendment dated June 28, 2002 (ADAMS accession number ML021790068).

Attachments II and III of the NFS license amendment request dated October 23, 2003, contain proprietary information and are being withheld from the public pursuant to 10 CFR 2.790. The Physical Safeguards Plan and the Fundamental Nuclear Material Control Plan also are deemed proprietary information and are being withheld from the public pursuant to 10 CFR 2.790(d). In addition, the Emergency Plan Revisions are sensitive, homeland security information, and are not publicly available.

Dated at Rockville, Maryland, this 17th day of December 2003.

For the Nuclear Regulatory Commission.

Gary S. Janosko,

Chief, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety, and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 03–31686 Filed 12–23–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards, Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on January 29–30, 2004, in the Montgomery

Room at the Residence Inn, 7335 Wisconsin Avenue, Bethesda, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c) (2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Thursday, January 29 , 2004—8:30 a.m. until the conclusion of business. The Subcommittee will discuss ACRS business processes, effective planning, use of electronic media, potential operational areas for improved effectiveness, and other activities related to the conduct of ACRS business. It will also discuss how well the Committee carries out its charter, the completeness of ACRS reviews, independence issues, and how well it meets the needs of its stakeholders.

Friday, January 30, 2004—8:30 a.m. until the conclusion of business. The Subcommittee will continue to discuss self-assessment of ACRS performance in CY 2003, potential operational areas for improved effectiveness, and other activities related to the conduct of ACRS business. It will also discuss current technical challenges confronting the ACRS, such as risk-informing 10 CFR 50.46, probabilistic risk assessment/ significance determination process issues, and proactive Committee initiatives. Additionally, the Subcommittee will discuss needed future technical expertise for the ACRS.

The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Dr. John T. Larkins (telephone: 301–415–7360) between 7:30 a.m. and 4:15 p.m. (ET) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted only during those portions of the meeting that are open to the public.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4:15 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes in the agenda.

Dated: December 18, 2003.

Medhat El-Zeftawy,

Acting Associate Director for Technical Support, ACRS/ACNW.

[FR Doc. 03–31689 Filed 12–23–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Peer Review Committee for Source Term Modeling; Notice of Meeting

The Peer Review Committee for Source Term Modeling will hold a closed meeting on January 7, 8, 9, 2004 at Sandia National Laboratories (SNL), Albuquerque, NM.

The entire meeting will be closed to public attendance to protect information classified as national security information pursuant to 5 U.S.C. 552b(c)(1).

The agenda for the subject meeting shall be as follows:

Wednesday, Jan 7, Thursday, Jan 8, and Friday, Jan 9, 2004—8:30 a.m. until the conclusion of business:

A sub-panel of the Committee will gather information on the behavior of spent nuclear fuel under adverse service conditions. The information gathered will enable the Committee to provide advice and recommendations to aid SNL in development of guidance documents on source terms that will assist the NRC in evaluations of the impact of specific terrorist activities targeted at a range of spent fuel storage casks and radioactive material (RAM) transport packages.

For further information regarding the time of the meeting and possible changes to the starting and ending times and the duration of the meeting, contact: Dr. Andrew L. Bates, *telephone:* (301) 415–1963 or Dr. Charles G. Interrante, *telephone:* (301) 415–3967 between 7:30 a.m. and 4:15 p.m. (ET).

Dated: December 18, 2003.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 03–31688 Filed 12–23–03; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Privacy Act of 1974; System of Records

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of a new system of records—PBGC–14, My Plan Administration Account Authentication Records—PBGC.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is establishing a new system of records, PBGC–14, My Plan Administration Account (My PAA) Authentication Records—PBGC, subject to the Privacy Act of 1974, as amended. The new system of records is necessary to reflect new records and processes associated with a new online application that will permit individuals to submit information electronically and make payments through the PBGC's Internet Web site (*http://www.pbgc.gov*).

DATES: Comments on the new system of records and proposed routine uses must be received on or before January 23, 2004. The new system of records will become effective February 3, 2004, without further notice, unless comments result in a contrary determination and a notice is published to that effect.

ADDRESSES: Comments may be mailed to the Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, or delivered to Suite 340 at that address during normal business hours. Comments also may be submitted electronically through the PBGC's Web site at *http://www.pbgc.gov/privacyact,* or by fax to 202–326–4112. The PBGC will make all comments available on its Web site, *http://www.pbgc.gov.* Copies of the comments may also be obtained by writing to the PBGC's Communications and Public Affairs Department at Suite 240 at the above address or by visiting that office or calling (202) 326–4040 during normal business hours. TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to (202) 326–4040.

FOR FURTHER INFORMATION CONTACT: D. Bruce Campbell, Attorney, Pension Benefit Guaranty Corporation, Office of the General Counsel, 1200 K Street, NW., Washington, DC 20005–4026; 202–326–4000 Ext. 3672. For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to (202) 326–4024.

SUPPLEMENTARY INFORMATION: The PBGC is committed to improving customer service and governmental efficiency through the use of information technology to administer the defined benefit pension plan termination insurance program established by title IV of the Employee Retirement Income Security Act of 1974, as amended. A major component of the PBGC's strategy to implement the Government Paperwork Elimination Act (GPEA), Pub. L. 105–277 (1998), is the development of an online self-service center so that PBGC customers can

conduct required plan transactions with the PBGC through the Internet.

My PAA is a secure Web-based application that will allow authenticated plan sponsors, administrators, and pension practitioners such as enrolled actuaries and other benefit professionals to work together to file and pay premiums due the PBGC under 29 U.S.C. 1306, check premium account histories, make plan termination filings under 29 U.S.C. 1341, make reportable event filings under 29 U.S.C. 1343, contact the PBGC with questions, and perform other plan maintenance tasks online. The PBGC is establishing a new system of records, PBGC–14, My Plan Administration Account Authentication Records—PBGC, to maintain records about individuals who register to use the My PAA application to verify their identity and authenticate the actions taken by that user with respect to PBGC filings.

To open a My PAA online account, an individual must register with the PBGC as the ''filing coordinator.'' To become a filing coordinator, the individual must submit his or her name, employer, contact information, including e-mail address, and the pension plan name, employer identification number (EIN), and plan number (PN) for each plan for which the individual wants to act as filing coordinator.

To verify that the individual has authority to make filings on behalf of the plan, the individual must submit the number of participants in the plan reported to the PBGC in the plan's most recent premium filing, and the amount of premiums paid to the PBGC for that filing year. The My PAA application will compare the information submitted by the individual with data from previous filings in the PBGC's premium database. If the information submitted by the individual is correct, My PAA will e-mail a temporary user ID and password to the approved filing coordinator that will allow the filing coordinator to obtain access to the My PAA system. When an approved user logs on, the My PAA system will prepopulate data fields in My PAA and allow access to the plan's premium filing history from previous My PAA filings.

If the information submitted does not match the information in the PBGC's premium database, My PAA will notify the individual that he or she has been granted ''conditional'' status as filing coordinator until the PBGC is able to verify the individual's authority to act on behalf of the plan. A PBGC employee will manually review PBGC premium filing records or contact the plan's sponsor or administrator to verify the individual's authority to act on behalf of the plan. A conditional user receives a temporary user ID and password to make new filings via My PAA, but will not be granted access to the plan's premium filing history from previous My PAA filings. My PAA will not automatically prepopulate data fields as the system does when an approved user accesses the system.

The filing coordinator may use the My PAA application to invite other individuals to participate in PBGC filings with respect to a plan, and select the activities the individuals are authorized to perform. The roles or activities that may be authorized under My PAA include creating and editing filings, signing filings electronically as the plan administrator, signing filings electronically as the enrolled actuary, or authorizing payments to the PBGC. The filing coordinator must submit the individual's name and contact information, including e-mail address, and the activities the individual is authorized to perform in My PAA with respect to the plan. My PAA will e-mail the individual a temporary user ID and password that will permit the invited user to access the My PAA system to register to participate in filings.

My PAA requires a first-time user (either approved or conditional) to change his or her user ID and password when registering during the initial login to the system. The first-time user must also select a secret question/secret answer combination that will be used in addition to the user ID and password to authenticate the actions taken by that user.

The records maintained by the PBGC in PBGC–14, My Plan Administration Account Authentication Records—PBGC, will be used to verify the identity of, and authenticate the actions taken by, individuals using My PAA to make PBGC filings. The information that will be maintained includes the user's name, work telephone number, work e-mail address, other contact information, a temporary, PBGC-issued user ID and password, a user-selected user ID and password, and a secret question/secret answer combination for authentication.

For each pension plan that the user intends to participate in making filings for, the PBGC will also maintain the plan name, employer identification number (EIN), and plan number (PN); the plan administrator's name, address, phone number, and e-mail address; other contact information; and the role that the user will play in the filing process, *i.e.*, creating and editing filings, signing filings electronically as the plan administrator, signing filings electronically as the enrolled actuary, or authorizing payments to the PBGC.

PBGC general routine uses G1, Law Enforcement, G4, Disclosure in Litigation, G5, Disclosure to the Department of Justice in Litigation, G6, Disclosure to OMB, and G7, Congressional Inquiries apply to this system of records. These routine uses were published as the PBGC's Prefatory Statement of General Routine Uses at 60 FR 57462, 57563 (1995).

Issued in Washington, DC this 19th day of December, 2003.

Steven A. Kandarian,

Executive Director, Pension Benefit Guaranty Corporation.

PBGC–14

SYSTEM NAME:

My Plan Administration Account Authentication Records—PBGC.

SECURITY CLASSIFICATION:

Not applicable.

SYSTEM LOCATION:

Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who register to use the My PAA application to make PBGC filings and payments electronically via the PBGC's Internet Web site (*www.pbgc.gov*), including individuals acting for plan sponsors, plan administrators, and pension practitioners such as enrolled actuaries and other benefit professionals.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records include the user's name, work telephone number, work e-mail address, other contact information, a temporary, PBGC-issued user ID and password, a user-selected user ID and password, and a secret question/secret answer combination for authentication. For each pension plan that the user intends to participate in making filings with the PBGC, the name, employer identification number (EIN), and plan number (PN); the plan administrator's name, address, phone number, and e-mail address; other contact information; and the role that the user will play in the filing process, *i.e*, creating and editing filings, signing filings electronically as the plan administrator, signing filings electronically as the enrolled actuary, or authorizing payments to the PBGC.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

29 U.S.C. 1302, 1306, 1307, 1341, and 1343.

PURPOSE(S):

This system of records is maintained for use in verifying the identity of, and authenticating actions taken by, individuals who register to use the My PAA application to make PBGC filings.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

PBGC General Routine Uses G1, G4, G5, G6, and G7 apply to this system of records (*See* Prefatory Statement of General Routine Uses, 60 FR 57462, 57563 (1995)).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in automated form in computer databases maintained by the PBGC.

RETRIEVABILITY:

Records are indexed by name, user ID and password, and by plan name and EIN/PN.

SAFEGUARDS:

The PBGC has adopted appropriate administrative, technical, and physical controls in accordance with the PBGC's Automated Information Systems Security Program to protect the security, integrity, and availability of the information, and to assure that records are not disclosed to unauthorized individuals.

RETENTION AND DISPOSAL:

Records are maintained in accordance with the PBGC's established records disposition schedule for premium-related records.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Financial Operations Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026.

NOTIFICATION PROCEDURE:

Procedures are detailed in PBGC regulations: 29 CFR part 4902.

RECORD ACCESS PROCEDURES:

An individual may access his or her records via the My PAA application available on the PBGC's Internet Web site (*www.pbgc.gov*), or by following the procedures outlined at 29 CFR part 4902.

CONTESTING RECORD PROCEDURES:

Same as notification procedure.

RECORD SOURCE CATEGORIES:

Subject individual and other registered users.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 03–31761 Filed 12–23–03; 8:45 am]

BILLING CODE 7708–01–P

POSTAL SERVICE BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIMES: Tuesday, January 6, 2004; 10:30 a.m. and 2:30 p.m.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW., in the Benjamin Franklin Room.

STATUS: January 6—10:30 a.m. (Closed); 2:30 p.m. (Open).

MATTERS TO BE CONSIDERED:

Tuesday, January 6—10:30 a.m. (Closed)

1. Financial Update.

2. Capital Investment—Informational Briefing on OCR Enhancements for Letter Mail Automation.

3. Strategic Planning.

4. Personnel Matters and Compensation Issues.

Tuesday, January 6—2:30 p.m. (Open).

1. Minutes of the Previous Meeting, December 8–9, 2003.

2. Remarks of the Postmaster General and CEO.

3. Committee Report.

4. Consideration of Board resolution on Capital Funding.

5. Annual Report on Government in the Sunshine Act Compliance.

6. Fiscal Year 2003 Comprehensive Report on Postal Operations, including the Preliminary Fiscal Year 2005 Annual Performance Plan—GPRA.

7. Election of Chairman and Vice Chairman of the Board of Governors.

8. Tentative Agenda for the February 2–3, 2004, meeting in Ft. Lauderdale, Florida.

CONTACT PERSON FOR MORE INFORMATION: William T. Johnstone, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–1000. Telephone (202) 268–4800.

William T. Johnstone,

Secretary.

[FR Doc. 03–31929 Filed 10–22–03; 3:40 pm]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26315]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

December 19, 2003.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of December, 2003. A copy of each application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth St., NW., Washington, DC 20549–0102 (tel. 202–942–8090). An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 15, 2004, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549–0609.

For Further Information Contact: Diane L. Titus at (202) 942–0564, SEC, Division of Investment Management, Office of Investment Company Regulation, 450 Fifth Street, NW., Washington, DC 20549–0504.

Mutual Investment Fund of Connecticut, Inc. (File No. 811–752)

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On January 29, 2003, applicant made a final liquidating distribution to its shareholders, based on net asset value. Expenses of $30,021 incurred in connection with the liquidation were paid by applicant and JP Morgan Chase Bank, applicant's investment adviser.

Filing Date: The application was filed on December 12, 2003.

Applicant's Address: c/o Connecticut Bankers Association, 10 Waterside Dr., Farmington, CT 06103.

The Montgomery Funds (File No. 811–6011); The Montgomery Funds II (File No. 811–8064)

Summary: Each applicant seeks an order declaring that it has ceased to be

an investment company. By June 23, 2003, shareholders of each applicant had transferred their assets to corresponding series of WF Funds and Gartmore Funds, based on net asset value. Expenses of $3,084,969 and $499,936, respectively, incurred in connection with the reorganizations were paid by applicants' investment advisers, Wells Capital Management Inc. and Gartmore Global Asset Management Trust, and/or their affiliates.

Filing Dates: The applications were filed on September 17, 2003, and September 18, 2003, respectively, and amended on November 20, 2003.

Applicants' Address: P.O. Box 2189, Mill Valley, CA 94942.

The Montgomery Funds III (File No. 811–8782)

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On June 23, 2003, applicant transferred its assets to Gartmore GVIT Developing Markets Fund, based on net asset value. Expenses of $116,149 incurred in connection with the reorganization were paid by applicant's investment adviser, Gartmore Global Asset Management Trust, and/or its affiliates.

Filing Dates: The application was filed on September 18, 2003, and amended on November 20, 2003.

Applicant's Address: P.O. Box 2189, Mill Valley, CA 94942.

The Avalon Fund of Maryland, Inc. (File No. 811–8773)

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 6, 2003, applicant transferred its assets to Eastern Point Advisors Funds Trust, based on net asset value. Applicant incurred no expenses in connection with the reorganization.

Filing Date: The application was filed on November 24, 2003.

Applicant's Address: 655 Fairfield Ct., Suite 200, Ann Arbor, MI 48108.

Putnam California Tax Exempt Money Market Fund (File No. 811–5333); Putnam New York Tax Exempt Money Market Fund (File No. 811–5335)

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On August 22, 2003, each applicant made a liquidating distribution to its shareholders, based on net asset value. Applicants incurred no expenses in connection with the liquidations.

Filing Date: The applications were filed on November 20, 2003.

Applicant's Address: One Post Office Sq., Boston, MA 02109.

Avalon Capital, Inc. (File No. 811–9004)

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On November 24, 2003, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $17,500 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on November 26, 2003.

Applicant's Address: c/o Gemini Fund Services, Inc., 150 Motor Parkway, Suite 205, Hauppauge, NY 11788.

Pioneer Market Neutral Fund (File No. 811–9867)

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Date: The application was filed on November 13, 2003.

Applicant's Address: 60 State St., Boston, MA 02109.

Oppenheimer Special Value Fund (File No. 811–10257)

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On May 16, 2003, applicant made a liquidating distribution to its shareholders, based on net asset value. Applicant incurred no expenses in connection with the liquidation.

Filing Date: The application was filed on November 5, 2003, and amended on December 2, 2003.

Applicant's Address: 6803 South Tucson Way, Englewood, Co 80112.

The Unified Funds (File No. 811–8968)

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On September 28, 2001, applicant transferred its assets to Liquid Green Money Market Fund, a series of AmeriPrime Advisors Trust, based on net asset value. Expenses of $9,764 incurred in connection with the reorganization were paid by Unified Investment Advisers, Inc., applicant's investment adviser.

Filing Date: The application was filed on November 7, 2003.

Applicant's Address: Unified Fund Services, Inc., 431 N. Pennsylvania St., Indianapolis, IN 46204.

UBS Managed Investments Trust (File No. 811–4040)

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 24, 2003, applicant transferred the assets of its one series to UBS Global Equity Fund, a series of The UBS Funds, based on net asset value. Expenses of $319,323 were incurred in connection with the reorganization. Fifty percent of these expenses were paid by UBS Global Asset Management, applicant's investment adviser, and the remaining fifty percent were allocated to applicant and the acquiring fund, based on their respective net assets.

Filing Dates: The application was filed on October 21, 2003, and amended on November 21, 2003.

Applicant's Address: 51 West 52nd St., New York, NY 10019–6114.

The Legends Fund, Inc. (File No. 811–7084)

Summary: Applicants seeks an order declaring that it has ceased to be an investment company. Applicant's board of directors and shareholders approved the merger of the Applicant into Touchstone Variable Series Trust on January 27, 2003, and April 18, 2003, respectively. Applicant's assets were distributed on April 23, 2003. Touchstone Advisors, Inc. paid for the expenses of the merger. Applicant has no remaining assets and no outstanding debts or liabilities.

Filing Date: The application was filed on June 30, 2003, and amended on December 17, 2003.

Applicant's Address: 515 West Market Street, Louisville, KY 40202.

New England Zenith Fund (File No. 811–3728)

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Shareholders approved the merger of applicant's series on April 25, 2003, and applicant distributed its assets on May 1, 2003. The funds surviving the merger are portfolios of the Metropolitan Series Fund, Inc. Applicant's investment manager, MetLife Advisers, LLC, and its affiliates, paid expenses of approximately $1,140,000 incurred in connection with the merger.

Filing Date: The application was filed on October 10, 2003.

Applicant's Address: 501 Boylston Street, Boston, MA 02116.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31697 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26314; File No. 812–13013]

Midland National Life Insurance Company, et al.

December 18, 2003.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order pursuant to Section 6(c) of the Investment Company Act of 1940, as amended the (''Act'') granting exemptions from the provisions of sections 2(a)(32), 22(c) and 27(i)(2)(A) of the Act and Rule 22c-1 thereunder.

APPLICANTS: Midland National Life Insurance Company (''Midland''), Midland National Life Separate Account C (the ''Midland Account''), and Sammons Securities Company, LLC (''Sammons Securities'') (all collectively, the ''Applicants'').

SUMMARY: The Applicants hereby apply for an order of the Commission exempting them with respect to the support of variable annuity contracts described herein (the ''Contracts'') and other variable annuity contracts that are similar in all material respects to the contracts described herein, that Midland may issue in the future (''Future Contracts''), and any other separate accounts of Midland and its successors in interest (''Future Accounts'') that support Future Contracts, and certain National Association of Securities Dealers, Inc. (''NASD'') member broker-dealers which, in the future, may act as principal underwriter of such Contracts (''Future Underwriters''), from the provisions of sections 2(a)(32), 22(c), and 27(i)(2)(A) of the Act and Rule 22c–1 thereunder, pursuant to section 6(c) of the Act, to the extent necessary to permit the recapture of a bonus credit (previously applied to premium payments) where the bonus credit was applied and (i) the contract owner (''Owner'') exercises his or her ''free look'' right, or (ii) in the event of death, partial withdrawal, or surrender of the contract in the first seven contract years (pursuant to a vesting schedule).

DATES: The Application was filed on September 3, 2003, and amended and restated on December 1, 2003.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving the Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on January 11, 2004, and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants: c/o Steve Horvat, Esq., Midland National Life Insurance Company, One Midland Plaza, Sioux Falls, SD 57193. Copy to Frederick R. Bellamy, Esq., Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Mark A. Cowan, Senior Counsel, or Zandra Bailes, Branch, Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

SUPPLEMENTARY INFORMATION: Following is a summary of the Application. The complete Application is available for a fee from the Commission's Public Reference Branch, 450 5th Street NW., Washington, DC 20549, (202) 942–8090.

Applicants' Representations

1. Midland is a stock life insurance company. Midland was organized in 1906, in South Dakota, as a mutual life insurance company at that time named the Dakota Mutual Life Insurance Company. It was reincorporated as a stock life insurance company in 1909. The name Midland was adopted in 1925. Midland was redomesticated to Iowa in 1999. It is licensed to do business in the District of Columbia, Puerto Rico, and in all States except New York. Midland is a subsidiary of Sammons Enterprises, Inc. which has controlling or substantial stock interests in a large number of other companies engaged in the areas of insurance, corporate services, and industrial distribution.

2. Under the terms of the Contracts, the assets of the Midland Account equal to the reserves and other contract liabilities with respect to the Midland Account are not chargeable with liabilities arising out of any other business which the sponsoring company may conduct (except to the extent that assets in the Midland Account exceed the reserves and liabilities of the Midland Account). The Midland Account is comprised of investment divisions established to receive and invest net premium payments under the Contracts (the ''Investment Divisions'') and other annuity contracts. The income, gains and losses, realized or unrealized, from the assets allocated to each Investment Division will be credited to or charged against that Investment Division without regard to other income, gains or losses of any other Investment Division. The Midland Account meets the definition of a ''separate account'' in Rule 0–1(e) under the Act.

3. The Board of Directors of Midland established the Midland Account under the insurance laws of the State of South Dakota in March 1991. The Midland Account is now governed by Iowa law. The Midland Account is registered under the Act as a unit investment trust (File No. 811–07772). The assets of the Midland Account support certain flexible premium variable annuity contracts, and interests in the Midland Account offered through such contracts have been registered under the Securities Act of 1933 (''1933 Act'') on three Form N–4 Registration Statements (File Nos. 33–64016, 333–71800 and 333–108437). The Contract, which includes the optional bonus and accompanying recapture that is the subject of this application, is registered in File No. 333–108437.

4. Sammons Securities, an affiliate of Midland, is the principal underwriter of the Contracts. Sammons Securities is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934, as amended, and is a member of the NASD.

5. Each Investment Division will invest exclusively in a designated series of shares, representing an interest in a particular portfolio of one or more designated management investment companies of the series type (''Funds''). Midland reserves the right to designate the shares of another portfolio of the Funds or of other management investment companies (''Other Funds'') as the exclusive investment vehicle for each new Investment Division that may be created in the future. Subject to Commission approval under section 26(c) of the Act, Applicants also reserve the right to substitute the shares of another portfolio previously designated as the exclusive investment vehicle for each Investment Division.

6. The Contracts are flexible premium deferred variable annuity contracts issued by Midland through the Midland Account. Midland currently intends to market the Contract under the name ''Advantage II Variable Annuity.'' The Contracts provide for the accumulation of values on a variable or fixed basis during the accumulation period, and may provide settlement or annuity payment plans on a variable or fixed

basis. The Contracts may be purchased on a non-qualified tax basis. The Contracts may also be purchased and used in connection with plans qualifying for favorable Federal income tax treatment.

7. The Owner determines in the supplemental application or transmittal form for a Contract how the net premium payments will be allocated among the Investment Divisions of the Midland Account, the Fixed Account and any available dollar cost averaging options of the Fixed Account (the ''Fixed Account Options''). The Owner generally may allocate premium payments to each Investment Division and to each Fixed Account Option. The Accumulation Value will vary with the investment performance of the Investment Divisions selected, and the Owner bears the entire risk for amounts allocated to the Investment Division.

8. An Owner may return his or her Contract for a refund. This is called the ''Free Look Right.'' The Free Look Right allows an Owner 10 days (or longer if required by state law) to return his or her Contract. Midland generally will return the Accumulation Value minus any premium bonus credit to the Owner, but may return the full premium payment (not including the bonus credit), if greater and required by state law.

9. An Owner may transfer Accumulation Value among the Investment Divisions and between the Fixed Account and any Investment Division prior to the maturity date. The amount that an Owner may transfer into or out of the Fixed Account is limited. The minimum transfer amount is $200, or 100% of an Investment Division if less than $200. The minimum amount does not have to come from or be transferred to just one Investment Division. The only requirement is that the total amount transferred in a day equals at least the transfer minimum. Midland currently allows an unlimited number of transfers of accumulated value in a contract year prior to the maturity date, but Midland reserves the right to charge a transfer fee of $15 for every transfer after the twelfth in a contract year. After the maturity date, Owners may only make two transfers per contract year and then only among the Investment Divisions of the Midland Account.

10. The Owner may withdraw all or part of his or her surrender value prior to the maturity date. If an Owner surrenders a Contract or takes partial surrender, Midland may deduct a surrender charge to compensate it partially for the selling and distribution expenses of the Contracts, including commissions and the costs of preparing sales literature and printing prospectuses. An Owner is permitted to withdraw 10% of net premiums (premium minus partial surrenders) once each contact year without incurring a surrender charge. The following chart shows the surrender charges that apply to the Contracts:

Length of time from premium payment (number of years)	Surrender charge (as a percentage of premium withdrawn)
1	9
2	8
3	7
4	6
5	5
6	4
7	3
8	2
9	1
10+	0

11. Under the Contracts, Midland will pay a death benefit under certain circumstances. Midland's death benefit equals the greatest of: (i) The Accumulation Value (less any non-vested premium bonus and premium taxes); or (ii) 100% of the total net premium payments. Future Contracts may provide different death benefits.

12. If an Owner elects the Premium Bonus Rider under the Contracts, then Midland will add a 6% bonus credit to the Owner's premium payments made during the first contract year. Once elected, the Premium Bonus Rider may not be terminated. The Owner will vest in a portion of this bonus over each of the first seven contract years. As requested in the application, Midland intends that if the Owner exercises the Free Look Right, then the Owner will not receive any portion of the bonus amount. In the event of death, annuitization, withdrawal (including any penalty fee withdrawals), or surrender of the Contract in the first seven contract years, the Owner or the Owner's beneficiary(ies) will only be entitled to that portion of the bonus that has vested, and is not retained by Midland, at the time the event occurs. In contract year 8 and thereafter, the Owner will be entitled to 100% of the bonus amount. The vesting schedule is as follows:

Contract year	Amount of bonus vested
1	4/12
2	5/12
3	6/12
4	7/12
5	8/12
6	9/12
7	10/12
8	12/12

13. Midland will assess daily charge during the first nine contract years against the Owner's Accumulation Value in the Midland Account as a charge for the Premium Bonus Rider. The current charge for the Premium Bonus Rider is at an annual rate of 0.65% of the Midland Account Accumulation Value. Midland reserves the right to change the charge for the Premium Bonus Rider, but the guaranteed maximum level of this charge is 0.70% annually.

14. On the maturity date the Owner may take the surrender value in one lump sum or convert the surrender value into an annuity. The owner may elect or change an annuity payment option up until thirty days before the maturity date. The first annuity payment will be made within one month after the maturity date. The first annual payment will be made within one month after the maturity date. The Owner generally may change the maturity date, subject to limits specified in the prospectus.

15. The amount of each annuity payment under the annuity payment plans will depend on which type of plan is selected, and depending on the plan that is chosen, may depend on factors such as the payee's age, sex (if allowed), and length of the payment period between each annuity payment.

16. Midland may offer Owners dollar cost averaging programs, where Midland, on a monthly or quarterly basis, will automatically transfer a predetermined amount of money from any Investment Option or the Fixed Account into one or more of the Investment Divisions; a portfolio rebalancing program, where Midland will automatically rebalance, on a monthly, quarterly, semi-annual or annual basis, the amounts in an Owner's Investment Divisions according to his or her desired asset allocation; a fixed account earnings sweep program, where Midland will transfer, on a monthly or quarterly basis, Fixed Account interest earnings to one or more of the Investment Divisions; and a systematic withdrawal option, where an Owner, on a monthly quarterly semi-annual or annual basis, which basis the Owner shall select may receive regular payments from his or her Contract subject to certain limitations; or other programs.

17. Midland deducts various fees and charges from the Contracts or the

Midland Account, which currently include daily mortality and expense risk fee; an annual maintenance fee (which may be waived if the Owner's net premium exceeds a certain amount or if the Owner's Contract is a qualified plan under Federal tax law); premium taxes, surrender charges (contingent deferred sales loads) ; transfer fees (if applicable although no such fees is currently charged); and fees for optional benefits or riders.

Applicants' Legal Analysis

1. Applicants respectfully request that the Commission, pursuant to section 6(c) of the Act, grant the exemptions set forth below to permit the Applicants to recapture the bonus credit applied to premium payments under the Premium Bonus Rider of the Contracts (subject to a vesting schedule) (i) upon exercise of the Free Look Right, or (ii) in the event of death, annutization, or surrender (full or partial) before the eighth contract year.

2. Section 6(c) authorizes the Commission, by order upon application, to conditionally or unconditionally grant an exemption from any provision, rule or regulation of the Act to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the contract and provisions of the Act. Applicants request exemptions for the Contracts described herein, and for Future Contracts, from sections 2(a)(32), 22(c) and 27(i)(2)(a) of the Act, and Rule 22c–1 thereunder, pursuant to section 6(c), to the extent necessary to recapture the bonus credit applied to a premium payment under the Premium Bonus Rider, as described above. Applicants seek exemptions therefrom in order to avoid any questions concerning the Contracts' compliance with the Act and rules thereunder.

3. For the reasons discussed below, Applicants assert that the recapture of some or all of the bonus credit under the Premium Bonus Rider in the circumstances described herein is necessary or appropriate in the public interest and consistent with the protection of investors and purposes fairly intended by the policy and provisions of the Act.

4. Section 27(i) provides that section 27 does not apply to any registered separate account funding variable insurance contracts, nor to the sponsoring insurance company and principal underwriter of such account, except as provided for in section 27(i)(2)(A). Section 27(i)(2)(A) of the Act, in pertinent part, makes it unlawful for any registered separate account funding variable insurance contracts, or for the sponsoring insurance company of such account, to sell any such contract unless such contract is a redeemable security.

5. Section 2(a)(32) of the Act defines ''redeemable security'' as any security under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

6. To the extent that the recapture of bonus credit under the Premium Bonus Rider might be seen as a discount from the net asset value, or might be viewed as resulting in the payment to an Owner of less than the proportionate share of the issuer's net assets, the bonus credit recapture would trigger the need for relief absent some exemption from the Act. Rule 6c–8 provides, in relevant part, that a registered separate account, and any depositor of such account, shall be exempt from sections 2(a)(32), 22(c), 27(c)(1), 27(c)(2) and 27(d) of the Act and Rule 22c–1 thereunder to the extent necessary to permit them to impose a deferred sales load on any variable annuity contract participating in such account. However, the bonus credit recapture under the Premium Bonus Rider is not a sales load, but a recapture of a bonus credit Midland previously applied to an Owner's premium payments. Under the Premium Bonus Rider, Midland provides the bonus credit from its general account on a guaranteed basis. The Contracts are designed to be long-term investment vehicles. In undertaking this financial obligation, Midland contemplates that an Owner will retain a Contract over an extended period, consistent with the long-term nature of the Contracts. Midland designed its product so that it would recover its costs (including the bonus credit) over an anticipated duration while a Contract is in force. If an Owner withdraws his or her money from the Contract before this anticipated period, Midland must recapture the bonus credit under the Premium Bonus Rider in order to avoid a loss.

7. Applicants submit that the recapture of a bonus credit does not violate section 2(a)(32) of the Act. The Applicants submit that the bonus recapture under the Premium Bonus Rider of the Contracts does not deprive the Owner of his or her proportionate share of the issuer's current net assets. An Owner's right to the bonus credit under the Premium Bonus Rider will begin to vest in the first contract year, and will become fully vested after the seventh contract year. Until that time, Midland retains the right and interest in the dollar amount of any unvested bonus credit amount. Thus, when Midland recaptures a bonus credit, it is only retrieving its own assets, and because an Owner's interest in the bonus credit is not vested, such Owner would not be deprived of a proportionate share of the Midland Account's assets (the issuer's current net assets) in violation of section 2(a)(32). Therefore, such recapture does not reduce the amount of the Midland Account's current net assets an Owner would otherwise be entitled to receive. However, to avoid uncertainty as to full compliance with the Act, the Applicants request an exemption from the provisions of sections (2)(a)(32) and 27(i)(2)(A) to the extent deemed necessary to permit them to recapture the bonus credit under the Premium Bonus Rider of the Contracts and Future Contracts.

8. Section 22(c) of the Act states that the Commission may make rules and regulations applicable to registered investment companies, and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company to accomplish the same ends as contemplated by section 22(a). Rule 22c–1, promulgated under section 22(c) of the Act, in pertinent part, prohibits a registered investment company issuing a redeemable security (and a person designated in such issuer's prospectus as authorized to consummate transactions in such security, and a principal underwriter of, or dealer in, any such security) from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security.

9. As a result of the 6% bonus credit under the Premium Bonus Rider, an Owner who made a $10,000 initial premium payment could be viewed as having an Accumulation Value of $10,600 before any earnings accrued. Midland's addition of the bonus credit might arguably be viewed as resulting in an Owner purchasing a redeemable security for a price below the current net asset value. Further, by recapturing the bonus credit, Midland might arguably be redeeming a redeemable security for a price other than one based on the current net asset value of the Midland Account. The Applicants contend that these are not correct interpretations or applications of these statutory and regulatory provisions. The Applicants contend that the bonus credit under the Premium Bonus Rider of the Contracts does not violate section 22(c) and Rule 22c–1.

10. An Owner's interest in his or her Accumulation Value or in the Midland Account would always be offered at a price based on the net asset value next calculated after receipt of the order. The granting of a bonus credit pursuant to the Premium Bonus Rider does not reflect a reduction of that price. Instead, Midland will purchase with its own general account assets an interest in the Midland Account equal to the bonus credit. Because the bonus credit will be paid out of Midland's assets, not the Midland Account's assets, no dilution will occur as a result of the credit.

11. The recapture of the bonus credit under the Premium Bonus Rider does not involve either of the evils that the Commission intended to eliminate or reduce with Rule 22c–1. The Commission's stated purposes in adopting Rule 22c–1 were to avoid or minimize (i) dilution of the interests of other security holders and (ii) speculative trading practices that are unfair to such holders. These evils were the result of backward pricing, the practice of basing the price of a mutual fund share on the net asset value per share determined as of the close of the market on the previous day. Backward pricing allowed investors to take advantage of increases or decreases in net asset value that were not yet reflected in the price, and thereby the values of outstanding mutual fund shares were diluted.

12. The proposed recapture of the bonus credit under the Premium Bonus Rider does not pose such threat of dilution. The bonus credit recapture will not alter an Owner's net asset value. Midland will determine an Owner's surrender value under a Contract in accordance with Rule 22c–1 on a basis next computed after receipt of an Owner's request for surrender (likewise, the calculation of death benefits and annuity payment amounts will be in full compliance with the forward pricing requirement of Rule 22c–1). The amount recaptured will equal the amount of the bonus credit that Midland paid out of its general accounts assets. Although an Owner will retain any investment gain attributable to the bonus credit, Midland will determine the amount of such gain on the basis of the current net asset value of the Investment Division. Thus, no dilution will occur upon the recapture of the bonus credit.

13. Further, Applicants submit that the other harm that Rule 22c–1 was designed to address (speculative trading practices calculated to take advantage of backward pricing) will not occur as a result of Midland's recapture of the bonus credit. Variable annuities are designed for long-term investment, and by their nature, do not lend themselves to the kind of speculative short-term trading that Rule 22c–1 was designed to prevent. More to the point, the credit recapture simply does not create the opportunity for speculative trading.

14. Applicants assert that Rule 22c–1 and section 22(c) should have not application to the bonus credit available under the Premium Bonus Rider, as neither of the harms that Rule 22c–1 was designed to address is present in the recapture of the bonus credit. However, to avoid uncertainty as to full compliance with the Act, the Applicants request an exemption from the provisions of section 22(c) and Rule 22c–1 to the extent deemed necessary to permit them to recapture the bonus credit under the Premium Bonus Rider of the Contracts and Future Contracts.

15. Applicants submit that Midland's recapture of the bonus credit is designed to prevent anti-selection. The risk of anti-selection would be that an Owner could make significant premium payments into the Contract solely in order to receive a quick profit from the credit.

Conclusion

1. For the reasons discussed above, the Applicants submit that the bonus credit involves none of the abuses to which provisions of the Act and the rules thereunder are directed. The Owner will always retain the investment experience attributable to the bonus credit, and will retain the principal amount in all cases except under the single circumstances described herein. Further, Midland should be able to recapture such bonus credit to protect itself from investors wishing to use the Contract as a vehicle for a quick profit at a Midland's expense, and to enable Midland to limit potential losses associated with such bonus credit.

2. Accordingly, Applicants request exemptions from section 2(a)(32), 22(c), and 27(i)(2)(A) of the Act and Rule 22c–1 thereunder, to the extent necessary to permit the Applicants to recapture the bonus credit applied to a premium payment in the circumstance described above. For the reasons set forth above, Applicants believe that the exemptions requested are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act, and consistent with and supported by Commission precedent.

3. Applicants seek relief herein not only for themselves with respect to the support of the Contracts, but also with respect to Future Accounts or Future Contracts described herein. Applicants represent that the terms of the relief requested with respect to any Contracts or Future Contracts funded by the Midland Account or Future Accounts are consistent with the standards set forth in section 6(c) of the Act and Commission precedent. The Commission has previously granted class relief (from certain specified provisions of the Act for separate accounts that support variable annuity contracts) that is materially similar to the relief described in the application.

4. In addition, Applicants seek relief herein with respect to Future Underwriters (*i.e.*, a class consisting of NASD member broker-dealers which may also as principal underwriter of the Contracts and Future Contracts). The Commission has regularly granted relief to ''future underwriters'' that are not named, and are not affiliates of the Applicants. Applicants represent that the terms of the relief requested with respect to any Future Underwriters are consistent with the standards set forth in section 6(c) of the Act and Commission precedent.

5. Applicants state that, without the requested class relief, exemptive relief for any Future Account, Future Contract, or Future Underwriter would have to be requested and obtained separately. Applicants assert that these additional requests for exemptive relief would present no issues under the Act not already addressed herein. Applicants state that if the Applicants were to repeatedly seek exemptive relief with respect to the same issues addressed herein, investors would not receive additional protection or benefit, and investors and the Applicants could be disadvantaged by increased costs from preparing such additional request for relief. Applicants argue that the requested class relief is appropriate in the public interest because the relief will promote competitiveness in the variable annuity market by eliminating the need for Midland to file redundant exemptive applications, thereby reducing administrative expenses and maximizing efficient use of resources. Elimination of the delay and the expense of repeatedly seeking exemptive relief would, Applicants opine, enhance Applicants' ability to effectively take advantage of business opportunities as such opportunities arise. Applicants submit, for all the reasons stated herein, that their request for class exemptions is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of

the Act, and that an order of the Commission including such class relief, should, therefore, be granted. Any entity that currently intends to rely on the requested exemptive order is named as an applicant. Any entity that relies upon the requested order in the future will comply with the terms and conditions contained in this Application.

6. Applicants represent that the requested exemptions are necessary and appropriate in the public interest and consistent with protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31696 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48937; File No. SR–Amex–2003–109]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC To Correct a Numerical Error on a Previously Approved Proposed Rule Change

December 17, 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 December 11, 2003, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Amex has designated this proposal as one concerned solely with the administration of the Amex pursuant to section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(3)[4] thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to change the rule number originally assigned to Amex Rule 359 (Mandatory Continuing Education for all Floor Members and Mandatory Continuing Education and Initial Test Requirements for Floor Clerks of Members and Member Firms) to Amex Rule 359A. The Amex proposes no substantive changes to the rule. The text of the proposed rule change is available at the 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, the Exchange included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The 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 proposes to replace the rule number originally assigned to Amex Rule 359 (Mandatory Continuing Education for all Floor Members and Mandatory Continuing Education and Initial Test Requirements for Floor Clerks of Members and Member Firms) in SR–Amex–2003–06,[5] and replace it with Amex Rule 359A. The same rule number was chosen inadvertently in a subsequent proposed rule change after SR–Amex–2003–06 was filed on January 31, 2003, and Amendment No. 1 was filed on May 20, 2003. The other proposed rule change bearing a similar rule number was approved ahead of SR–Amex–2003–06.

2. Statutory Basis

The Exchange believes that the proposal is consistent with section 6(b) of the Act[6] in general and furthers the objectives of section 6(b)(1) of the Act[7] in particular in that it is designed to enforce compliance by its members and persons associated with its members, with the rules of the Exchange.

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.

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 proposed rule change has become effective pursuant to section 19(b)(3)(A)(iii) of the Act[8] and subparagraph (f)(3) of Rule 19b–4 thereunder,[9] because it is concerned solely with the administration of the Amex.[10] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Amex–2003–109. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the

[5] Securities Exchange Act Release No. 48258 (July 30, 2003), 68 FR 46674 (August 6, 2003).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(1).

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(3).

[10] The Commission notes that the Amex referenced section 19(b)(3)(A)(ii) of the Act as the rationale for the instant proposed rule change being effective upon filing with the Commission. 15 U.S.C. 78f(b)(3)(A)(ii). *See* SR–Amex–2003–109, page 6 of 7. The Amex's reference to this section of the Act is improper. The Commission assumes, however, that the error is a typographical error, and did not, in this instance, require the Amex to amend the proposed rule change to correct its mistake.

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 file number SR–Amex–2003–109 and should be submitted by January 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31644 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48935; File No. SR–NASD–2003–171]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify CAES and ITS Pricing

December 17, 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 November 24, 2003, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has designated this proposal as one establishing or changing a due, fee, or other charge imposed by Nasdaq under section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4 thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes certain changes to NASD Rule 7010 (''System Services'') to amend the transaction charges for users of the Computer Assisted Execution System (''CAES'') and of the CAES linkage with the InterMarket Trading System (''ITS''). Nasdaq will implement the proposed rule change on December 1, 2003.

The text of the proposed rule change is below.[5] Proposed new language is in *italics;* proposed deletions are in brackets.

* * * * *

7010. System Services

(a) through (c) No change.

(d) Computer Assisted Execution Service. The charges to be paid by members receiving the Computer Assisted Execution Service (CAES) shall consist of a fixed service charge and a per transaction charge plus equipment related charges.

(1) Service Charges

$100 per month for each market maker terminal receiving CAES.

(2) Transaction Charges *and Credits*

[(A) $0.003 per share executed up to a maximum of $75 per execution shall be paid by any order entry firm or CAES market maker that enters an order into CAES that is executed in whole or in part, and $0.0015 per share executed up to a maximum of $50 per execution shall be credited to the CAES market maker that executes such an order.

(B) $0.002 per share executed up to a maximum of $75 per execution shall be paid by any member that sends a commitment through the ITS/CAES linkage to buy or sell a listed security that is executed in whole or in part, and $0.0015 per share executed up to a maximum of $37.50 per execution shall be credited to a member that executes such an order.]

(A) Orders to buy or sell securities listed on the New York Stock Exchange: no charge and no credit.

(B) Orders to buy or sell securities not listed on the New York Stock Exchange:

Average daily share volume executed in CAES or through the ITS/CAES linkage during a month (both NYSE & AMEX listed securities):
0 to 499,999
500,000 or more
Fee per share executed for orders entered into CAES or commitments sent through the ITS/CAES linkage if such an order or commitment is executed in whole or in part:
$0.0027, with a maximum of $75 per execution
$0.0025, with a maximum of $75 per execution

Average daily share volume executed in CAES or through the ITS/CAES linkage (both NYSE & AMEX listed securities):
1 or more
Liquidity rebate per share executed for orders/quotes posted into CAES, if such an order/quote is executed in whole or in part:
$0.002, with a maximum of $37.50 per execution

(e) through (u) 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, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to modify certain transaction charges for users of CAES and the CAES/ITS linkage. Nasdaq

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4.

[5] The Commission made technical changes to the rule text to address minor errors in the proposed rule change. Telephone conversation between Alex Kogan, Attorney, Nasdaq, and Ian K. Patel, Attorney, Division of Market Regulation, Commission, dated December 5, 2003.

believes that the proposed structure of fees and credits reflects more accurately the existing market price levels for similar services, and, as such, will result in more equitable allocation among members of the charges associated with CAES and CAES/ITS. Nasdaq expects that the proposed rule change will encourage greater use of CAES and CAES/ITS, contributing to greater competition for executions of orders for New York Stock Exchange, Inc.-(''NYSE'') and American Stock Exchange LLC-(''AMEX'') listed securities.

The proposed rule distinguishes between NYSE and non-NYSE exchange-listed securities, and eliminates transaction charges with respect to executions in NYSE-listed securities. Nasdaq expects that the elimination of such charges will encourage members to make greater use of CAES and the CAES/ITS linkage to trade NYSE securities, thereby increasing competition in this market segment, and benefiting members as well as the investing public.[6] As there will be no transaction charges for NYSE-listed securities, Nasdaq represents that there will also not be a liquidity provider credit with respect to such securities.

With respect to transaction charges for non-NYSE securities, the proposal sets a slightly lower per-share rate for any firm that, in a given calendar month, uses CAES and the CAES/ITS linkage to execute an average of at least 500,000 shares per trading day. To calculate the average, executions in both NYSE and non-NYSE securities will be counted. Such lower rate—25 cents per 100 shares—will apply only to non-NYSE securities in those months when this higher average is attained. In months when the average number of shares executed per trading day is below 500,000, the rate for non-NYSE securities will be 27 cents per 100 shares. The proposed rule retains the existing $75 per execution cap on the transaction charge. Finally, the proposal will set the liquidity provider credit for all firms at 20 cents per 100 shares for non-NYSE securities (regardless of total share volume levels), subject to a $37.50 cap per execution.

Nasdaq believes that all of these changes are designed to make CAES and CAES/ITS more economically feasible for its members and to encourage greater use of these systems.

[6] Nasdaq notes that, according to the fee schedule posted on the Archipelago Exchange website, www.arcaex.com, Archipelago Exchange also distinguishes between NYSE and non-NYSE securities and does not charge for transactions in NYSE securities.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[7] in general, and section 15A(b)(5) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Association operates or controls. Nasdaq believes that by adopting a pricing structure that is responsive to market demands, the proposed rule supports efficient use of existing systems by members and ensures that the charges associated with such use are allocated equitably.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in 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 were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act [9] and subparagraph (f)(2) of Rule 19b–4 thereunder,[10] because it establishes or changes a due, fee, or other charge imposed by Nasdaq. At any time within 60 days after the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

[7] 15 U.S.C. 78*o*–3.

[8] 15 U.S.C. 78*o*–3(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–NASD–2003–171. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 at 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 the File No. SR–NASD–2003–171 and should be submitted by January 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31643 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48938; File No. SR–NASD–2003–170]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Reduce Fees for the Use of the Automated Confirmation Transaction Service (ACT)

December 17, 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 November 24, 2003, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder[4] as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to reduce fees for the use of the Automated Confirmation Transaction Service (''ACT'').[5] The new fee schedule will be implemented beginning on December 1, 2003. Additionally, the proposed rule change (i) makes minor modifications to the rule language describing the existing discount for transactions in Nasdaq-listed securities through the Nasdaq National Market System (''NNMS''), (ii) deletes a reference to a ''terminal fee'' for an ''ACT only terminal,'' because Nasdaq no longer provides this service, and (iii) deletes text describing a three-month trial period following the introduction of the ACT Workstation, since the text refers to a period that has fully transpired. The text of the proposed rule change is available at Nasdaq 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, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

ACT is an automated trade reporting and reconciliation service that speeds the post-execution steps of price and volume reporting, comparison, and clearing for transactions reported to Nasdaq, including trades in Nasdaq-listed securities, exchange-listed securities, and OTC Bulletin Board securities. ACT handles transactions executed through Nasdaq's automated trading systems, as well as transactions negotiated directly between market participants and transactions that are internalized by market participants.

As part of an ongoing effort to reduce the costs incurred by market participants to use Nasdaq services, Nasdaq is reducing the fees for trade reports in exchange-listed securities by introducing a volume-based discount. The discount applies to all reports in ITS Securities, a term defined in NASD Rule 5210(c) that includes all securities listed on the New York Stock Exchange, the American Stock Exchange, and other exchanges whose listed securities trade through the Intermarket Trading System (defined as ''ITS Covered Transactions''). Thus, the discounts offered by the proposed rule change apply to reports that are automatically generated by Nasdaq's automated systems for trading exchange-listed securities,[6] as well as internalized trades in ITS Securities and reports for such securities submitted pursuant to ''automated give-up'' (''AGU'') and Qualified Service Representative (''QSR'') arrangements.[7] However, the discounts do not apply to transactions that are subject to trade comparison through ACT, for which Nasdaq will continue to charge $0.0144 per side for each 100 shares (subject to a minimum charge of $0.0576 and a maximum charge of $1.08).

Under the proposal, the per side fee paid by an ACT participant for trade reports during a particular month would depend upon the volume of media transaction reports for ITS Covered Transactions (i) that were submitted to ACT automatically by a Nasdaq trading system and in which the participant was identified as the reporting party,[8] or (ii) that were submitted or introduced to ACT by the participant (regardless of what party is identified as the reporting party).[9] If an ACT participant's average daily volume of such media trade reports was 5,000 or less, its fee for all ACT reports for ITS Covered Transactions during the month would be $0.029 per report. An ACT participant with an average daily volume of more than 5,000 media reports, however, would pay $0.029 per report for a number of reports equal to 5,000 times the number of trading days in the month, but all additional reports during the month would be free.

Nasdaq is also making minor modifications to the rule language describing the existing discount for transactions in Nasdaq-listed securities through the NNMS. These modifications do not alter the substance of this discount, under which the $0.029 fee for reports of trades in Nasdaq-listed securities through the NNMS is waived during any month in which a market participant is a party (either reporting or non-reporting) to an average daily volume of at least 10,000 reports of such trades during the month. As with the proposed discount for ITS Securities, Nasdaq determines eligibility for the NNMS discount by aggregating activity associated with all of the MPIDs associated with a single CRD number (but not activity associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number).

Finally, Nasdaq is deleting a reference to a ''terminal fee'' for an ''ACT only terminal,'' a service that Nasdaq no longer provides, and is deleting text describing a three-month trial period following the introduction of the ACT Workstation, since the text refers to a period that has fully transpired.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[10] in general, and with section 15A(b)(5) of

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] This proposed rule change applies to usage of ACT by NASD members. The usage of ACT by non-members is governed by NASD Rule 6120.

[6] At present, those systems are the Intermarket Trading System/Computer Assisted Execution System (''ITS/CAES'') and Primex. However, Nasdaq has recently proposed to allow the trading of exchange-listed securities through the Nasdaq National Market Execution System (''NNMS''). *See* SR–NASD–2003–149 (October 3, 2003). At the time of implementation of SR–NASD–2003–149, the fee schedule adopted herein (rather than the fee schedule for trades in Nasdaq National Market and SmallCap Market securities executed through the NNMS) will apply to reports of executions of ITS Securities through the NNMS (unless Nasdaq amends its ACT fee schedule prior to that time).

[7] AGU and QSR arrangements allow a participant to report trades executed with other brokers with whom they have entered into a contractual relationship.

[8] Volume will be measured with reference to the market participant identifier (''MPID'') appearing in the reporting party field of trade reports. If a particular corporate entity has multiple MPIDs associated with the Central Registration Depository (''CRD'') number under which it conducts business, Nasdaq will aggregate trade reports associated with all of its MPIDs. However, Nasdaq will not aggregate one corporate entity's trade reports with those associated with MPIDs assigned to subsidiaries or other affiliates with a different CRD number.

[9] Volume will be measured with reference to the MPID of the submitting or introducing party as reflected in the data received by Nasdaq in the trade report, with aggregation of multiple MPIDs associated with a single CRD number.

[10] 15 U.S.C. 78o–3.

the Act,[11] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. The proposed rule change recognizes the economies of scale and scope associated with higher volumes of trade reports, and will make it more economical for many market participants to use ACT for reporting their trading activity in exchange-listed securities. The proposed rule change is similar in structure to discounts implemented by Nasdaq for Nasdaq-listed stocks within the past year.[12]

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act [13] and subparagraph (f)(2) of Rule 19b–4 thereunder,[14] because it establishes or changes a due, fee, or other charge imposed by NASD. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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. Comments may also be submitted electronically at the following e-mail address: *rule-comments @sec.gov.* All comment letters should refer to File No. SR–NASD–2003–170. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 number SR–NASD–2003–170 and should be submitted by January 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

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[11] 15 U.S.C. 78o–3(b)(5).

[12] See Securities Exchange Act Release Nos. 47661 (April 10, 2003), 68 FR 19045 (April 7, 2003) (SR–NASD–2003–51) and 47919 (May 23, 2003), 68 FR 32788 (June 2, 2003) (SR–NASD–2003–86).

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 240.19b–4(f)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48933; File No. SR–NASD–2002–168]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc; Order Granting Approval of Proposed Rule Change and Amendment No. 1, Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2, Thereto, Relating to Proposed NASD Rule 2130 Concerning the Expungement of Customer Dispute Information From the Central Registration Depository System

December 16, 2003.

I. Introduction and Description of the Proposal

On November 19, 2002, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change that would: (1) Require all directives to expunge customer dispute information from the Central Registration Depository (''CRD'or ''CRD system'') to be confirmed by or ordered by a court of competent jurisdiction; (2) require member firms and associated persons seeking expungement to name NASD as an additional party in any judicial proceeding seeking expungement relief or confirming an arbitration award containing expungement relief; and (3) permit member firms and associated persons to ask NASD to waive the requirement to name NASD as a party on the basis that the expungement order meets at least one of the standards for expungement articulated in the proposed rule.

On January 28, 2003, NASD submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on March 10, 2003.[4] The Commission received 28 comments on the proposal from a wide range of sources. The NASD responded to these comments by amending the filing on September 11, 2003.[5] This order approves the proposed rule change, as amended by Amendment No. 1. In addition, the Commission is publishing a notice to solicit comment on and is simultaneously approving, on an accelerated basis, Amendment No. 2 to the proposal. Below is the text of the proposed rule change, as amended by Amendment No. 2. Deletions of the proposed rule text, which was published in the Notice, appear in [brackets]; proposed rule language to be added by Amendment No. 2 appears in *italics.*

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter, dated January 28, 2003, from Patrice M. Gliniecki, Vice President and Deputy General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission (''Amendment No. 1'').

[4] *See* Securities Exchange Act Release No. 47435 (March 4, 2003), 68 FR 11435 (''Notice'').

[5] *See* letter from Shirley H. Weiss, Associate General Counsel, Office of the General Counsel, NASD, to Jonathan G. Katz, Secretary, Commission (September 11, 2003) (''Amendment No. 2''). In Amendment No. 2, the NASD made certain changes to its proposed rule text in response to comments received by the Commission in connection with the filing. The Amendment No. 2 rule text changes are published in their entirety and discussed at length below.

2130. Obtaining an Order of Expungement of Customer Dispute Information From the Central Registration Depository (CRD System)

(a) Members or associated persons seeking to expunge information from the CRD system arising from disputes with [public] customers must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief.

(b) Members or associated persons petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief must name NASD as an additional party and serve NASD with all appropriate documents unless this requirement is waived pursuant to subparagraph (1) or (2) below.

(1) Upon request, NASD may waive the obligation to name NASD as a party if NASD determines that the expungement relief is based on *affirmative* judicial or arbitral findings that:

(A) the claim, allegation, or information is [without factual basis] *factually impossible or clearly erroneous;*

(B) the [complaint fails to state a claim upon which relief can be granted or is frivolous] *registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds*; or

(C) the [information contained in the CRD system is defamatory in nature] *claim, allegation, or information is false.*

(2) If the expungement relief is based on judicial or arbitral findings other than those described above, NASD, in its sole discretion and under extraordinary circumstances, also may waive the obligation to name NASD as a party if it determines that:

(A) the expungement relief and accompanying findings on which it is based are meritorious; and

(B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements.

(c) *For purposes of this rule, the terms ''sales practice violation,'' ''investment-related,'' and ''involved'' shall have the meanings set forth in the Uniform Application for Securities Industry Registration of Transfer (''Form U4'') in effect at the time of issuance of the subject expungement order.*

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II. Summary of Comments and Response to Comments

A. Comments Received

As stated above, the Commission received 28 comments from a variety of sources.[6] The majority of comments received were in favor of the NASD putting a rule in place on this topic, but had a variety of suggestions as to how to make the proposed rule text more effective. The arguments put forth in the comments are summarized as follows.

Argument #1—The criteria adopted with respect to when the NASD will waive its involvement at the court confirmation level should be the criteria used by arbitrators for granting expungement. In short, rather than simply the criteria for NASD joining the court confirmation proceeding, the standards should be applied directly to arbitrators through the NASD's Code of Arbitration Procedures.[7]

Argument #2—Member firms and associated persons will be in a position to ''buy clean records'' through an arbitration award containing unwarranted expungement criteria that includes one of the three standards proposed.[8]

Argument #3—The standard for proving a defamation claim varies by jurisdiction and, in conjunction with the proposed standard language invoking defamation principles, the result will be confusion as to which law should be applied.[9]

Argument #4—An absolute or partial privilege exists for defamation claims that arise out of quasi-judicial proceedings (*e.g.*, arbitration) in most jurisdictions, but not all. Thus, confusion could result from the lack of uniformity in this regard.[10]

Argument #5—Extensive collateral litigation will be required to resolve which jurisdiction's defamation standard should apply.[11]

Argument #6—The proposal will cause a ''chilling effect.'' Investors will be disinclined to bring any arbitration claims because of the near certainty that members and associated persons will raise defamation as a defense and counterclaim.[12]

Argument #7—The proposal will result in a ''dispositive motions practice.'' The formal pleading requirements established by the proposal will give rise to an expensive and legally complex motions practice (thus defeating the main goal of arbitration—informal and inexpensive conflict resolution).[13]

[6] *See* Letter to Margaret H. McFarland, Deputy Secretary, Commission, from Charles W. Austin, Jr., Executive Vice-President, Public Investors Arbitration Bar Association (March 28, 2003) (''PIABA Comment); letter to Secretary, Commission, from Joel A. Goodman and Stephen Krosschell, Goodman & Nekvasil, P.A. (March 29, 2003) (''G&N Comment''); electronic mail (''e-mail'') to Secretary, Commission, from Barry D. Estell (March 28, 2003) (''Estell Comment''); letter to Secretary, Commission, from C. Thomas Mason III (March 31, 2003) (''Mason Comment''); letter to Jonathan G. Katz, Secretary, Commission, from Stuart J. Kaswell, Senior Vice President and General Counsel, Securities Industry Association (March 31, 2003) (''SIA Comment''); e-mail to Commission Rule Comments from Steven M. Sherman (March 31, 2003) (''Sherman Comment''); e-mail to Commission Rule Comments from Alan L. Sachs (March 28, 2003) (''Sachs Comment''); e-mail to Commission Rule Comments from Helen Mangano (March 28, 2003) (''Mangano Comment''); e-mail to Commission Rule Comments from John J. Miller (March 30, 2003) (''Miller Comment''); letter to Jonathan G. Katz, Secretary, Commission, from Gerald S. Siegmyer, Siegmyer, Oshman & Geddie, L.L.P. (April 7, 2003) (''SO&G Comment''); letter to Commission from Donald G. McGrath, McGrath & Polvino, PLLC (March 27, 2003) (''M&P Comment''); letter to Commission from A. Daniel Woska, Woska & Hasbrook (March 31, 2003) (''W&H Comment''); letter to Jonathan G. Katz, Secretary, Commission, from Dan Jamieson (April 25, 2003) (''Jamieson Comment''); letter to Commission from Kenneth R. Hyman, President, Partnervest Securities, Inc. (May 19, 2003) (''Partnervest Comment''); e-mail to Commission from Steven K. McGinnis (May 19, 2003) (''McGinnis Comment''); letter to Commission from Robert L. Hicks, President, Finance 500 (May 19, 2003) (''Finance 500 Comment''); e-mail to Commission Rule Comments from Robert Eastmann (June 3, 2003) (''Eastmann Comment''); letter to Margaret H. McFarland, Deputy Secretary, Commission, from Deborah Bortner, North American Securities Administrators Association CRD Steering Committee Co-Chair and Washington State Director of Securities (June 4, 2003) (''NASAA Comment''); e-mail to Commission Rule Comments from Tammy McQuade (June 7, 2003) (''McQuade Comment''); e-mail to Commission Rule Comments from Fired Broker (June 9, 2003) (''Fired Broker Comment''); e-mail to Commission Rule Comments from Mike Marchetta (June 10, 2003) (''Marchetta Comment''); e-mail to Commission Rule Comments from David Macias (June 10, 2003) (''Macias Comment''); e-mail to Commission Rule Comments from djs (June 10, 2003) (''djs Comment''); 23 substantially identical form letters to Commission from John Schooler, President, WFP Securities (May 21, 2003) (''Form Letter Comment''); e-mail to Commission Rule Comments from Richard Lavoice (July 29, 2003) (''Lavoice Comment''); e-mail to Commission Rule Comments from Steve Kus (July 2, 2003) (''Kus Comment''); e-mail to Commission Rule Comments from David Haburjak (July 8, 2003) (''Haburjak Comment''); and e-mail to Commission Rule Comments from Jim Aldendifer (October 12, 2003) (''Aldendifer Comment'').

[7] *See* PIABA Comment and Mason Comment.

[8] *See* PIABA Comment; G&N Comment; Estell Comment; Mason Comment; SO&G Comment; W&H Comment; and Jamieson Comment.

[9] *See* PIABA Comment.

[10] *See* PIABA Comment; G&N Comment; Mason Comment; Mangano Comment; and SO&G Comment.

[11] *See* PIABA Comment.

[12] *See* PIABA Comment; G&N Comment; Estell Comment; Mason Comment; Sachs Comment; Mangano Comment; Miller Comment; SO&G Comment; M&P Comment; and W&H Comment.

[13] *See* PIABA Comment; G&N Comment; Estell Comment; Mason Comment; Sachs Comment; Mangano Comment; Miller Comment; SO&G Comment; M&P Comment; and W&H Comment.

Argument #8—NASD Rule 2110 (''just and equitable principles of trade'') should be strengthened to prevent the use of unwarranted criteria for expungement or a new rule should be adopted that states that a member may not seek expungement unless one of the standards is met.[14]

Argument #9—Expungements generally will increase because of the additional criteria and such an increase is clearly detrimental to investors.[15]

Argument #10—A conflict will be created in cases when it is in the investor's interest to settle (through an arbitration award containing expungement criteria), but the investor's counsel will be averse to admitting to have filed a claim warranting expungement (*e.g.*, a defamatory claim).[16]

Argument #11—Pro se investors will be unable to meet the heightened formal pleading requirements established by the proposed standards.[17]

Argument #12—The status quo is not unfair and altering the status quo would place member and associated records in a privileged class relative to other classes of public records (*i.e.*, civil actions are not expungeable from the public record).[18]

Argument #13—The court confirmation process will be an insufficient safeguard relative to the added expungement criteria, because the NASD does not have the resources to put forth serious opposition to expungements at the court confirmation level.[19]

Argument #14—CRD information is considered to be part of the states' books and records. NASAA and the states currently insist that only ''factually impossible'' claims are expungeable and, thus, an expansion of the expungement criteria would conflict with the states' books and records laws.[20]

Argument #15—Investors already view the NASD arbitration process with suspicion and adding criteria for expungement will serve to exacerbate this perception.[21]

Argument #16—The integrity of the CRD will be negatively affected by the proposal.[22]

Argument #17—The court confirmation process is still too burdensome on members and associated persons and this burden should be eased, rather than increased.[23]

Argument #18—The proposal evidences a general lack of respect for arbitrators. Moreover, it will undermine the integrity of arbitrators by limiting their decision-making ability.[24]

Argument #19—The proposal should not be acted upon in isolation, instead it should be combined with NASD NtM 02–74 regarding expanding the amount of information that brokers must report, generally.[25]

Argument #20—The proposal would automatically convert the NASD into an adversary of members at the court confirmation level. Furthermore, the proposal will create a systemic prejudice on the part of NASDR against members.[26]

Argument #21—The court confirmation process will require a rehearing of the issues and recalling of witnesses. Such rehearing and recalling will not only be inefficient, but could result in the confirming court making different findings from those made in the underlying arbitration proceeding. This could create confusion as to the status of the underlying arbitration decision.[27]

Argument #22—The current system of disclosing unproven allegations is inequitable and making it more difficult for members and associated persons to remove such allegations from their CRD records is ''doubly unfair.'' [28]

B. Amendment No. 2

In Amendment No. 2, the NASD addressed a number of the comments received by the Commission in response to the publication of the notice in the **Federal Register**. As noted above, some commenters expressed concern that the mere existence of an NASD rule governing expungement could encourage registered persons to seek expungements and make expungement easier to obtain. NASD noted its belief that this is not a legitimate concern. NASD stated that these commenters may not have considered the fact that NASD currently expunges information from the CRD system when ordered to do so by a court of competent jurisdiction, and that court-ordered expungements currently are not subject to any NASD limitations or standards.[29] Under the 1999 moratorium, registered persons seeking expungement relief need only obtain a court order to expunge or court confirmation of an arbitration award granting expungement relief. Under the proposed rule, NASD stressed that it will have the opportunity to review the basis for expungement and to oppose an expungement in court unless there is a specific finding that the expungement meets one of the prescribed standards.

In Amendment No. 2, NASD discussed a concern raised by commenters that arbitrators should have sole authority and complete discretion to order expungement. They suggested that NASD's and the States' proposed role in the court confirmation process would undermine arbitrators' credibility. In response, NASD argued that, to the contrary, the critical element in the proposal is NASD's reliance on fact finders, especially arbitrators, to find that the expungement relief is based on one of the standards in the proposed rule. Also of note, NASD stated in Amendment No. 2 that NASD Dispute Resolution will provide training to arbitrators regarding the standards for expungement that will trigger the NASD waiver of opposition. Under proposed Rule 2130, NASD asserted that it will rely on arbitrators' findings and waive participation in the court confirmation process if arbitrators have appropriately awarded expungement.

Other commenters contended that the proposed procedures will be economically prohibitive. In response, NASD recognized that the additional step of naming NASD as a party may involve additional costs. In an effort to minimize costs to the parties, NASD may waive participation in the court confirmation process before filing with the court if the parties give NASD a copy of the award to review and the

[14] *See* PIABA Comment; G&N Comment; and NASAA Comment.

[15] *See* G&N Comment and SO&G Comment.

[16] *See* G&N Comment.

[17] *See* G&N Comment.

[18] *See* Estell Comment; Sherman Comment; Mangano Comment; Miller Comment; and M&P Comment.

[19] *See* G&N Comment; Estell Comment; Mason Comment; Jamieson Comment.

[20] *See* Estell Comment; Mason Comment; and Sherman Comment.

[21] *See* Estell Comment; Sherman Comment; and Mangano Comment.

[22] *See* Mason Comment; Sachs Comment; SO&G Comment; M&P Comment; and W&H Comment.

[23] *See* SIA Comment.

[24] *See* SIA Comment; Jamieson Comment; Partnervest Comment; McGinnis Comment; Finance 500 Comment; and Form Letter Comment.

[25] *See* SIA Comment and Jamieson Comment.

[26] *See* Partnervest Comment; McGinnis Comment; Finance 500 Comment; and Form Letter Comment.

[27] *See* SIA Comment; Partnervest Comment; McGinnis Comment; Finance 500 Comment; and Form Letter Comment.

[28] *See* Eastmann Comment; McQuade Comment; Fired Broker Comment; Marchetta Comment; Macias Comment; djs Comment; LaVoice Comment; Kus Comment; Haburjak Comment; and Aldendifer Comment.

[29] NASD has, since the inception of the CRD system, executed expungements involving customer dispute information based on a court order or (since the imposition of the moratorium in 1999 on expungements based solely on arbitration awards) court confirmation of an arbitration award directing expungement. These court orders included expungement relief granted in cases involving both settlements and hearings on the merits.

arbitrators have ordered expungement based on one of the standards in the rule. NASD noted the belief that the availability of this waiver process should limit any additional costs to the parties.

The NASD also spoke to whether the proposed rule will discourage settlements, since the parties will no longer have total control over whether information about the arbitration will be expunged. NASD admitted that it is unable to predict the ultimate effect of the proposed rule on settlements. Further, NASD noted that compliance with the proposed rule may have the effect of decreasing the number of settlements that are reached. Currently, it is possible that respondents may agree to pay damages as a quid pro quo for expungement and obtain court confirmation of the expungement. NASD believes that the proposed rule will reduce, if not eliminate, the risk of expunging information that is critical to investor protection and regulatory interests as a condition in settlement negotiations. NASD asserted that the potential dampening effect on settlements must be weighed against the integrity of the information in the CRD system, and the ability of public investors and regulators to examine the entirety of a registered person's record, with the limited exceptions as proposed.

A number of comments received expressed the concern that members and associated persons will be able to ''buy clean records'' by inserting terms into arbitration settlements that match the standards established under the proposed rule. NASD responded to this concern in Amendment No. 2 by asserting that the ''affirmative determination'' requirement imposed on arbitrators should foil attempts to ''buy a clean record.'' Under the proposed standard, dismissal of a claim alone would not be a sufficient basis for ordering expungement. NASD states that its arbitrator training materials will make clear that an expungement order must be premised on an *affirmative determination* by the arbitrator that the respondent was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds. Without such an *affirmative finding,* NASD would have no basis under this standard to waive its obligation to be named as a party in the court confirmation process.

Commenters expressed concern that the ''complaint fails to state a claim upon which relief can be granted'' standard, which parallels a motion to dismiss made in federal court, could be interpreted to authorize arbitrators to grant such motions in arbitration. In response, NASD modified in Amendment No. 2 the language describing the standards under which NASD may waive participation in the court confirmation process. Currently, there is no provision in the Code of Arbitration Procedure that either permits or prohibits motions. NASD did not intend for the proposed rule to have any effect on the authority of arbitrators to grant or deny motions to dismiss a claim before a hearing on the merits. Therefore, through Amendment No. 2, NASD eliminated the ''complaint fails to state a claim upon which relief can be granted'' standard and replaced it with a more objective standard based on CRD reporting requirements. Specifically, Amendment No. 2 proposed a standard that would require an affirmative arbitral or judicial finding that the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds. Such a finding, NASD argued, would be consistent with the registered representative reporting ''No'' answers to current Question 14I(1) of the Uniform Application for Securities Industry Registration or Transfer (''Form U–4''). Should arbitrators make the required finding, NASD argued, no logical basis would exist for reporting the underlying complaint and other information on an individual's CRD record. NASD stated its belief that this revised standard eliminates any unintended implications for the arbitration process, while preserving the intended substantive effect of the standard.

Commenters were also concerned that the ''defamatory in nature'' standard would encourage respondents to counterclaim for defamation and require claimants to defend such claims, thereby creating undue burdens on public investors in the arbitration process. Some commenters correctly noted that claims in arbitration are privileged and therefore immune from suit. In response, NASD stated that it believes the proposed rule should not substantially affect either the substance or procedure of an arbitration proceeding and should not place any undue burden on claimants in the arbitration process. Thus, to avoid the possibility that the proposed standard might result in additional counterclaims for defamation, NASD replaced it in Amendment No. 2 with a requirement that the arbitrator or adjudicator make a finding that the claim, allegation, or information is ''false.''

Some commenters expressed the concern that the ''without factual basis'' standard is overly vague. In response, NASD replaced the ''without factual basis'' standard with a ''factual impossibility or clearly erroneous'' standard. NASD asserted that this standard has a clear meaning to regulators and public investors and was favored by a number of commenters. This standard, NASD believes, would enable an individual who has been erroneously named in an arbitration, because he or she was not even employed by the member firm during the relevant time, to obtain expungement of a dismissed complaint.

Some commenters suggested that the burden of complying with the three proposed standards should be placed squarely upon the NASD's members. Such a rule would require that NASD members only seek expungement of data from the CRD system, if such data fits within one of the three standards. NASD noted that it does not believe such an approach is necessary to achieve the objectives of the proposed rule. Federal and state courts, that are fully informed about the investor protection and regulatory implications of a proposed expungement order, NASD argued, should be trusted to make the proper decision.

Other commenters put forth the argument that the burden of complying with the three proposed standards should be applied to arbitrators directly through the NASD's Code of Arbitration Procedure. NASD argued that imposing substantive requirements on arbitrators via the Code of Arbitration Procedure would be inappropriate. NASD stated that in no other instance does the Code of Arbitration Procedure impose limitations on arbitrators' ability to decide a legal issue. NASD asserted that arbitrators will know the standards for expungement relief under proposed Rule 2130, because they will have received appropriate training, and members and associated persons will know that arbitrators will only grant expungement relief based on those standards. Therefore, NASD stressed that, although the proposed rule does not place any specific obligations on arbitrators or respondents, all parties and arbitrators will be aware of the standards under which expungement relief should be granted.

As discussed above, under proposed Rule 2130, NASD will participate in the court confirmation proceeding and oppose confirmation of the expungement portion of the arbitration award if the expungement order does not meet one of the specified criteria. Some commenters asserted that NASD

will be unable to present sufficient opposition to expungement attempts at the court confirmation level. NASD responded in Amendment No. 2 by stating that these comments were without merit or supporting evidence. NASD noted that it is committed to enforcing the proposed rule, as amended, and that it has an obligation as a self-regulatory organization to fulfill all of its regulatory obligations. Furthermore, NASD stressed that it will be subject to Commission oversight in its administration of the proposed rule. As a further means to ensure that the court is made aware of the investor protection and regulatory implications of an expungement, NASD noted that states will be able to intervene if they have concerns regarding whether investor protection or regulatory issues have been fairly considered by the NASD.[30]

The NASD also discussed on the effective date of the proposed rule in Amendment No. 2. NASD stated that, following Commission approval of proposed Rule 2130, it will announce the approval of the Rule in a NtM, which also will announce the effective date of Rule 2130. According to NASD, the NtM will announce that the requirements of Rule 2130 will apply to all arbitrations or civil lawsuits filed on or after the effective date. NASD noted that all requests to expunge customer dispute information from the CRD system arising from arbitrations or civil lawsuits filed before the effective date of the rule, including any settlements arising therefrom, will continue to be subject to the terms of the moratorium in effect as of January 19, 1999.

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change, as amended, the comments, and the NASD's response thereto, and finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities association,[31] and, in particular, with the requirements of section 15A[32] of the Act. Specifically, the Commission finds that approval of the proposed rule change is consistent with section 15A(b)(6)[33] of the Act because it is designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission finds that the proposed rule change, as amended, is reasonably designed to accomplish these ends by allowing fact finders and the NASD to consider all competing interests before directing or granting expungement of customer dispute information from the CRD.

Moreover, the Commission, pursuant to section 19(b)(2)[34] of the Act, finds good cause for approving Amendment No. 2 prior to the 30th day after the date of publication of notice thereof in the **Federal Register**. As discussed below, the Commission believes that the NASD has responded to the concerns raised by the commenters and has struck a fair and reasonable balance between the burden that the proposed rule change will impose upon member firms and associated persons and the benefit that the proposed rule change will bestow upon investors, generally. To the extent that the NASD's Amendment No. 2 has not specifically addressed any arguments raised, the Commission is not persuaded by these arguments. The Commission believes that the proposal is a clear improvement over the current system for the expungement of information from the CRD system and believes that it should be put into place as soon as practicable to ensure that investors and regulators have access to more accurate information through the CRD system.

With respect to Argument Nos. 1–9, 11, 13, and 18 discussed above, the Commission believes that the NASD has sufficiently responded in Amendment No. 2. Specifically, with respect to Argument Nos. 1 and 8, the Commission believes that the NASD has sufficiently justified its application of the standards in question to the NASD's waiver or non-waiver of involvement at the court confirmation level. Argument Nos. 1 and 8 assert that the standards should be applied to arbitrators through the Code of Arbitration Procedure and to NASD members seeking expungement, respectively. The Commission agrees with the NASD that standards will be most effectively applied at the waiver juncture. In no other instance in the NASD's Code of Arbitration Procedure are arbitrators bound by substantive restrictions on how they decide an arbitration case. Moreover, as the NASD notes in Amendment No. 2, arbitrators will be aware of the standards that will be utilized with respect to the NASD's waiver of involvement, and, thus, arbitrators will indirectly consider them. NASD notes in Amendment No. 2 that the standards should not be applied to members directly, because federal and state courts are more than able to make the proper decisions with respect to arbitration award confirmation. The Commission agrees with this analysis, and also believes that the potential involvement of the NASD at the court confirmation level will provide greater safeguards than simple application of the rule to members.

With respect to Argument No. 2, concerning the ''buying of clean records,'' the Commission is satisfied that the NASD's requirement that an ''affirmative'' determination be made by an arbitrator will provide sufficient regulatory protection. In the initial proposed rule filing, the NASD's proposal simply required that a finding be made by an arbitrator that matched one of the proposed standards. In response to this, commenters expressed the concern that members and associated persons would be able to negotiate for the inclusion of a finding in the arbitration settlement that matched one of the requisite standards. By requiring an ''affirmative determination'' on the part of the arbitrator that one of the standards was met, the NASD asserted that this concern and the ability of members and associated persons to ''buy clean records'' will be greatly reduced. The Commission agrees with the NASD's analysis in this regard.

Argument Nos. 3–6 and 10 all relate to the potential problems that could be caused by the NASD's use of the word ''defamation'' in one of the three standards for waiver. In response to these arguments, the NASD proposed replacing the phrase ''information contained in the CRD system is defamatory in nature'' with ''claim, allegation, or information is false.'' The Commission believes that this change sufficiently addresses Argument Nos. 3–6 and is satisfied that the new proposed language should achieve the NASD's goal in this respect (*i.e.*, ensuring that the CRD system contains accurate information).

Argument Nos. 7 and 11 are concerned with the proposed rule leading to a formal dispositive motions practice at the arbitration level. The Commission believes that the NASD has

[30] NASD represented to the Commission that it is in the process of establishing a notice procedure, whereby the state(s) in which a member or associated person is registered would be notified when that member or associated person seeks a waiver of NASD involvement in the court confirmation level. To the extent that the state(s) wishes to intervene, it could so petition the court. Telephone conference between Shirley H. Weiss, Associate General Counsel, Office of General Counsel, NASD, and Christopher B. Stone, Special Counsel, Division of Market Regulation, Commission (October 17, 2003).

[31] 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[32] 15 U.S.C. 78o–3.

[33] 15 U.S.C. 78o–3(b)(6).

[34] 15 U.S.C. 78s(b)(2).

sufficiently responded to this argument through Amendment No. 2. As discussed at length above, the initial proposed rule text included language that tracked Federal practice pleading requirements. Such language, the commenters argued, could lead to a complex, lengthy, and expensive dispositive motions practice. By removing this potentially problematic language in Amendment No. 2, the Commission believes that the NASD has responded sufficiently to these concerns.

With respect to Argument No. 9, concerning the NASD's proposed rule text itself leading to an increase in expungements, the NASD disagreed. The Commission agrees with the NASD in that the proposed rule is clearly an improvement over the current expungement system in which there are no parameters placed on expungements being incorporated into arbitration awards.

With respect to Argument No. 13, concerning the NASD's inability to present serious opposition to expungement requests at the court confirmation level, the NASD provided some comfort. In Amendment No. 2, the NASD stressed that it is a federally registered self-regulatory organization that is required by the federal securities laws to enforce its rules.[35] Moreover, to the extent it fails in that regard, it must answer to the Commission. The Commission acknowledges that the extent to which the proposed rule will ultimately require the NASD to contest expungements at the court confirmation level cannot be divined. The Commission believes, however, that the proposal is an improvement over the current system for expungement. To the extent that the NASD's responsibilities at the court confirmation level ever became untenable, the Commission would expect the NASD to approach the Commission with a proposed rule change or in some way seek to alter the process to ensure that the NASD fulfills its self-regulatory obligations.

With respect to Argument No. 18, concerning the proposal's lack of respect for the arbitration process, the NASD responded in Amendment No. 2. The NASD noted that, rather than indicating a lack of respect for arbitration, the proposal demonstrates that the NASD is prepared to rely heavily on the fact-finding ability of arbitrators. Once an arbitrator makes an ''affirmative determination'' that one of the standards has been met, the NASD will waive its involvement at the court confirmation level. The Commission believes that the proposal strikes the appropriate balance between providing arbitrators with sufficient flexibility in addressing issues, while at the same time placing appropriate parameters on the type of information that is potentially expungeable from the CRD system.

While Amendment No. 2 does not directly address Argument Nos. 12, 14–17, and 19–22, the Commission is not otherwise persuaded by these arguments. The Commission believes that the proposal strikes the appropriate balance between permitting members and associated persons to remove information from the CRD system that holds no regulatory value, while at the same time preserving information on the CRD system that is valuable to investors and regulators.

With respect to Argument No. 12, concerning the proposal's establishment of a privileged class of public records, the Commission is unconvinced. The Commission believes that, notwithstanding the state ''public record'' status of data in the CRD system, such data is expungeable under certain circumstances. Indeed, a process for the expungement of data from the CRD system has been in place since the establishment of the CRD system. The Commission also is not persuaded by this ''states'' rights' argument and notes that NASAA itself did not make this argument to the Commission.

With respect to Argument No. 14, concerning the rule's potential conflict with the states' books and records rules, the Commission is not persuaded. NASAA works closely with the NASD in the operation and enhancement of the CRD system. To the extent this is a valid concern of the states, the Commission would have expected NASAA to have raised this point. In fact, NASAA submitted a detailed comment letter on the proposal and did not raise this concern.

With respect to Argument Nos. 15 and 16, concerning a worsening of the already poor perception that investors have of the NASD arbitration process and of the integrity of CRD data, the Commission is not persuaded. These arguments appear to rely on the assumption that adopting explicit criteria for expungement will make expungement easier, compromise the process for expungement, and, ultimately, degrade the CRD system. As discussed at length above, the Commission believes that the proposal will have the opposite effect. Specifically, the Commission believes it will strengthen the expungement process, by ensuring that only information that is not valuable to regulators and investors is expunged from the CRD system.

Argument Nos. 17 and 20–22 ostensibly relate to maintaining the accuracy of data that appears in the CRD system. Specifically, by making it more difficult to expunge information, the arguments aver, members and associated persons will be less likely and less able to expunge inaccurate information from the system—ultimately, degrading the system. The Commission appreciates these arguments and agrees that expungement of inaccurate information from the CRD system is crucial to the system's value. Further to that point, the Commission would clearly be opposed to any proposed rule that would place an unfair burden upon members and associated persons seeking to expunge inaccurate information from the system. The Commission, however, does not believe that the proposal will make expungement of *appropriate* information from the system overly or unfairly difficult. To the extent a member or associated person seeks to expunge *appropriate* information, the NASD should waive involvement at the court confirmation level. In such a circumstance, the process should function not unlike how it currently functions and should not require a significant rehearing of the issues and/or recalling of witnesses. The Commission believes that the proposal has been structured in such a way that the potential for divergent findings at the court confirmation level and the arbitration level has been minimized. In sum, the Commission believes that the proposal addresses the serious Commission concern that valuable information is being expunged from the CRD system through arbitration settlements that include negotiated expungement instructions.

Finally, with respect to Argument No. 19, asserting that the proposal should be acted upon in conjunction with NASD NtM 02–74, the Commission does not agree. The NASD is a registered national securities association and is owed a certain degree of latitude with respect to how it carries out its self-regulatory responsibilities. The Commission believes that the decision to file this proposal separately from the proposal that will follow from NtM 02–74 is the type of self-regulatory decision that the NASD has discretion to make. Moreover, NtM 02–74 has not yet been filed by the NASD and the Commission does not believe it would be in the interests of investors to delay the Commission's action on the instant proposal.

[35] *See* Section 19(g) of the Act, 15 U.S.C. 78s(g).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 2, 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. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–NASD–2002–168. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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–2002–168 and should be submitted by January 14, 2004.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[36] that the proposed rule change (SR–NASD–2002–168), as modified by Amendment No. 1, be, and it hereby is, approved, and that Amendment No. 2 be, and hereby is, approved on an accelerated basis. As discussed above, the NASD will announce the effective date of this proposed rule change through a NtM to be circulated as soon as possible after the publication of this approval order in the **Federal Register**.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[37]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31646 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–P

[36] 15 U.S.C. 78s(b)(2).

[37] 17 CFR 200.30–2(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48930; File No. SR–NASD–2003–177]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Technical Amendments to Interpretive Material 3130

December 16, 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 December 2, 2003, the National Association of Securities Dealers, Inc. (''NASD'') 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 NASD. NASD has designated the proposed rule change as ''non-controversial'' under section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend NASD IM–3130. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

IM–3130. Restrictions on a Member's Activity

(a) This explanation outlines and discusses some of the financial and operational deficiencies which could initiate action under Rule 3130. Paragraphs [(b)]*(c)*(2) and [(c)]*(d)*(2) of Rules 3130 and 3131 recognize that there are various unstated financial and operational reasons for which [the Association] *NASD* may impose restrictions on a member so as to prohibit its expansion or to require a reduction in overall level of business. These provisions are deemed necessary in order to provide for the variety of situations and practices which do arise and which, if allowed to persist, could result in increased exposure to customers and to broker/dealers.

(b) In the opinion of the Board of Governors, it would be impractical and unwise to attempt to identify and list all of the situations and practices [which] that might lead to the imposition of restrictions or the types of remedial actions [the Association] NASD may direct be taken because they are numerous and cannot be totally identified or specified with any degree of precision. The Board believes, however, that it would be helpful to members' understanding to list some of the other bases upon which [the Association] *NASD* may conclude that a member is in or approaching financial difficulty.

(c) For purposes of paragraphs [(b)]*(c)*(2) and [(c)]*(d)*(2) of Rule 3130, a member may be considered to be in or approaching financial or operational difficulty in conducting its operations and therefore subject to restrictions if it is determined by [the Association] *NASD* that any of the parameters specified therein are exceeded or one or more of the following conditions exist:

(1) through (8) No change

(d) For purposes of paragraphs [(b)]*(c)*(2) and [(c)]*(d)*(2) of Rule 3131, a member may be considered to be in or approaching financial or operational difficulty in conducting its operations and therefore subject to restrictions if it is determined by [the Association] *NASD* that any of the parameters specified therein are exceeded or one or more of the following conditions exist:

(1) No change

(2) The member has experienced a substantial change in the manner in which it processes its business which, in [the] *NASD's* view, [of the Association,] increases the potential risk of loss to customers and members.

(3) through (8) No change

(e) If [the Association] *NASD* determines that any of the conditions specified in paragraphs (c) or (d) of this explanation exist, it may require that the member take appropriate action by effecting one or more of the following actions until such time as [the Association] *NASD* determines they are no longer required:

(1) through (12) No change

(13) Be subject to such other restrictions or take such other action as [the Association] *NASD* deems appropriate under the circumstances in the public interest and for the protection of members.

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD 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. NASD 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 proposed rule change would: (i) change references to ''paragraphs (b)(2) and (c)(2)'' of NASD Rules 3030 and 3031 to ''paragraphs (c)(2) and (d)(2)'' in NASD IM–3130(a), (c), (d), and (e); and (ii) change references to ''the Association'' to ''NASD'' in NASD IM–3130, thereby conforming the rule language in NASD IM–3130 to the rule language in Rules 3130 and 3131, as recently amended.[5]

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[6] in general, and with section 15A(b)(6) of the Act,[7] in particular, which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general to protect investors and the public interest. NASD believes that conforming the references in NASD IM–3130 to renumbered paragraphs in recently amended NASD Rules 3130 and 3131 and changing references to ''the Association'' to ''NASD'' would be consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[5] *See* Securities Exchange Act Release No. 48438 (September 4, 2003), 68 FR 53766 (September 12, 2003) (SR–NASD–2003–74).

[6] 15 U.S.C. 78*o*–3.

[7] 15 U.S.C. 78*o*–3(b)(6).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

NASD has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The proposed rule change corrects references to recently amended rules, which should preserve the accuracy of NASD's rules. For these reasons, the Commission designates the proposal to be effective and operative upon filing with the Commission.[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.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). The Commission notes that NASD provided written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

[10] For purposes only of accelerating the operative date of the proposed rule change the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–NASD–2003–177. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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–2003–177 and should be submitted by January 14, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31649 Filed 12–23–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48932; File No. SR–NASD–2003–186]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Administration of Qualification Examinations on Security Futures

December 16, 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 December 11, 2003, the National Association of Securities Dealers, Inc. (''NASD'') submitted to 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 NASD. The NASD has filed the proposed rule

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4

change pursuant to Rule 19b–4(f)(6) under the Act.[3] 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 Proposed Rule Change

In this filing, the NASD discusses the implementation of new and revised qualification examinations to address trading in security futures.

The NASD does not propose to amend any of its existing rule text.

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 NASD 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 NASD 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 commodity Futures Modernization Act of 2000 (''CFMA'')[4] lifted the ban on the trading of security futures (*i.e.* futures on single stocks and on narrow-based stock indexes). The NASD states that, at the time the CFMA was enacted, expectations for security futures were very high, and two separate markets were developed to trade these new products. To meet the challenge of ensuring that individuals engaging in a security futures business ere properly qualified, the NASD took the unique step of mandating that firms include training in security futures as part of their firm-element continuing education program. Furthermore, to assist firms in meeting this responsibility, the NASD and the National Futures Association (''NFA'') contracted with the Institute for Financial Markets to develop an internet-based training program. NASD and NFA have made this program available to firms and registered representative for free. Since its inception in October 2002, over 12,000 individuals have completed the Internet training, which takes approximately two to three hours to complete.

At the time trading in security futures commenced, NASD also indicated that it planned to both modify and create qualification examinations to address trading in security futures. Specifically, NASD intended to modify the Series 4 examination (Registered Options and Security Futures Principal (replacing Registered Options Principal)), Series 9/10 examination (Limited Principal General Securities Sales Supervisor), and Series 42 examination (Limited Representative Options and Security Futures (replacing Limited Representative Options)). In addition, NASD intended to create a new Series 43 examination for general securities representatives (those persons who have successfully completed the Series 7 exam) seeking to engage in a security futures business.[5] The Series 43 is targeted at new entrants into the securities industry. Existing registrants (*i.e.,* those registered before the Series 43 examination is effective) are required to complete a firm-element continuing education program prior to engaging in a security futures business. Once the Series 43 was developed, NASD intended to permit existing registrants the option of completing the firm-element continuing education program in lieu of the Series 43 examination until December 31, 2006.

In the approximately one year since security futures began trading, NASD has devoted substantial resources to creating the Series 43 examination. Industry and SRO representatives[6] have met for 11 days and have devoted collectively over 1800 hours in meeting time developing a content outline and a question bank for the Series 43.[7] In addition, NASD has incurred over $45,000 in expenses to develop these materials. The Series 43 examination development is now complete. Revised study outlines for the Series, 4, 9/10 and 42 also have been developed. Questions for those examinations will be borrowed from the Series 43 question bank and developed by committees charged with maintaining and reviewing the question banks for those examinations.

Despite these efforts, current data on trading volume has shown that there is very limited trading activity in security futures. According to data from the Options Clearing Corporation, the average trading volume for 2003 in security futures is around 10,000 contracts per day across the two exchanges. In addition, NASD's market regulation surveillance confirms that most of this volume is propriety trading among market-maker firms. NFA representatives have informed the NASD that security futures products represented 0.0028% of all futures contracts traded so far in 2003. While similar statistics are not calculated for the securities industry, the figures would be substantially lower given the size of the securities markets.

Moreover, interest among registered representatives to engage in a sescurity futures business has waned. Since July 2003, an average of fewer than 50 registered persons per month in the securities industry have completed the Internet-based continuing education.

In view of the foregoing, the NASD does not believe it is appropriate or necessary to institute the Series 43 exam or amend other existing qualification examinations at the present time. The NASD believes the current system of a firm-element continuing education requirement continues to work well. The NASD states that the feedback it has received on the Internet-training program has been very positive. In addition, the NASD states that it has not received any evidence of customer complaints in these products. Moreover, the NASD is hesitant to amend existing examinations to address security futures because the net result will be to deemphasize other more pertinent subject areas, as the NASD does not intend to expand the number of questions on the Series 4, 9/10, and 42 exams.[8] Finally, the introduction of a separate, stand-alone qualification examination for security futures seems excessive in view of the level of trading in these products. The NASD also anticipates that very few representatives would elect to take the Series 43 exam.

The NASD notes that its colleagues at NFA have made similar conclusions about the need to revise the Series 3 to reflect trading of security futures. Both NASD and NFA believe that the qualification requirements between the securities and futures industry should generally be comparable, and, as regulators, the NASD has sought to avoid favoring one industry group over another, or actions leading to regulatory arbitrage.

[3] 17 CFR 240.19b–4.

[4] P.L. 106–554, 114 Stat. 2763 (December 21, 2000).

[5] A new Series 43 examination was necessary, in part, because the New York Stock Exchange did not intend to incorporate questions on security futures on the Series 7 examination.

[6] SRO representatives from the NASD, NFA, CBOE, AMEX, OneChicago, and NQLX helped develop the content outline and question bank.

[7] These totals do not include travel time, time spent preparing for meetings (including developing and reqriting questions), and NASD staff time administering the Series 43 program.

[8] The problem is equally acute on the futures industry side, where the proposed revised Series 3 examination will have approximately 17% of its questions addressing security futures.

While the NASD does not plan to implement the new or revised qualification examinations today, it intends to monitor activity in security futures very closely. The NASD also intends to continue coordinating with NFA. The NASD intends to make periodic assessments of the activity in security futures to determine the appropriate time to implement the examinations. The NASD does not believe that there is any single factor that should be determinative of whether security futures examinations should be implemented. Rather, the NASD intends to review the following:

- Volume in security futures contracts
- Analysis of who is trading security futures
- Number of registered representatives completing continuing education
- Number of accounts authorized to trade security futures
- Nature of security futures customers
- Evidence, if any, of customer complaints
- Evidence, if any, of regulatory concerns arising from the NASD's surveillance and examination programs.

Once the NASD determines that new/revised qualifications are appropriate, or the SEC requests that the NASD implement the examinations, the NASD represents that it will be able to have them effective in less than four months. The NASD states that, as its efforts to date indicate, it remains fully committed to providing the necessary resources to ensure that representatives engaging in a security futures business are properly trained and qualified. The NASD intends to closely monitor activity in security futures to determine when, and if, it becomes an appropriate date to implement revised qualification examinations.

NASD believes that for the reasons stated above it is appropriate to defer implementation of revised and new qualification examinations concerning security futures.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[9] which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has been filed by the NASD as ''non-controversial'' pursuant to section 19(b)(3)(A) of the Act[10] and subparagraph (f)(6) of Rule 19b–4 thereunder.[11] Because the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act[12] and Rule 19b–4 thereunder.[13]

The Commission hereby waives the thirty-day operative waiting period. The Commission believes that it is consistent with the protection of investors and the public interest to waive the thirty-day operative waiting period because the proposed rule change explains the NASD's reasons for delaying the implementation of the new qualification exams for security futures.[14] The Commission notes that the NASD members that trade security futures are required to provide firm-element training for individuals engaged in security futures business.

NASD has requested that the Commission waive the five-day pre-filing requirement in Rule 19b–4(f)(6)(iii).[15] The Commission hereby waives that requirement.

At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–NASD–2003–186. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–2003–186 and should be submitted by January 14, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Security.

[FR Doc. 03–31650 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–M

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4.

[14] For purposes of accelerating the operative date of the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48909; File No. SR–NSCC–2003–16]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Data Services Only Members

December 11, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on June 30, 2003, the National Securities Clearing Corporation (''NSCC'') 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 primarily by NSCC. 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 proposed rule change adds a new Rule 31 to NSCC's Rules and amends miscellaneous other provisions of NSCC's Rules as they pertain to data services only members.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed rule change (i) expands the types of entities that may become data services only members under NSCC's rules to include the same type of entities that are eligible to use NSCC's mutual fund services; (ii) permits data services only members to access NSCC's mutual fund profile service; and (iii) consolidates many of NSCC's rules applicable to data services only members in a new Rule 31 of NSCC's rules.

The proposed rule change adds new types of entities that may become data services only members of NSCC. Data services only members are only eligible to access certain limited data and information services of NSCC specifically enumerated under NSCC's rules. They are not permitted to enter transactions for settlement through NSCC facilities.

Currently, a data services only member must meet the requirements of any clause (i) through (vi) of Section 1 of Rule 2 of NSCC's Rules; that is, they must be either a registered broker-dealer, bank or trust company, registered clearing agency, insurance company or entity licensed to sell insurance products, an investment company that has registered under the Investment Company Act of 1940, as amended, or an entity that has demonstrated to NSCC's Board of Directors that its business and capabilities are such that it could reasonably expect material benefit from access to such services in order to be accepted as a data services only member.

These types of entities are identical to the types permitted to be NSCC members under Rule 2, subject in the case of Rule 2 membership to additional criteria relating to standards of financial responsibility and operational capability as set forth in NSCC's procedures. Since data services only members do not input transactions for settlement through NSCC's facilities and since NSCC is therefore not subject to settlement exposure by these members, data services only members are not subject to additional NSCC membership standards regarding financial responsibility.

The proposed rule change adds to the types of entities that may become data services only members the types that are currently eligible to use mutual fund services under rule 52;[4] that is, they may also be either (i) an investment advisor as defined in section 202(a)(ii) of the Investment Advisors Act of 1940, as amended; (ii) a principal underwriter as defined in section 2(a)(29) of the Investment Company Act of 1940, as amended, or a co-distributor, sub-distributor, or otherwise authorized to process mutual fund transactions; or (iii) an organization or entity that acts as a third-party administrator on behalf of defined contribution plans as defined in section 414(i) of the Internal Revenue Code of 1986, as amended.

The proposed rule change also adds NSCC's mutual fund profile service to the types of services available to data services only members. Mutual fund profile service (''MFPS'') contains information on mutual funds and investment funds as input by the fund, including data on commission discounts (''breakpoints'') available to certain investors buying shares of certain funds under the criteria established by the fund.

Allowing data services only members to access mutual fund profile service and expanding the entities eligible to become data services only members will assist in making mutual fund information, including breakpoint information, more widely available.

The proposed rule change also makes technical changes to NSCC's Rules by adding a new Rule 31 applicable to data services only members, consolidating for ease of reference many NSCC rule provisions applicable to data services only members. Consolidation of many of the provisions applicable to data services only members in Rule 31 will benefit NSCC participants by clarifying the responsibilities and entitlements directly applicable to data services only members and by making it easier for entities not familiar with clearing agency rules to join NSCC.

The technical changes proposed for consolidation of certain rule provisions applicable to data services only members will facilitate access to NSCC services by qualified entities. The proposed changes which add additional entity types to the ones which may currently qualify to become a data services only member and permit data services only members to access NSCC's mutual fund profile service will enable a wider group of mutual fund industry participants to have automated access to MFPS data about mutual funds. These

[1] 15 U.S.C. 78s(b)(1).

[2] The category of data services only member and modifications applicable to such category were approved by the Commission in Securities Exchange Act Release Nos. 44960 (October 19, 2001), 66 FR 56383 [File No. SR–NSCC–2001–14] (added data services only members as a new category to NSCC rules and permitted them to use limited services]; 45560 (March 14, 2002), 67 FR 13200 [File No. SR–NSCC–2001–18] (permitted data services only members to access Fund/SERV for non-settling transactions); 47197 (January 15, 2003), 68 FR 3917 [File No. SR–NSCC–2002–13] (permitted data services only members to access NSCC's insurance processing services for non-settling transactions); and 47664 (April 7, 2003), 68 FR 17850 [File No. SR–NSCC–2003–04] (permitted data services only members and insurance carrier members to populate NSCC's new product repository databases with information relating to insurance products).

[3] The Commission has modified parts of these statements.

[4] Entities eligible to use mutual fund services include fund members admitted under Rule 51 and TPA members admitted under Rule 60 of NSCC's Rules.

proposed changes to NSCC's rules facilitate the prompt and accurate clearance and settlement of securities transactions and are therefore consistent with the requirements of the Act and the rules and regulations thereunder.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe the proposed rule change will impose a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not solicited nor received written comments on the proposed rule change. NSCC has worked closely with the industry to enhance the availability of mutual fund services to a wider range of mutual fund industry participants. NSCC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(iii) of the Act [5] and Rule 19b–4(f)(4)[6] promulgated thereunder because the proposal effects a change in an existing service of NSCC that (i) does not adversely affect the safeguarding of securities or funds in the custody or control of NSCC or for which it is responsible and (ii) does not significantly affect the respective rights or obligations of NSCC or persons using the service. At any time within sixty days of the filing of the proposed rule change, the Commission could have summarily abrogated such rule change if it appeared to the Commission that such action was necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–NSCC–2003–16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *http://www.nscc.com/legal/.* All submissions should refer to the File No. SR–NSCC–2003–16 and should be submitted by January 14, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31648 Filed 12–23–03; 8:45 am]

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[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(4).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48946; File No. SR–NYSE–2003–34]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change Relating to the Amendment and Restatement of the Constitution of the Exchange To Reform the Governance and Management Architecture of the Exchange

December 17, 2003.

I. Introduction

On November 7, 2003, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') 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 to amend and restate the Exchange's Constitution to reform the governance and management architecture of the Exchange. The proposed rule change was published for public comment in the **Federal Register** on November 13, 2003.[3] In addition to the proposed amendments to the NYSE Constitution, which are the subject of this Order, the Notice of the proposed rule change included as exhibits the texts of the Proxy Statement sent to NYSE members detailing the proposed changes to the Constitution and a letter, dated November 4, 2003, from the Exchange's Interim Chairman and CEO to NYSE members supplementing the Proxy Statement (the ''Supplemental Letter'').[4] On November 19, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[5] The Commission received 18 comment letters regarding the proposed rule change.[6] This Order approves the Exchange's rule change as proposed.

II. Description of the Proposed Rule Change

The NYSE proposes to amend and restate its Constitution to significantly change and enhance its governance

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 48764 (November 7, 2003), 68 FR 64380 (''Notice'').

[4] In the Supplemental Letter, the NYSE's Interim Chairman and CEO indicated, among other things, his intention to bring before the NYSE Board several further amendments to the Constitution to further clarify and underscore the separation and independence of the regulatory function from the Exchange's marketplace function and from inappropriate influence by members and member organizations. The Commission notes that on November 24, 2003, the reconstituted Board voted to approve these amendments, as well as several others, to the NYSE Constitution. *See* Special Membership Bulletin regarding Additional Amendments to the Constitution, dated November 26, 2003. *See also* Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Annette L. Nazareth, Director, Division of Market Regulation (''Division''), Commission, dated December 4, 2003 (''Additional Amendments Letter''). The NYSE intends to file a proposed rule change with the Commission pursuant to section 19(b)(1) of the Act to incorporate these additional Constitutional changes. *See infra* notes 14, 22, 23, 35, 36, 39, 40, and 88.

[5] *See* Letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated November 19, 2003. In Amendment No.1, the Exchange advised that the proposed rule change was approved by unanimous written consent of the Exchange's Board of Directors effective November 13, 2003, and by vote of the members of the Exchange on November 18, 2003. The Exchange noted that, as a result, its internal procedures with respect to the proposed rule change were complete. Amendment No. 1 is simply a technical amendment and thus it is not necessary for the Commission to seek public comment on it.

[6] A list of commenters on the rule proposal, whose comments were received as of December 12, 2003, is attached as Exhibit A to this Order. The public file for the NYSE's proposal, which includes all comment letters received on the proposal, is located at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549–0102.

structure. In short, the Exchange proposes to restructure its governance architecture so that it will have a Board of Directors (''Board'') that is independent of members, member organizations, and listed issuers, and whose membership includes only one officer of the Exchange. The Exchange also proposes to create a Board of Executives that is representative of securities firms, listed issuers, and institutional investors. In addition, the NYSE proposes that its regulatory unit report directly to a fully independent committee of the Board, and not to NYSE management. The Exchange represents that the proposed rule change would guarantee the independence of its regulatory function both from members and member organizations and from inappropriate linkage with its marketplace function, yet would retain sufficient proximity to the marketplace to assure the market sensitivity that, in the Exchange's view, is fundamental to effective regulation.

A description of the most significant changes to the NYSE Constitution follows.

A. Board of Directors

The NYSE proposes to reduce the size of its Board, which previously had 24 members plus as many as three members of NYSE management, to between 6 and 12 members, plus the Chairman of the Board and the Chief Executive Officer (if different than the Chairman). The Board would be required to meet not less than four times per year, and directors would serve one-year terms.[7]

Board members (excluding the Chief Executive Officer) would be required to be independent of the management of the Exchange, the membership of the Exchange, and issuers of securities listed on the Exchange. Among other things, no director (other than the Chief Executive Officer) could be a member of the NYSE; an officer or employee of the NYSE; a person employed by or affiliated, directly or indirectly, with a member organization of the NYSE or with a broker or dealer that engages in a business involving substantial direct contact with securities customers; or an executive officer of a listed issuer. In addition, no director (excluding the Chief Executive Officer) would qualify as independent unless the Board affirmatively determined that the director had no material relationship with the Exchange. The Board would be required to adopt specific standards relating to such determination, comparable to standards required of issuers listed on the Exchange.[8]

The selection process for Board members would be designed to enable the Exchange to comply with the ''fair representation'' requirements of section 6(b)(3) of the Act.[9] Under the proposed amendments to the Constitution, the Nominating & Governance Committee (which, under the proposal, would be composed solely of independent directors) ultimately would be responsible for recommending to the Board candidates for Board membership. The amendments further would require, however, that the ''Industry Members'' of the Board of Executives, described below, recommend candidates constituting twenty percent of the number of directors to be elected by members of the Exchange, but in no event fewer than two directors.[10]

If a single individual serves as both the Chairman and Chief Executive Officer (''CEO''), the Board would be required to designate a director as a ''lead director'' to preside over executive sessions of the Board. The CEO would not be permitted to participate in executive sessions. The Board would be required to publicly disclose the lead director's name and the means by which interested parties could communicate with the lead director.[11]

The Board would be required to compile and distribute an annual nominating report listing the nominees for positions to be elected by the members. The Board would also be required to appoint the members of the Board of Executives.[12]

B. Board of Executives

Pursuant to the proposed Constitutional amendments, the Board would be required to establish a Board of Executives which, subject to the Board's ultimate authority, review, and oversight (and except with respect to the responsibilities delegated to the Standing Committees, discussed below), would advise the CEO in his or her management of the operations of the Exchange.[13] The Board of Executives would consist of the Chairman of Board, who would be the Chairman of the Board of Executives; the CEO (if different than the Chairman); and at least 20 but no more than 25 additional members, who would serve for one-year terms. The Board of Executives would be required to meet not less than six times per year.

The members of the Board of Executives would be required to include at least six individuals who are either the chief executive or a principal executive officer of a member organization that engages in a business with direct contact with securities customers; at least two individuals who are either the chief executive or a principal executive officer of a specialist member organization; and at least two floor representatives other than specialists. The members of the Board of Executives from these categories would be known collectively as the ''Industry Members'' of the Board of Executives. The Board of Executives also would be required to include at least two lessor members who are not affiliated with a broker or dealer in securities; at least four individuals who are either the chief executive or a principal executive officer of an institution that is a significant investor in equity securities, at least one of whom is a fiduciary of a public pension fund; and at least four individuals who are either the chief executive or principal executive officer of a listed company.[14]

If the Board were to increase the size of the Board of Executives, it must strive to maintain approximately the same balance between Industry Members and other members of the Board of Executives as set forth above. If the Board were to increase the size of the Board of Executives, it would also be free to add members to the Board of

[7] NYSE Constitution, Article IV, Section 2.

[8] The Board would be required to adopt these standards by effecting a rule change within the meaning of section 19(b)(1) of the Act. The Commission recently approved revisions to the Exchange's corporate governance standards for its listed issuers that, among other things, set forth criteria for determining whether a director is ''independent.'' *See* Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (''NYSE/Nasdaq Corporate Governance Listing Standards Approval Order'').

[9] 15 U.S.C. 78f(b)(3). Section 6(b)(3) of the Act requires the rules of a national securities exchange to provide for the fair representation of its members in the selection of directors and the administration of its affairs, and provide that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, broker or dealer. *See infra* notes 15–21 and accompanying text for a discussion of fair representation.

[10] *See infra* note 17 and accompanying text.

[11] NYSE Constitution, Article IV, Section 2.

[12] NYSE Constitution, Article IV, Section 1.

[13] NYSE Constitution, Article V, Section 1.

[14] *Id.* The Commission notes that the reconstituted NYSE Board recently voted to further amend the provisions of the NYSE Constitution relating to the composition of the Board of Executives to: (1) Add a representative of individual investors who are retail clients of member organizations; and (2) remove the requirement that specialist representatives be chief executive or principal executive officers of specialist firms, but require that each such representative be registered as a specialist and spend substantial time on the floor of the Exchange. *See* Additional Amendments Letter, *supra* note 4.

Executives who represent other elements of the Exchange community.

C. Fair Representation Requirements

As a registered national securities exchange, the NYSE must adhere to section 6(b)(3) of the Act,[15] which requires the NYSE to assure a fair representation of its members in the selection of its directors and the administration of its affairs, and provide that one or more directors be representative of issuers and investors.[16] In order to satisfy this fair representation obligation, the NYSE proposes to provide in its amended Constitution that the Industry Members of the Board of Executives would recommend to the Board candidates constituting 20% of the directors to be elected by the members of the Exchange, but in no event fewer than two directors.[17] The Constitution would state that the Industry Members are required to propose persons who, in their opinion, are committed to serving the interests of the public and strengthening the Exchange as a public market, and will allow the Exchange to meet the fair representation requirements set forth in the Act.[18]

The Constitution would provide that the directors elected by Exchange members must include directors who will enable the Exchange to comply with the requirements of section 6(b)(3) of the Act.[19] To this end, the proposed amendments also would require the Nominating & Governance Committee, in meeting its responsibilities to recommend candidates for Board membership, to propose candidates who are, in its opinion, committed to serving the interests of the public and strengthening the NYSE as a public securities market, at least one of whom is intended to allow the Exchange to meet the requirements of section 6(b)(3) of the Act concerning issuers and at least one of whom is intended to allow the Exchange to meet the requirements of section 6(b)(3) of the Act concerning investors.[20]

The NYSE also proposes an amendment to permit members of the Exchange to propose, by petition, nominees for positions that are to be filled at the elections prescribed in the Exchange's Constitution.[21] Specifically, any such nominee would be required to be endorsed by not less than forty members. No member would be permitted to endorse more than one nominee. However, not less than one hundred members would be permitted to propose, by petition, an entire ticket or any portion of a ticket. If the Board finds that an individual proposed by petition is eligible for election, then the individual would be deemed a nominee for the relevant office or position.

D. Committees

1. Committees Consisting Solely of Directors

The proposed amendments to the NYSE Constitution would provide for the appointment of two types of Standing Committees of the Exchange: (a) Standing Committees composed entirely of directors other than the CEO; and (b) Standing Committees that are joint committees composed of both directors other than the CEO and members of the Board of Executives. The Board would appoint the Standing Committees and their respective chairpersons at its annual organizational meeting, and the Board would be required to adopt a charter for each Standing Committee consistent with the duties of that committee as prescribed in the NYSE Constitution.[22]

The amendments would provide for the appointment of four Standing Committees that would consist solely of directors other than the CEO and would report to the Board: (a) The Nominating & Governance Committee; (b) the Human Resources & Compensation Committee; (c) the Audit Committee; and (d) the Regulatory Oversight & Regulatory Budget Committee. Each of these Standing Committees could be combined with any other Standing Committee in this group, or be subdivided into one or more Standing Committees.[23]

The Nominating & Governance Committee would be responsible for: (a) Recommending to the Board candidates for Board membership; (b) recommending to the Board candidates for membership on the Board of Executives; (c) conducting the Board's annual governance review; (d) reviewing and recommending the Exchange's corporate governance guidelines; (e) establishing an appropriate process for, and overseeing the implementation of, the Board's self-assessments (including Board self-assessment, committee self-assessments and director assessments) and the Board of Executives' self-assessments; (f) recommending director compensation; and (g) succession planning for the Chairman and the CEO.

In addition to the criteria that the Nominating & Governance Committee would be required to follow in recommending candidates for the Board, discussed above,[24] the Committee also would be required to establish procedures to solicit the input of investors in equity securities and members of the Exchange regarding Board candidates.

The Nominating & Governance Committee also would be required to solicit input from the various Exchange communities regarding candidates for appointment by the Board to the Board of Executives. Consensus recommendations for candidates for the Board of Executives representing specialists, floor representatives, and lessor members [25] that are put forward by the respective representatives of these groups would be required to be forwarded to the Board as the recommendations of the Nominating & Governance Committee, unless and to the extent the committee determines that a candidate does not qualify for the position.

The Human Resources & Compensation Committee would be responsible for: (a) Reviewing and approving corporate goals and objectives relevant to the compensation

[15] 15 U.S.C. 78f(b)(3).

[16] *See supra* note 9.

[17] NYSE Constitution, Article IV, Section 2. The Exchange has confirmed that the slate of candidates approved by the Board would constitute a full slate of candidates and 20% of that slate (but in no event fewer than two candidates) would be candidates proposed by the Industry Members. Telephone conversation between James F. Duffy, Senior Vice President and Associate General Counsel, NYSE, and Nancy J. Sanow, Assistant Director, Division, Commission, on December 10, 2003.

[18] NYSE Constitution, Article V, Section 1.

[19] NYSE Constitution, Article IV, Section 2.

[20] NYSE Constitution, Article IV, Section 12. The Nominating & Governance Committee also would be required to establish procedures to solicit the input of investors in equity securities and members of the Exchange regarding Board candidates. *See infra* at note 24 and accompanying text.

[21] NYSE Constitution, Article III, Section 1.

[22] NYSE Constitution, Article IV, Section 12. The Commission notes that the reconstituted NYSE Board recently voted to further amend the Constitution to grant Standing Committees the authority to engage independent legal counsel and other advisors, but the committees may not use counsel or advisors who advise Exchange officers or employees. *See* Additional Amendments Letter, *supra* note . The Exchange confirms that the reconstituted Board also has the authority to engage independent legal counsel and other advisors. Telephone conversation between Darla C. Stuckey, Corporate Secretary, NYSE, and Nancy J. Sanow, Assistant Director, Division, Commission, on December 15, 2003.

[23] The Board could also constitute itself as a committee of the whole in respect of a Standing Committee consisting solely of directors. However, if the Board does so with respect to the activities of the four Standing Committees enumerated above, the CEO would be recused from such Board deliberations. The Commission notes that the reconstituted NYSE Board recently voted to further amend the Constitution to provide that the CEO would be recused from deliberations of the Board with respect to the four Standing Committees whether it is acting as the Board or as a committee of the whole. *See* Additional Amendments Letter, *supra* note 4.

[24] *See supra* note and accompanying text.

[25] *See supra* Section II.B.

of the CEO, evaluating the CEO's performance in light of these goals and objectives, and, together with the other directors elected by the members, determining and approving such compensation; (b) reviewing and approving recommendations regarding compensation and personnel actions involving senior Exchange personnel, including recommendations received from the Regulatory Oversight & Regulatory Budget Committee regarding senior regulatory personnel; and (c) reporting annually to the members of the Exchange and the public on the compensation of the five most highly compensated officers of the Exchange, as well as director compensation, and on the compensation philosophy and methodology used to award the compensation, including information relating to appropriate comparisons, benchmarks, performance measures and evaluation processes consistent with the mission of the Exchange.

The Audit Committee would be responsible for assisting the Board in its oversight of the integrity of the Exchange's financial statements, the Exchange's compliance with legal and regulatory requirements, and the independent auditor's qualifications and independence. The Audit Committee would have direct responsibility for: (a) The hiring, firing and compensation of the independent auditor; (b) overseeing the independent auditor's engagement; (c) meeting regularly in executive session with the auditor; (d) reviewing the auditor's reports with respect to the Exchange's internal controls; (e) pre-approving all audit and non-audit services performed by the auditor; and (f) determining the budget and staffing for the Internal Audit Unit. The amended Constitution would state that the Audit Committee charter must contain additional duties and responsibilities comparable to those required of issuers listed on the Exchange.[26]

The Regulatory Oversight & Regulatory Budget Committee would be responsible for: (a) Assuring the effectiveness, vigor and professionalism of the Exchange's regulatory program; (b) determining the budget for the Exchange's Regulatory Group, Listings and Compliance Unit, Hearing Board, Arbitration Unit, and Regulatory Quality Review Unit; and (c) oversight of the Exchange's Regulation, Enforcement & Listing Standards Committee and Regulatory Quality Review Unit. The Regulatory Oversight & Regulatory Budget Committee also would determine annually the Exchange's regulatory plan, budget, and staffing proposals, and would be responsible for assessing the Exchange's regulatory performance and recommending compensation and personnel actions involving senior regulatory personnel to the Board's Human Resources & Compensation Committee for action.

2. Joint Committees

The amended Constitution would provide for a Regulation, Enforcement & Listing Standards Committee, which would be a Joint Committee composed of both directors (other than the CEO) and members of the Board of Executives, including at least one Industry Member, as selected by the Board. A majority of the members of the committee voting on a matter subject to its vote, however, would be required to be Board directors.[27]

The Regulation, Enforcement & Listing Standards Committee would report to the Regulatory Oversight & Regulatory Budget Committee, and would: (a) review and provide general advice with respect to the Exchange's programs for market surveillance, member and member organization regulation and enforcement, and the listing and de-listing of securities; and (b) hear appeals of disciplinary determinations and determinations to de-list a listed company.[28]

Under the proposed changes to the Constitution, the Board could appoint additional Joint Committees from time to time, provided that each Joint Committee would consist of at least one director other than the CEO.[29]

3. Committees With Directors From the Board and the Board of Executives

The Proxy Statement noted that the Market Structure & Strategy, Quality of Markets/Public Policy and Finance Committees would be comprised of members of both the Board of Directors and Board of Executives, but there must be at least one independent director on such committees and all such committees would report to the Board.[30]

E. Special Committees, Advisory Committees, and Other Bodies

The amended Constitution would provide for the appointment of special committees, subcommittees, advisory committees, boards, or councils from time to time in the Board's discretion, and could be comprised of individuals who are not Board directors or members of the Board of Executives.[31]

F. Officers

The officers of the Exchange would include the Chairman of the Board; the CEO; the President, if there be one; the Chief Regulatory Officer; one or more Vice Presidents; a Secretary; a Treasurer; a Controller; and such other officers as the CEO may propose, subject to the approval of the Board.[32] The proposed amendments would permit any of these offices to be occupied by more than one individual.

The Board would appoint the Chairman, the CEO, and the Chief Regulatory Officer. If the Chairman is neither the CEO nor chosen from among the directors elected by the members, he or she must satisfy the independence criteria set forth in Article IV, Section 2 of the Constitution. The CEO would be authorized to appoint the President and the other officers of the Exchange, subject to the approval of the Board.[33]

No officer of the Exchange would have any authority to recommend candidates for the Board or for appointment by the Board to any committee. However, the Board or the Nominating & Governance Committee would be permitted to solicit the input of any Exchange officer at its own initiative and discretion.

G. The Chairman

The Chairman of the Board would preside at all meetings of the Board and the Board of Executives. If the Chairman is also the CEO, however, he or she would not participate in executive sessions of the Board. The Chairman would also be required to make an Annual Report on the Exchange's activities to a Plenary Session.[34]

H. The CEO

The CEO, subject to the authority of the Board, would be responsible for the management and administration of the affairs of the Exchange.[35]

[26] NYSE Constitution, Article IV, Section 12.

[27] NYSE Constitution, Article IV, section 12(b)(1).

[28] *Id.*

[29] NYSE Constitution, Article IV, section 12(b)(2).

[30] *See* Proxy Statement.

[31] NYSE Constitution, Article IV, section 13.

[32] NYSE Constitution, Article VI, section 1. The amendments would remove the positions of Executive Vice Chairman and Vice Chairmen and add the positions of CEO and Chief Regulatory Officer to the list of the Exchange's officers.

[33] *Id.*

[34] NYSE Constitution, Article VI, section 2. The Board and Board of Executives must meet jointly in a Plenary Session at least twice a year. The Chairman would chair all Plenary Sessions. NYSE Constitution Article V, section 11.

[35] NYSE Constitution, Article VI, section 3. As noted above, the CEO would not appoint the Chief Regulatory Officer, and could not participate in executive sessions of the Board. In addition, as described in the Additional Amendments Letter, the reconstituted NYSE Board voted to further amend the Constitution, subject to Commission approval, to clarify that the CEO's responsibilities are subject to the specific provisions in the Constitution regarding the segregation of the

Continued

I. The Chief Regulatory Officer

The Chief Regulatory Officer would be responsible for the management and administration of the regulatory functions of the Exchange. The Chief Regulatory Officer would be subject to the authority of the Board and the Regulatory Oversight & Regulatory Budget Committee, and to the administrative standards and policies established by the CEO made applicable to the Chief Regulatory Officer by the Regulatory Oversight & Regulatory Budget Committee.[36]

J. Other Officers

The President and other officers would have such functions and responsibilities as the CEO assigns, subject to the approval of the Board, and, in the case of senior regulatory personnel, subject to the specific oversight and control of the Regulatory Oversight & Regulatory Budget Committee.[37]

K. Delegation Authority

The amended NYSE Constitution would provide that the Board may delegate such of its powers as it may determine to the Board of Executives, to such officers of and employees of the Exchange, and to such committees, composed either of directors or otherwise, as the Board may authorize.[38] Notwithstanding the foregoing, however, the Board would not be permitted to delegate, and no committee would be permitted to re-delegate, to the Board of Executives or to any committee not consisting solely of directors, authority to adopt rules under Section 1 of Article VIII (dealing with rulemaking), or Section 1 of Article IX (dealing with disciplinary rules). Moreover, the Board would not be permitted to delegate, and no committee would be permitted to re-delegate, to the Board of Executives or to any committee not consisting solely of directors, authority to act on any subject matter described in the Constitutional provisions concerning the responsibilities of the Nominating & Governance Committee; the Human Resources & Compensation Committee; the Audit Committee; the Regulatory Oversight & Budget Committee; and the Regulation, Enforcement & Listing Standards Committee.[39] Any exception to these delegation provisions would require a rule change filed with the Commission within the meaning of section 19(b)(1) of the Act.[40]

The proposed amendments also would provide that the Board could continue to exercise any and all powers that it has delegated notwithstanding such delegation, and that the Board could exercise such review and oversight over the exercise of (or omission to exercise) any delegated authority as it might at any time determine.[41]

L. Amendments to the Constitution

Under the proposed amendments, the Board would be permitted to amend or repeal specified provisions of the Constitution, or adopt new provisions, by the affirmative vote of a majority of the entire Board in favor of the amendment or repeal, or by the members of the Exchange who are entitled to vote thereon.[42] The specified provisions include Articles of the Constitution relating to: the Board of Directors (excluding the provision relating to the limitation on the delegation of authority); the Board of Executives (excluding that provision which requires the Board of Executives to be a reasonably balanced representation of Exchange communities); the officers of the Exchange; and the indemnification of Exchange directors, officers or employees. The remaining provisions of the Constitution may be amended or repealed, and new provisions may be adopted, only by the members of the Exchange who are entitled to vote thereon.

However, no Constitutional amendment approved by the majority of the entire Board would be permitted to take effect without the vote of members until the expiration of two weeks from the date the proposed Constitutional amendment was first furnished to members.[43]

M. Transition

The proposed amendments also would add a new Article XVI to the Constitution, to provide for a ''Transition Period'' that commences on the date that the amended and restated Constitution is approved by members and ending on the date of the next annual meeting of the Exchange and that is intended to allow for continuity of the Exchange's governance during the interim period.[44] Upon expiration of the Transition Period, Article XVI would have no further force and effect. Article XVI further would note that the extraordinary circumstances under which the restated and amended Constitution was proposed and the initial Board of Directors was constituted caused the Exchange to dispense with certain requirements, including: (a) Use of the Nominating Committee to nominate directors; (b) the opportunity for members to petition to nominate additional director candidates; and (c) approval of the proposed amendments by the Board in accordance with the prescribed time frames. The amended Constitution would state that all such requirements are waived and the actions take in contravention of all such requirements are ratified.[45]

N. Other Governance Changes Proposed by the NYSE

The NYSE has directly implemented other governance changes that are in

regulatory functions of the Exchange. *See* Additional Amendments Letter, *supra* note 4.

[36] NYSE Constitution, Article VI, section 4(a). As described in the Additional Amendments Letter, the reconstituted NYSE Board voted to further amend the Constitution to clarify that the President could not appoint any regulatory officers. *See* Additional Amendments Letter, *supra* note 4.

[37] NYSE Constitution, Article VI, section 4(b).

[38] NYSE Constitution, Article IV, section 14. The amended Constitution would also provide that any committee of directors to which authority is delegated to adopt rules under Article VIII, section 1 (dealing with the operation and administration of the Exchange) and Article IX, section 1 (dealing with the discipline of members, member organizations and others) must include at least one director nominated by the Industry Members of the Board of Executives.

[39] The Commission notes that the reconstituted NYSE Board recently voted to amend this proposed provision to allow the Board to delegate rulemaking authority on the subjects normally confined to the Board or Standing Committees consisting solely of directors to an Exchange officer in between Board meetings, as necessary, subject to informing the Board at its next meeting and, in the case of regulatory matters, subject to the approval of the Chief Regulatory Officer. *See* Additional Amendments Letter, *supra* note 4.

[40] NYSE Constitution, Article IV, section 14. The Commission notes that the reconstituted Board recently voted to further amend the Constitution to add officers and employees of the Exchange to the provision prohibiting the Board to delegate, and a committee to redelegate, authority to adopt rules under Article VIII, section 1 or Article IX, section 1 of the Constitution, or to act on any subject matter described in Article IV, section 12(a) or (b)(1), except by effecting a proposed rule change within the meaning of section 19(b) of the Act. *See* Additional Amendments Letter, *supra* note 4.

[41] NYSE Constitution, Article IV, section 14(b).

[42] NYSE Constitution, Article XIV, section 1. The Commission notes that any further changes to the NYSE Constitution would be required to be filed with the Commission pursuant to section 19(b) of the Act.

[43] The NYSE also proposes that the Board may make such changes to a proposed amendment approved by the affirmative vote of a majority of the entire Board as it may deem necessary or appropriate to carry out the intention of such proposed amendment without the need for a further waiting period. As noted above, changes to the NYSE Constitution would be required to be filed with the Commission pursuant to section 19(b) of the Act.

[44] The amended and restated Constitution was approved by NYSE members on November 18, 2003. *See* Amendment No. 1, *supra* note 5.

[45] The Commission notes that the revisions to the NYSE Constitution set forth in the proposed rule change are effective upon Commission approval of the proposed rule change.

addition to the revisions to the NYSE Constitution approved in this Order. Those other changes include, among other things, commitments to increase the transparency of the Board and Board Committees by requiring the disclosure of Committee charters and bases for certain Board and Committee action; to provide a means by which members and investors may communicate with the NYSE's non-management directors; and to provide annual reports regarding certain activities of the Board and several key committees, including an annual report detailing the charitable activities of or on behalf of the Exchange.

III. Summary of Comments on NYSE Proposal

The Commission received a total of 18 comment letters on the NYSE proposal.[46] A number of commenters broadly supported the NYSE's proposed governance changes, at least to the extent that the changes are considered a positive initial step toward reform.[47] Many of the commenters, however, stated that the proposals did not go far enough. For example, they expressed concerns about the adequacy and effectiveness of the NYSE's revisions to its governance, particularly with respect to the composition of the Board of Directors, the establishment of the Board of Executives, and the structure of the regulatory function.[48] Several commenters also urged the Commission not to approve the proposal until the NYSE had made further changes to it, arguing that the proposal did not go far enough to restore investor confidence.[49] The commenters generally addressed issues falling into one or more of the categories discussed below.

A. The Board of Directors

A number of commenters criticized the proposed composition of the Board of Directors for failing to include investor representatives on the Board.[50] Two commenters referred to investors as being the ''ultimate constituency'' of the Exchange and consequently there should be several investor representatives on the Board.[51] Another commenter advocated that the Board should have ''significant representation'' from the public institutional investor community, and yet another commenter stated that approximately one-third of Board seats should be reserved for investor representatives.[52] In contrast, one commenter criticized the proposed Board composition for excluding industry representatives from serving as directors.[53] This commenter argued that industry professionals bring valuable experience and insight to the Board in addressing regulatory and other issues, particularly in hectic times.

Four commenters questioned the independence of the directors.[54] In particular, these commenters suggested that director independence is compromised by the fact that directors are elected by the Exchange members or by their ties to corporate America. One commenter proposed having the Commission and the North American Securities Administrators Association each annually appoint individuals having a background in securities regulation to one seat on the Board in order to ensure some independent and qualified representation.[55]

Several commenters questioned the ability of the reconstituted Board to operate effectively.[56] One of these commenters raised concerns regarding the directors' availability (noting in particular one candidate who serves on eight Boards for listed companies in addition to other long term commitments, and two other candidates who live in the United Kingdom). This commenter expressed doubts that the Board would be able to handle the responsibilities of regular Board meetings, meetings with the Board of Executives, and overseeing and serving on the various key standing committees.[57] Another commenter questioned the ability of a small body of public directors, meeting only four times a year, to function without help from securities professionals.[58] One commenter also expressed concern about the proposed directors' lack of securities industry experience, as well as their ties to corporate America and/or the financial services industry.[59]

B. Board of Executives

Several commenters disputed the efficacy of having the proposed Board of Executives. One commenter argued that the creation of a Board of Executives is an inadequate substitute for direct industry participation in exchange governance.[60] Two commenters characterized the existence of the Board of Executives, in addition to the Board of Directors, as an unnecessarily complex structure, having no advantages over the traditional Board structure with independent key committees, and as setting a poor example for listed companies.[61] One of the commenters also expressed a concern that the dual Board structure would obfuscate rather than enhance accountability.[62]

Another commenter criticized the composition of the Board of Executives for not having adequate ''buy-side'' representation, arguing that the Board of Executives as proposed would be composed primarily of ''sell-side'' representation.[63] This commenter advocated increasing the number of members representing individual and institutional investors.

C. Regulatory Function

A majority of commenters called for greater independence of the regulatory function from the business operation of the NYSE.[64] Most of these commenters advocated a complete separation of the regulatory function from the Exchange.[65] Several commenters

[46] Exhibit A to this Order contains a list of comment letters received by the Commission on the NYSE proposal as of December 12, 2003, including the citations to the comment letters referenced in this Order. The public file for the proposed rule change includes a letter to Chairman Donaldson from NYSE Interim Chairman & CEO John S. Reed regarding the NYSE proposal. The Reed Letter stated that the SRO model can properly fit within the governance structure of the Exchange and pointed to five design elements that support this view. For example, the Reed Letter pointed to a pure ''outside'' ''independent'' Board as a core requirement, and a special Oversight Committee of the Board with its specific functions and a charter that will be made public, as design elements. The Reed Letter also pointed out that the fact that the Exchange hosts the trading environment for members but does not directly participate in members' results helps create a distance between business issues and management. Another design element noted in the Reed Letter is that the success of the Exchange requires a tough but fair regulatory regime that is publicly visible. The Reed Letter noted the existence of ''tight'' SEC oversight as the final design element. The Second Reed Letter, *infra* Section IV, is also contained in the public file for the proposed rule change.

[47] *See* Saul Letter, ICI Letter, First CII Letter, and SIA Letter.

[48] *See* Saul Letter, Peake Letter, CalPERS Letter, CALSTRS Letter, ICI Letter, First CII Letter, PIABA Letter, SIA Letter, State Treasurers' Letter, Knotter Letter, and Ohio Retirement Systems Letter.

[49] *See* CalPERS Letter, CALSTRS Letter, and ICI Letter.

[50] *See* CalPERS Letter, CALSTRS Letter, ICI Letter, PIABA Letter, State Treasurers' Letter, and Ohio Retirement Systems Letter.

[51] *See* ICI Letter and State Treasurers' Letter.

[52] *See* CALSTRS Letter and CalPERS Letter, respectively.

[53] *See* Saul Letter.

[54] *See* Anderson Letter, CALSTRS Letter, PIABA Letter, Knotter Letter and Second CII Letter.

[55] *See* PIABA Letter.

[56] *See* Saul Letter, Peake Letter, and PIABA Letter.

[57] *See* Peake Letter.

[58] *See* Saul Letter.

[59] *See* PIABA Letter.

[60] *See* Saul Letter.

[61] *See* CalPERS Letter and CALSTRS Letter.

[62] *See* CALSTRS Letter.

[63] *See* ICI Letter.

[64] *See* Peake Letter, CalPERS Letter, Merrill Letter, CALSTRS Letter, First CII Letter, SIA Letter, State Treasurers' Letter, Second CII Letter, Ohio Retirement Systems Letter, and Sonoma Letter.

[65] *See* Peake Letter, CalPERS Letter, Merrill Letter, First CII Letter, SIA Letter, Second CII Letter,

Continued

suggested that the Commission consider alternative regulatory models, including merging the Exchange's regulatory function with that of the NASDR, adopting a ''hybrid SRO,'' or having the Commission take a more direct regulatory role.[66]

Several commenters questioned the effectiveness of the regulatory oversight of a Board whose members are directly elected by the persons they are regulating.[67] One commenter proposed that a nomination model similar to that in place for the Public Company Accounting Oversight Board be adopted for nominating the directors charged with overseeing the regulatory arm of the Exchange, with the SEC having sole responsibility of appointing the directors of the oversight bodies.[68]

In contrast, another commenter argued that member participation in regulation was necessary, and that a Board of Directors consisting solely of public directors would find itself ''severely handicapped'' in dealing with regulatory issues, despite the presence of an advisory Board of Executives.[69] This commenter also expressed concern that the proposal represents a major change in regulation and that it was proposed without a full discussion of the consequences. This commenter argued that one of the possible consequences of excluding member representatives from the Board is that Exchange members might turn away from the Exchange and the auction system, resulting in internalized order flow and a fragmented market. This commenter also stated that member participation makes regulation more ''palatable'' and generates awareness of regulatory issues.

D. Committee Structure

One commenter expressed concern that, with respect to the Market Structure Committee, a mixed committee of members of the Board of Directors and the Board of Executives, the proposal did not explicitly require a majority of directors to be members of this committee.[70] This commenter criticized this omission, stating that the most crucial part of the regulatory structure is market structure, particularly in light of recent controversies. This commenter also criticized the fact that the Nominating & Governance Committee is composed solely of existing directors, and has no outside members, and argued that this creates a self-perpetuating Board.

E. Chairman and CEO

Two commenters expressed concern that allowing the CEO and Chairman to be the same person would result in a concentration of too much power, particularly in light of the fact that, under this proposal, the Chairman also would act as the sole liaison between the Board of Directors and the Board of Executives.[71] Another commenter also urged separation of the Chairman and CEO functions to enhance the independence of the Board of Directors.[72]

F. Transparency

Several commenters proposed that the Exchange take additional steps to improve its transparency,[73] advocating that the Exchange should set the ''gold standard'' for disclosure.[74] One commenter stated that the Exchange should be under the same disclosure requirements as listed companies.[75] In addition, this commenter asserted that the Exchange should disclose all ties between Board members, that the Exchange should be banned from making any charitable or political contributions, and that the Exchange should post all documents relating to Board and committee reports and compensation disclosures on its Web site.[76] Another commenter proposed that all key Exchange committees be required to publish annual reports on how they functioned and executed their duties.[77]

In addition, a few commenters urged that final details on the compensation package of the Exchange's former Chairman be made public.[78]

IV. NYSE's Response to the Comment Letters

The Exchange, through its Interim Chairman and CEO, submitted a letter dated December 11, 2003, which responds to issues raised by the commenters.[79] The Exchange noted that the proposed rule change was ''intended to solve an immediate board-level governance problem faced by the Exchange'' and was ''not intended to address all structural issues that the Exchange, and indeed our industry, now face.''

The Exchange took issue with the view of several commenters that the Board should include one or more individuals to represent the interest of the public investor. The Exchange stated that ''the single most important feature of the proposed rule change is that, with the exception of the CEO, the [Board] is completely independent.'' In that regard, the Exchange noted that ''[a]s the Exchange's fiduciaries, our directors will not have the agenda of a customer, an owner or user, and will not represent any single constituent group.'' Therefore, the Exchange concluded that ''it would be inappropriate to seek to specifically include [Board] members that are representative of the buy-side or of any particular constituent group.''

The Exchange acknowledged that individual investors are the Exchange's ''ultimate constituency.'' However, the Exchange stated that ''individual investors trading on the Exchange through broker-dealers in small volumes have interests that conflict with other individual investors who participate in the market through public or private funds trading in larger volumes.'' Thus, the Exchange stated that the ''hard-won lesson is that the only way to sort out these issues without bias or conflicts is through an independent board whose primary goal is to 'do the right thing' for the individual investor as such.''

Finally, in response to commenters who believed that there should be an individual investor representative on the Board of Executives, the Exchange noted that it intends to amend its Constitution to provide for an individual investor representative on the Board of Executives.

In response to comments regarding regulation and the merits of separating the regulatory and market functions of the Exchange, the NYSE reiterated its position as set forth in the proposed rule change that the filing ''does not ask the Commission to approve either the continuation of self-regulation in the United States or at the Exchange.'' The Exchange noted that ''[i]f the Commission decides that broker-dealers should continue to regulate themselves through national securities exchanges, [the] Exchange's new governance architecture provides the best model for resolving and managing conflicts of interest inherent in self-regulation while maintaining the marketplace proximity requisite for optimizing regulatory intervention in delicate market mechanisms.'' The Exchange added that it expects to implement its model

Ohio Retirement Systems Letter, and Sonoma Letter.

[66] *See* Peake Letter, Second CII Letter, SIA Letter, and Sonoma Letter.

[67] *See* Anderson Letter, CALSTRS Letter, PIABA Letter, and Knotter Letter.

[68] *See* Second CII Letter.

[69] *See* Saul Letter.

[70] *See* Peake Letter.

[71] *See* CalPERS Letter and CALSTRS Letter.

[72] *See* Ohio Retirement Systems Letter.

[73] *See* CALSTRS, First CII Letter, State Treasurers' Letter, and Second CII Letter.

[74] *See* CALSTRS and Second CII Letter.

[75] *See* First CII Letter.

[76] *See also* Second CII Letter.

[77] *See* CALSTRS Letter.

[78] *See* CALSTRS Letter and State Treasurers' Letter.

[79] *See* Second Reed Letter.

through an independent Board and through a division of regulatory and marketplace functions within the Exchange, including by having a Chief Regulatory Officer reporting directly to the Board of Directors.

In conclusion, the Exchange noted that its proposal seeks to address a ''very immediate board-level governance problem'' and urged that ''the Commission approve the proposed rule change as soon as possible so that the Exchange can continue to function effectively as a marketplace while revitalizing its regulatory function and addressing other important issues from a much improved governance platform.''

V. Discussion

The Commission has considered the Exchange's proposed rule change and finds that, in the context in which they were submitted, the proposed amendments to the NYSE Constitution are consistent with the Act and the rules and regulations promulgated thereunder that are applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Act.[80] Specifically, the Commission finds that, in this context, the amended and restated Constitution is consistent with section 6(b)(1) of the Act[81] which requires that the exchange be ''so organized and [have] the capacity to carry out the purposes of [the Act]'' and to ''enforce compliance by its members and persons associated with its members with the provisions of [the Act].'' The Commission also finds that, in this context, the amended and restated Constitution is consistent with section 6(b)(3) of the Act,[82] which requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. In addition, the Commission finds that, in this context, the amended and restated Constitution is consistent with section 6(b)(5) of the Act[83] in that it is designed, among other things, to facilitate transactions in securities; 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, and does not permit unfair discrimination among issuers. Further, the Commission finds that, in this context, the amended and restated Constitution is consistent with section 6(b)(7) of the Act,[84] which, among other things, requires that the rules of a national securities exchange provide a fair procedure for the disciplining of members and persons associated with members.

Recent events at the Exchange have called into question whether its Board of Directors and key Board committees have been sufficiently independent from NYSE management to assure that these governing bodies exercise their judgment in an objective and autonomous manner. The Exchange quickly confronted its governance issues by appointing an Interim Chairman, without any ties to the Exchange, and by proposing amendments to its Constitution that would significantly alter its governance structure. Moreover, the Exchange has proposed changes to its Constitution that are designed to assure the independence of its regulatory unit from NYSE management and from the entities that it regulates. At the same time, the NYSE has created a mechanism of nomination to the Board of Directors designed to fulfill the ''fair representation'' requirements applicable to national securities exchanges, as set forth in section 6(b)(3) of the Act.[85]

The Commission discusses below significant aspects of the amendments to the NYSE Constitution.

A. Board of Directors

The amended Constitution provides for a smaller board, composed of independent directors (other than the CEO). Board members (excluding the CEO) must be independent from the management of the Exchange, from the members of the Exchange, and from the issuers listed on the Exchange. In addition, the Exchange must make an affirmative determination of a director's independence. The NYSE also commits to adopting specific standards requiring that the independence determination be comparable to the standards required of listed issuers. Generally, the Board will supervise the regulatory function; monitor the Exchange's performance; approve the Exchange's strategy; hire, fire and determine the compensation of senior management; create a succession plan; and ensure appropriate behavior by Exchange employees, officers and directors.

The Commission believes that the proposal to completely replace the previously large, mixed-composition NYSE Board with a smaller board composed of independent directors (other than the CEO) should increase the likelihood that the directors will be free of any relationship that might impair, or appear to impair, the directors' ability to make judgments in the best interest of the Exchange and investors. The changes to the Constitution explicitly prohibit a director from being a member or lessor member, an officer or employee of the Exchange (except for the CEO), a person employed by or affiliated with a member organization or with a broker-dealer that has substantial direct contact with securities customers, or an executive officer of a listed issuer. Not only must the Board make an affirmative determination that the director (other than the CEO) has no material relationship with the Exchange, it also must assess the director's eligibility according to specific standards relating to independence that are comparable to the standards the NYSE now requires of its listed companies.[86] Indeed, the Commission notes that the NYSE proposal goes one step further than the new requirements for NYSE listed companies because the NYSE will have a board composed of independent directors (except for the CEO), whereas NYSE listed companies must have only a majority of independent directors on their boards.[87] Several commenters raised doubts about the independence of the NYSE directors because of the ties that directors may have to corporate American and/or the financial industry. Also, a few commenters advocated a greater role by the Commission in appointing NYSE directors in order to further assure the directors' independence. The Commission believes that this ''independence'' standard for the NYSE Board should benefit the Exchange by assuring that key decisions are made by persons free from material relationships

[80] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C.78c (f).

[81] 15 U.S.C. 78f(b)(1).

[82] 15 U.S.C. 78f(b)(3).

[83] 15 U.S.C. 78f(b)(5).

[84] 15 U.S.C. 78f(b)(7).

[85] 15 U.S.C. 78f(b)(3).

[86] See NYSE Constitution Article IV, Section 2, which states that the Exchange ''shall adopt specific standards relating to such determination, comparable to the standards required of issuers listed on the Exchange, by effecting a rule change within the meaning of section 19(b)(1) of the Act.'' 15 U.S.C. 78s(b)(1). *See also* NYSE/Nasdaq Corporate Governance Listing Standards Approval Order. The Commission expects the NYSE to file shortly after issuance of this Order a proposed rule change pursuant to section 19(b) of the Act that contains independence standards for NYSE directors comparable to those recently adopted for its listed issuers.

[87] The Commission notes that the NYSE's CEO would be the only director that would not meet the definition of ''independence.''

with—and thus from potentially improper influence by—the Exchange or the entities it regulates.

Several commenters expressed concerns about the composition of the Board, including the lack of investor or industry representation, and issues regarding the ability of the directors to operate effectively, given each director's time constraints and the relatively small number of times the Board is required to meet. The Commission believes that, at this point, the NYSE has taken steps designed to assure that the concerns of investors are adequately represented on the NYSE Board. The NYSE has proposed that its new board be independent of specific constituencies, most notably broker-dealer members of the Exchange. In this manner, the NYSE intends the Board to be able to consider the needs of the entire exchange community, including large and small investors, issuers, and securities firms. The Commission notes that the Nominating & Governance Committee will establish procedures to solicit the input of investors regarding Board candidates, and that the committee is explicitly required to nominate a director that represents investors, as discussed in more detail below.

In addition, some commenters expressed concern that permitting the Chairman and CEO to be the same person would result in too great a concentration of power, and some commenters advocated a formal separation of the two positions. The Commission notes that the NYSE has established constraints on the ability of a combined Chairman-CEO to influence decisions that should be made by persons independent of Exchange management. For example, the NYSE's proposal prohibits the CEO from participating in executive sessions of the Board so that, if there is a combined Chairman-CEO, a ''lead director'' must be designated to preside over executive sessions.[88] In the Commission's view, these structural changes are designed to help assure the independence of the Board from undue management pressures and, in the context of the amendments to the Constitution before the Commission, should be approved.

B. Board of Executives

The NYSE proposes to create a Board of Executives composed of from 20 to 25 individuals who are drawn from clearly defined segments of the NYSE constituencies, including representatives from the retail broker-dealer, specialist, floor broker, lessor member, institutional investor, and listed company communities. The Board of Executives' main role is to advise the CEO in his or her management of the Exchange's operations. The Industry Members of the Board of Executives, representing member organizations, specialist organizations and floor representatives, are to recommend candidates constituting 20% of the members to be elected, but no fewer than two directors.

A number of commenters questioned the efficacy of the Board of Executives and the composition of the Board of Executives, and several stated that a dual board structure is unnecessarily complex and offers few advantages.

The Commission believes that the NYSE's creation of a Board of Executives, composed of individuals from the various Exchange constituencies, is reasonable in the context of an independent Board of Directors. The Board of Executives provides a useful mechanism designed to assure that various Exchange stakeholders continue to have a voice in the decisions of the Exchange; yet the Board of Directors, the body charged with governance of the Exchange and regulation of its members, is independent. The Commission notes that the concept of self-regulation is based on the principle that regulation is most effective when it is done as close as possible to the regulated activity. That principle becomes strained, however, if those in charge of regulation are dependent or aligned with those engaged in the regulated activity. The NYSE has taken steps to address this concern by providing for a self-regulatory function reporting to an independent Board. The Commission believes that the Board of Executives is designed to strike an appropriate balance by allowing representatives of those groups that have a day-to-day stake in the affairs of the Exchange to continue to have a voice, but not the leading role, in the Exchange's governance.

C. Fair Representation

Section 6(b)(3) of the Act[89] imposes specific obligations on the NYSE as a registered national securities exchange to ensure that members are fairly represented in the selection of its directors and the administration of its affairs. The Commission believes that, in this context, the NYSE's proposal is consistent with this mandate.

Under the amended Constitution, NYSE members would continue to elect the Board of Directors, other than the Chairman and the CEO. The ability to cast a vote for Board candidates ensures that members are involved in the selection of the NYSE directors, in compliance with section 6(b)(3).[90] Additionally, the amended Constitution would provide that the Industry Members of the Board of Executives, who represent different segments of the NYSE membership, including member organizations, specialist organizations, and floor representatives, have the right to designate 20% of the nominees elected by members to the Board (and in no event fewer than two directors).[91] Accordingly, NYSE members not only elect all of the members of the Exchange Board, (excluding the Chairman and CEO), but they also have the ability to nominate no less than 20% of them. These nominations must satisfy the independence standards for the Board. In addition, the amended NYSE Constitution maintains a petition process that permits members to put forward nominees for elected positions, so long as the nominee or nominees receive a sufficient number of endorsements.[92]

Furthermore, Industry Members are assured a role in the administration of the Exchange through their participation on the Board of Executives, which is empowered to advise the CEO in the management of the Exchange's operations. As members of the Board of Executives, Industry Members also will have the opportunity to participate on Joint Committees, including the Regulation, Enforcement & Listing Standards Committee, which is required to have at least one Industry Member. The amended NYSE Constitution also requires the Chairman to call a special meeting of the members upon written request of no less than one hundred members.[93]

Finally, section 6(b)(3) of the Act requires the NYSE to have rules that ensure that one or more directors represent issuers and investors, and not be associated with a member of the exchange, broker, or dealer. The Commission believes that the NYSE proposal explicitly fulfills this mandate

[88] The Commission notes that, under an amendment to the Constitution recently approved by the reconstituted NYSE Board, the CEO would be recused from deliberations of the Board, whether it is acting as the Board or as a committee of the whole with respect to the activities of the four Standing Committees. *See* Additional Amendments Letter, *supra* note .

[89] 15 U.S.C. 78f(b)(3).

[90] 15 U.S.C. 78b(b)(3).

[91] The Commission notes that the amended Constitution also would explicitly require the Industry Members to propose persons who, in their opinion, would allow the Exchange to meet the fair representation requirements set forth under section 6(b)(3).

[92] NYSE Constitution, Article III, Section 1(c).

[93] NYSE Constitution, Article III, Section 4.

by specifying that the directors elected by Exchange members shall include directors who will enable the Exchange to comply with the requirements of section 6(b)(3) of the Act[94] and also by requiring that the Nominating Committee recommend to the Board one candidate that represents issuers and one candidate that represents investors.[95]

D. Independence of the Regulatory Function

The Act requires registered exchanges to be so organized that they act as self-regulatory organizations in overseeing their markets and the conduct of their affairs. The Commission believes that any proposed revisions to the Exchange's governance must assure that the NYSE's regulatory function is strong, vigorous, and sufficiently independent and insulated from improper influence from management or any regulated entity. In the Commission's view, the proposed amendments to the NYSE's governance and management architecture are designed to advance this goal.

The NYSE has proposed to create a Chief Regulatory Officer who reports directly to the Board's Regulatory Oversight & Regulatory Budget Committee. As noted above, this Committee determines the Exchange's regulatory plan, programs, budget and staffing proposals and, significantly, is composed of independent directors (other than the CEO), *i.e.*, persons certifiably independent of management or any regulated entity. Inappropriate influence by management that might compromise regulatory integrity also is checked by the fact that the Regulatory Oversight & Regulatory Budget Committee recommends compensation and personnel actions involving senior regulatory personnel to the Board's Compensation Committee—another independent Board committee—rather than to the CEO or any other representative of management. In addition, the Chief Regulatory Officer has no formal reporting relationship with the CEO, except for limited administrative purposes.

Some commenters expressed concern regarding the regulatory function of the NYSE and supported a complete structural separation of the Exchange's regulatory and market functions. As noted above, the exchange self-regulatory structure set forth in the Act is based on the principle that regulation is best informed and most able to reflect ethical standards when that regulation takes place close to the activity to be regulated. Nonetheless, there must be sufficient independence in the regulatory process to prevail against undue interference or influence from the persons or entities being regulated. This independence could be achieved in a variety of ways, including separating entirely the regulatory and market functions of an SRO through, for example, the creation of separate subsidiaries, one of which contains the market function and the other the regulatory function.[96]

The Commission believes that the proposed amendments to the NYSE's governance structure, and in particular the creation of a Chief Regulatory Officer reporting directly to an independent Regulatory Oversight & Regulatory Budget Committee, add a significant degree of independence that should insulate regulatory activity from economic pressures and potential conflicts of interest. The Commission believes that, in this context, the NYSE's proposal is consistent with the statutory requirements. As the Commission continues to review issues relating to self-regulation, it may determine that further separation of the self-regulatory process from market operations would better assure the integrity of the securities markets and the protection of investors.

E. Committees

The proposed amendments to the NYSE Constitution codify the composition and operations of several key committees that have been delegated responsibility over critical Exchange operations. The Commission notes that information about the functions of nearly all NYSE committees was previously not widely available; indeed, only the Nominating Committee had been explicitly mentioned in the NYSE Constitution. The proposed amendments increase the transparency of several key committees and, as a result, their accountability, to the benefit of the Exchange and the investing public.

The Commission believes that the duties, responsibilities, and guidelines assigned to each Standing Committee should help foster strong and independent committees. For example, the Nominating & Governance Committee is subject to an explicit mandate to propose candidates for the Board who are committed to serving the interests of the public and strengthening the Exchange as a public securities market, and that meet the fair representation requirements of the Act. That Committee also has the obligation to conduct the Board's annual governance review, and establish an appropriate process for Board and Board of Executive self-assessments. In the Commission's view, an annual governance review and self-assessments are promising means of assuring that the NYSE remains vigilant and active in its pursuit of improved governance processes.

Similarly, the Commission believes that the new responsibilities of the Human Resources & Compensation Committee are appropriate. This Committee, and not management, must now set forth explicit corporate goals and objectives related to the compensation of the CEO, and evaluate the CEO's performance in light of these goals. These changes comport with the newly-adopted standards for NYSE listed issuers, which require that compensation matters be considered by a committee of the board composed exclusively of independent directors.[97] The new provision is in marked contrast to the way the NYSE Human Resources & Compensation Committee previously appeared to operate. In addition, the Commission believes that the requirement that the Committee report annually to members and the public on the compensation of the five most highly compensated officers of the Exchange, as well as on director compensation, should increase the transparency of this Committee's actions.

The Commission believes that the responsibilities assigned to the NYSE's Audit Committee also are appropriate, particularly with respect to the Audit Committee's direct responsibility for assuring that the NYSE retain a suitable independent auditor. The Commission notes that the NYSE has committed that the Audit Committee's charter would contain additional duties and responsibilities comparable to those

[94] NYSE Constitution, Article IV, Section 2.

[95] NYSE Constitution, Article IV, Section 12(a)(1). In this regard, the Commission notes that, in the Second Reed Letter, the Exchange disagreed with the suggestion of some commenters that the Board should include specific directors who represent ''public investors,'' the ''buy-side'' or ''any other particular constituent group.'' For the sake of clarity, the Commission would like to point out that, while the Act does not require the Board to include any directors who represent a discrete group within the universe of investors, in order to give effect to section 6(b)(3) of the Act, at least one director should represent the interests of investors generally, including when those interests may differ from the interests of Exchange members and broker-dealers. A proper reading of the proposed Constitution requires this result.

[96] For example, NASD, Inc. has one subsidiary, The Nasdaq Stock Market, Inc., to carry out NASD's market function and another subsidiary, NASD Regulation, to carry out the NASD's regulatory function.

[97] *See* NYSE/Nasdaq Corporate Governance Listing Standards Approval Order, *supra* note 86.

required of issuers listed on the Exchange.[98] Thus, the NYSE's own Audit Committee will be held to the same degree of independence and appropriate conduct that the NYSE requires of its listed companies.

The Commission also believes that the responsibilities assigned to the Regulatory Oversight & Regulatory Budget Committee should support and enhance the independence of the NYSE's regulatory regime. As noted above, this Committee is responsible for overseeing the Exchange's regulatory program. It is the Commission's view that this Committee should play a particularly important role in making certain that the Exchange possesses a strong and independent regulatory program.

Finally, the Commission also believes that the composition and operation of the Regulation, Enforcement & Listing Standards Committee which, among other things, is charged with hearing appeals of disciplinary determinations, complies with the Act's requirement to provide for a fair procedure for the disciplining of member and persons associated with members. This Joint Committee will be composed of both directors (other than the CEO) and members of the Board of Executives, including at least one Industry Member; moreover, a majority of the members voting on a matter subject to a vote of this Committee must be directors. Committee action on appeals of disciplinary determinations will require that a majority of members voting on the action must be independent directors, but the Committee must include at least one Industry Member, which means that there will be representation and input by at least one NYSE member.[99]

One commenter expressed concern about the composition of certain NYSE committees, while another commenter called for greater disclosure of information by key committees. In addition, several commenters advocated that the NYSE increase the transparency of its own operations. The Commission believes that the amendments regarding NYSE Committees should improve the governance of the NYSE and the transparency of its processes. The amended Constitution explicitly outlines the responsibilities and duties of several key committees. This increased disclosure of the decision-making processes and the bases for Committee actions should benefit the Exchange, its constituencies, and investors. The Commission recognizes that for the most part SROs in the past were not required to adhere to high standards of transparency. The Commission plans to continue to work with the NYSE and other SROs to improve their level of transparency.

F. Amendments to the Constitution

The Commission believes that the ability of directors to amend certain specified provisions of the Constitution without member approval should help streamline the Exchange's governance processes. Through this revision, the Board should be able to respond quickly and decisively if a revision to the specified provisions of the Constitution is considered appropriate and the majority of directors votes in favor of such change. The Commission believes that this kind of flexibility for directors is an appropriate tool to address potential governance weaknesses.

VI. Conclusion

In light of the serious governance issues recently confronted by the Exchange and the need for immediate reform measures, the NYSE's proposal is designed to address concerns about the independence of the Board of Directors and to assure the independence of the NYSE's regulatory function from the market function. The Commission believes that the proposed changes to the NYSE Constitution strengthen and improve the Exchange's governance structure. Among other things, under the amended Constitution, the independent Board will be responsible for monitoring the Exchange's governance processes, assessing whether further changes are warranted, and recommending appropriate action.

The Commission believes that the revised NYSE governance structure is one, but not the only, model for SRO governance consistent with the Act that would provide independence between the business side of the Exchange and its regulatory operations. Other self-regulatory structures or allocations of regulatory duties among SROs may offer advantages and disadvantages in terms of expertise, effectiveness, responsiveness, costs and, ultimately, investor protection. In considering the NYSE proposal, some commenters have advocated the complete separation of market and SRO functions. In the Commission's view, the complete structural separation of the NYSE's—or any other SRO's—regulatory function cannot be accomplished by an individual SRO, but would require Commission or Congressional action on a market-wide basis.

The Commission is considering a regulatory initiative to assess possible steps to strengthen the framework for the governance of SROs. In addition, the Commission will continue to consider ways to improve the transparency of the governance procedures of all SROs. In this context, some of the transparency topics the Commission may examine include increasing the disclosure of information relating to compensation of SRO directors, officers and employees; regulatory performance (*e.g.*, number of enforcement actions); types and amounts of fines levied; financial information and financial results; and the operation of key committees.

Finally, the Commission believes that the NYSE Board should continue to monitor and evaluate the Exchange's governance structure and processes on an ongoing basis, and propose further changes as appropriate, including whether the positions of Chairman and CEO should be separated permanently.

For the foregoing reasons, the Commission finds that the proposed rule change, File No. SR–NYSE–2003–34, is consistent with the Act and rules and regulations thereunder, applicable to a national securities exchange, and in particular with sections 6(b)(1), 6(b)(3), 6(b)(5) and 6(b)(7) of the Act.[100]

It is therefore ordered, pursuant to section 19(b)(2) of the Act that the proposed rule change, File No. SR–NYSE–2003–34, be, and hereby is, approved.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

Exhibit A—List of Comments Letters as of December 12, 2003 NYSE Amended and Restated Constitution and Corporate Governance Proposal (NYSE–2003–34)

1. Letter from Ralph S. Saul to Jonathan G. Katz, Secretary, Commission, dated November 12, 2003 (''Saul Letter'').

2. Letter from Junius W. Peake, Monfort Distinguished Professor of Finance, Kenneth W. Monfort College of Business, University of North Colorado, to Jonathan G. Katz, Secretary, Commission, dated November 22, 2003 (''Peake Letter'').

3. Letter from Sean Harrigan, President, Board of Administration, California Employees' Retirement System (''CalPERS''), to William H. Donaldson, Chairman, Commission, dated November 6, 2003 (''CalPERS Letter'').

4. Letter from Gary Andersen to Commission, dated November 6, 2003 (''Andersen Letter'').

5. Letter from Robert G. Merrill to William H. Donaldson, Chairman, Commission, dated November 7, 2003 (''Merrill Letter'').

[98] NYSE Constitution, Article IV, Section 12(a)(3).

[99] The Commission further notes that members of the Board of Executives have been added to the list of persons or entities that can call for a review by the Board of a determination by an Exchange hearing panel regarding a disciplinary proceeding. NYSE Constitution, Article IX, Section 6.

[100] 15 U.S.C. 78f(b)(1), (b)(3), (b)(5), and (b)(7).

6. Letter from Jack Ehnes, CEO, California State Teachers'' Retirement System (''CALSTRS''), to Jonathan G. Katz, Secretary, Commission, dated November 20, 2003 (''CALSTRS Letter'').

7. Letter from John Reed, Interim Chairman and CEO, NYSE, to William H. Donaldson, Chairman, Commission, dated November 25, 2003 (''Reed Letter'').

8. Letter from Amy B.R. Lancellotta, Senior Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission, dated December 2, 2003 (''ICI Letter'').

9. Letter from Sarah A.B. Teslik, Executive Director, Council of Institutional Investors, to William H. Donaldson, Chairman, Commission, dated November 3, 2003 (''First CII Letter'').

10. Letter from Charles W. Austin, President, Public Investors Arbitration Bar Association, to Jonathan G. Katz, Secretary, Commission, dated December 2, 2003 (''PIABA Letter'').

11. Letter from Marc E. Lackritz, President, Securities Industry Association, to Jonathan G. Katz, Secretary, Commission, dated December 5, 2003 (''SIA Letter'').

12. Letter from Alan Hevesi, Comptroller, State of New York; Phil Angelides, Treasurer, State of California; Richard H. Moore, Treasurer, State of North Carolina; Sean Harrigan, President, CalPERS; Jack Ehnes, CEO, CALSTRS; Dale McCormick, Treasurer, State of Maine; Randall Edwards, Treasurer, State of Oregon; Michael Fitzgerald, Treasurer, State of Iowa; Jonathan Miller, Treasurer, State of Kentucky; Denise Nappier, Treasurer, State of Connecticut; and Brian K. Krolicki, Treasurer, State of Nevada; to Chairman Donaldson, Commission, dated November 20, 2003 (''State Treasurers'' Letter'').

13. Letter from James D. Knotter to William H. Donaldson, Chairman, Commission, dated November 10, 2003 (''Knotter Letter'').

14. Letter from Hans R. Reinisch to William H. Donaldson, Chairman, Commission, dated November 11, 2003 (''Reinisch Letter'').

15. Letter from Sarah A.B. Teslik, Executive Director, Council of Institutional Investors, to Jonathan G. Katz, Secretary, Commission, dated November 24, 2003 (''Second CII Letter'').

16. Letter from John S. Reed, Interim Chairman & CEO, NYSE, to Jonathan G. Katz, Secretary, Commission, dated December 11, 2003 (''Second Reed Letter'').

17. Letter from J.P. Allen, Chair, Highway Patrol Retirement System; Robert M. Beck, Chair, Ohio Police and Fire Pension Fund; Charlie Adkins, Chair, Public Employees Retirement System of Ohio; Eugene E. Norris, Chair, State Teachers Retirement System of Ohio; and Barbara J. Miller, Chair, School Employees Retirement System of Ohio, to William H. Donaldson, Chairman, Commission, dated November 24, 2003 (''Ohio Retirement Systems Letter'').

18. Letter from John B. Licata, CEO, Sonoma Securities Corporation, to William H. Donaldson, Chairman, Commission, dated November 22, 2003 (''Sonoma Letter'').

[FR Doc. 03–31641 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48908; File No. SR–OCC–2003–05]

Self-Regulatory Organizations; the Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Assignment of S&P 100 Index Options

December 11, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on July 21, 2003, The Options Clearing Corporation (''OCC'') 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 primarily by OCC. 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 proposed rule change changes the assignment methodology for S&P 100 (''OEX'') index options from random to pro rata.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

At present, OCC uses a random assignment procedure for most classes of options.[3] Pro rata assignment was approved by the Commission for flexibly structured foreign currency options[4] and at present is used only for those options.

The Chicago Board Options Exchange (''CBOE'') has asked OCC to change to a *pro rata* assignment methodology for exercises of OEX options. CBOE believes that assigning OEX option exercises on a *pro rata* basis will permit more effective hedging by market participants. When exercises are assigned on a random basis, a holder of a short position in a series in which less than 100% of the open interest is exercised cannot accurately predict whether and to what extent his position will be assigned even after he knows the percentage of open interest exercised. Under the *pro rata* assignment methodology, OCC assigns exercises in a series of options to each clearing member account in approximately the same proportion that the number of short positions of that series carried in the account bears to the total number of short options of that series. As a result, once the percentage of open interest exercised is known, clearing members and market makers can predict whether and to what extent their positions will be assigned and take appropriate market action if desired.[5]

OCC's procedures for assigning exercise notices are not set out in OCC's rules but are treated as a stated policy, practice, or interpretation with respect to OCC Rule 803, which generally addresses assignments to clearing members.[6] This proposed rule change will not effect a substantive change in either of the assignment procedures. It would merely change the assignment procedure for OEX exercises from random to *pro rata.*

OCC believes that the proposed rule change is consistent with section 17A of the Act because it promotes the prompt and accurate clearance and settlement of securities transactions and fosters cooperation and coordination with persons engaged in the clearing and settlement of securities transactions.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

[3] This process was discussed in detail in Securities Exchange Act Release No. 46735 (October 28, 2002), 67 FR 67434 (November 5, 2002) (File No. SR–OCC–2002–19).

[4] Securities Exchange Act Release No. 38165 (January 14, 1997), 62 FR 3070 (January 21, 1997) (File No. SR–OCC–96–19).

[5] OCC assigns exercises directly to clearing members and market makers. Positions carried in combined market maker accounts are carried net and identified by acronyms that make it possible for OCC to assign exercises to short positions of individual market makers on a pro rata basis.

[6] Upon request to OCC, investors may obtain a description of OCC's assignment procedures and the options classes to which they apply.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(i) of the Act [7] and Rule 19b–4(f)(1) [8] thereunder because it constitutes a stated policy, practice or interpretation with respect to the meaning, enforcement or administration of an existing rule. At any time within 60 days of the filing of the proposed rule change, the Commission could have summarily abrogated such rule change if it appeared to the Commission that such action was necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–OCC–2003–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of OCC. All submissions should refer to the File No. SR–OCC–2003–5 and should be submitted by January 14, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31647 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–P

[7] 15 U.S.C. 78s(b)(3)(A)(i).

[8] 17 CFR 240.19b-4(f)(1).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48934; File No. SR–PCX–2003–54]

Self Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Accelerated Approval to Proposed Rule Change To Amend PCXE Rule 7.37(d) Relating To Routing Orders Away

December 16, 2003.

On September 25, 2003, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend PCXE Rule 7.37(d) to clarify the process by which orders are routed outside the Archipelago Exchange Facility (''ArcaEx'') to away market centers or market participants. The proposed rule change was published for comment in the **Federal Register** on November 19, 2003.[3] The Commission received no comment letters on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, particularly, section 6(b)(5) of the Act.[4] The Commission believes that the PCX's clarification of the process by which orders are routed outside ArcaEx to away market centers or market participants under PCXE Rule 7.37(d) would foster cooperation and coordination with persons engaged in regulating, clearing, settling and facilitating transactions in securities.

Furthermore, the Commission finds good cause for approving the proposed rule change prior to the thirtieth day after notice of the publication in the **Federal Register**. The proposal does not seek to change the process by which ArcaEx routes orders to away market centers or market participants under PCXE Rule 7.37(d), but rather to clarify the existing process. The Commission believes that acceleration of this proposal would assist ArcaEx participants to better understand how ArcaEx may route their orders to away market centers or market participants under PCXE Rule 7.37(d) in a more timely manner. Accordingly, the Commission finds good cause, consistent with section 19(b)(2) of the Act,[5] to approve the proposed rule change on an accelerated basis.[6]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (File No. SR–PCX–2003–54) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31642 Filed 12–23–03; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 48768 (November 10, 2003), 68 FR 65338.

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(2).

[6] In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

The Ticket to Work and Work Incentives Advisory Panel Teleconference

AGENCY: Social Security Administration (SSA).

ACTION: Notice of teleconference.

DATES: Thursday, January 22, 2004.

Teleconference: Thursday, January 22, 2004, 1:30 p.m. to 3:30 p.m. Eastern time.

Ticket to Work and Work Incentives Advisory Panel Conference Call: Call-in number: 1–877–546–1565. Pass code: PANEL. Leader/Host: Sarah Wiggins Mitchell.

SUPPLEMENTARY INFORMATION:

Type of meeting: This teleconference meeting is open to the public. The interested public is invited to participate by calling into the teleconference at the number listed above. Public testimony will not be taken.

Purpose: In accordance with section 10(a)(2) of the Federal Advisory

Committee Act, the Social Security Administration (SSA) announces this teleconference meeting of the Ticket to Work and Work Incentives Advisory Panel (the Panel). Section 101(f) of Public Law 106–170 establishes the Panel to advise the President, the Congress and the Commissioner of SSA on issues related to work incentives programs, planning and assistance for individuals with disabilities as provided under section 101(f)(2)(A) of the Ticket to Work and Work Incentives Advisory Act (TWWIIA). The Panel is also to advise the Commissioner on matters specified in section 101(f)(2)(B) of that Act, including certain issues related to the Ticket to Work and Self-Sufficiency Program established under section 101(a) of that Act.

Agenda: The Panel will be discussing its Annual Report to the President and Congress. The agenda for this meeting will be posted on the Internet at *http://www.socialsecurity/work/panel* one week prior to the teleconference or can be received in advance electronically or by fax upon request.

Contact Information: Records are being kept of all Panel proceedings and will be available for public inspection by appointment at the Panel office. Anyone requiring information regarding the Panel should contact the TWWIIA Panel staff by:

- Mail addressed to Ticket to Work and Work Incentives Advisory Panel Staff, Social Security Administration, 400 Virginia Avenue, SW., Suite 700, Washington, DC 20024;
- Telephone contact with Monique Fisher (202) 358–6435;
- Fax at (202) 358–6440; or
- E-mail to *TWWIIAPanel@ssa.gov.*

Dated: December 18, 2003.

Deborah Morrison,

Designated Federal Official.

[FR Doc. 03–31682 Filed 12–23–03; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 4570]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Deadly Medicine: Creating the Master Race''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 (68 FR 19875), I hereby determine that an object to be included in the exhibition ''Deadly Medicine: Creating the Master Race,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner. I also determine that the exhibition or display of the exhibit object at the Holocaust Memorial Museum, Washington, DC, from on or about April 22, 2004, to on or about October 17, 2005, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit object, contact Julianne Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, telephone: (202) 619–6529. The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: December 17, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 03–31722 Filed 12–23–03; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4569]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Gauguin Tahiti''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 (68 FR 19875), I hereby determine that the objects to be included in the exhibition ''Gauguin Tahiti,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Museum of Fine Arts, Boston, MA, from on or about February 29, 2004, to on or about June 20, 2004, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julianne Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, (telephone: 202/619–6529). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: December 17, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 03–31721 Filed 12–23–03; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4571]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Playing with Fire: European Terracotta Models, 1740–1840''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 (68 FR 19875), I hereby determine that the objects to be included in the exhibition ''Playing with Fire: European Terracotta Models, 1740–1840,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, NY, from on or about January 26, 2004, to on or about April 25, 2004, and at

possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julianne Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, (telephone: 202/619–6529). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: December 17, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 03–31723 Filed 12–23–03; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4572]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Roth Time—A Dieter Roth Retrospective''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 [79 Stat. 985, 22 U.S.C. 2459], the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681 *et seq.*), Delegation of Authority No. 234 of October 1, 1999 (64 FR 56014), Delegation of Authority No. 236 of October 19, 1999 (64 FR 57920), as amended by Delegation of Authority No. 236–3 of August 28, 2000 (65 FR 53795), and Delegation of Authority No. 257 of April 15, 2003 (68 FR 19875), I hereby determine that the objects to be included in the exhibit, ''Roth Time—A Dieter Roth Retrospective,'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with foreign lenders. I also determine that the temporary exhibition or display of the objects at the Museum of Modern Art, New York, New York, from on or about March 10, 2004, to on or about June 7, 2004, and possible additional venues yet to be determined is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, 202/619–5997, and the address is United States Department of State, SA–44, Room 700, 301 4th Street, SW., Washington, DC 20547–0001.

Dated: December 11, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 03–31724 Filed 12–23–03; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4574]

Bureau of Nonproliferation; Imposition of Missile Proliferation Sanctions Against Macedonian Entities

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made that Macedonian entities have engaged in missile technology proliferation activities that require the imposition of sanctions pursuant to the Arms Export Control Act, as amended, and the Export Administration Act of 1979, as amended (as carried out under Executive Order 13222 of August 17, 2001).

EFFECTIVE DATE: December 24, 2003.

FOR FURTHER INFORMATION CONTACT: Vann H. Van Diepen, Office of Chemical, Biological and Missile Nonproliferation, Bureau of Nonproliferation, Department of State (202–647–1142).

SUPPLEMENTARY INFORMATION: Pursuant to Section 73(a)(1) of the Arms Export Control Act (22 U.S.C. 2797b(a)(1)); Section 11B(b)(1) of the Export Administration Act of 1979 (50 U.S.C. app. 2401b(b)(1)), as carried out under Executive Order 13222 of August 17, 2001 (hereinafter cited as the ''Export Administration Act of 1979''); and Executive Order 12851 of June 11, 1993; a determination was made on December 11, 2003, that the following foreign persons have engaged in missile technology proliferation activities that require the imposition of the sanctions described in Section 73(a)(2)(A) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(A)) and Section 11B(b)(1)(B)(i) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)(B)(i) on the following entities and their subunits and successors:

1. Blagoja Samakoski (Macedonian national);

2. Mikrosam (Macedonia).

Accordingly, the following sanctions are being imposed on these entities:

(A) New individual licenses for exports to the entities described above of MTCR Annex equipment or technology controlled pursuant to the Export Administration Act of 1979 will be denied for two years;

(B) New licenses for export to the entities described above of MTCR Annex equipment or technology controlled pursuant to the Arms Export Control Act will be denied for two years; and

(C) No new United States Government contracts relating to MTCR Annex equipment or technology involving the entities described above will be entered into for two years.

With respect to items controlled pursuant to the Export Administration Act of 1979, the export sanction only applies to exports made pursuant to individual export licenses.

These measures shall be implemented by the responsible agencies as provided in Executive Order 12851 of June 11, 1993.

Dated: December 18, 2003.

Susan F. Burk,

Acting Assistant Secretary of State for Nonproliferation, Department of State.

[FR Doc. 03–31726 Filed 12–23–03; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 4573]

Bureau of Nonproliferation; Imposition of Nonproliferation Measures on Macedonian Entities, Including a Ban on U.S. Government Procurement

AGENCY: Bureau of Nonproliferation, Department of State.

ACTION: Notice.

SUMMARY: The U.S. Government has determined that Macedonian entities have engaged in missile technology proliferation activities that require the imposition of measures pursuant to Executive Order 12938 of November 14, 1994, as amended by Executive Order 13094 of July 28, 1998.

EFFECTIVE DATE: December 24, 2003.

FOR FURTHER INFORMATION CONTACT: On general issues: Vann H. Van Diepen, Office of Chemical, Biological, and Missile Nonproliferation, Bureau of Nonproliferation, Department of State, (202–647–1142). On import ban issues: Rochelle E. Stern, Office of Foreign Assets Control, Department of the Treasury, (202–622–4855). On U.S. Government procurement ban issues: Gladys Gines, Office of the Procurement

Executive, Department of State, (703–516–1691).

SUPPLEMENTARY INFORMATION: Pursuant to the authorities vested in the President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), the Arms Export Control Act (22 U.S.C. 2751 *et seq.*), and section 301 of title 3, United States Code, and Executive Order 12938 of November 14, 1994, as amended, the U.S. Government determined on December 11, 2003 that the following Macedonian persons engaged in proliferation activities that require the imposition of measures pursuant to sections 4(b), 4(c), and 4(d) of Executive Order 12938:

1. Blagoja Samakoski (Macedonian national);

2. Mikrosam (Macedonia).

Accordingly, pursuant to the provisions of Executive Order 12938, as amended, the following measures are imposed on these entities and their subunits and successors for a period of two years:

1. All departments and agencies of the United States Government shall not procure or enter into any contract for the procurement of any goods, technology, or services from these entities and shall terminate any such existing contracts;

2. All departments and agencies of the United States government shall not provide any assistance to these entities, and shall not obligate further funds for such purposes;

3. The Secretary of the Treasury shall prohibit the importation into the United States of any goods, technology, or services produced or provided by these entities, other than information or informational materials within the meaning of section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

These measures shall be implemented by the responsible departments and agencies as provided in Executive Order 12938.

In addition, pursuant to section 126.7(a)(1) of the International Traffic in Arms Regulations, it is deemed that suspending the above-named entities from participating in any activities subject to Section 38 of the Arms Export Control Act would be in furtherance of the national security and foreign policy of the United States.

Therefore, until further notice, the Department of State is hereby suspending all licenses and other approvals for: (a) Exports and other transfers of defense articles and defense services from the United States; (b) transfers of U.S.-origin defense articles and defense services from foreign destinations; and (c) temporary import of defense articles to or from the above-named entities.

Moreover, it is the policy of the United States to deny licenses and other approvals for exports and temporary imports of defense articles and defense services destined for these entities.

Dated: December 18, 2003.

Susan F. Burk,

Acting Assistant Secretary of State for Nonproliferation, Department of State.

[FR Doc. 03–31725 Filed 12–23–03; 8:45 am]

BILLING CODE 4710–25–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee; Initiation of Environmental Review of Dominican Republic Free Trade Negotiations; Public Comments on Scope of Environmental Review

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: This publication gives notice that, pursuant to the Trade Act of 2002, and consistent with Executive order 13141 (64 FR 63169) (Nov. 18, 1999) and its implementing guidelines (65 FR 79442), the Office of the United States Trade Representative (USTR), through the Trade Policy Staff Committee (TPSC), is initiating an environmental review of the proposed United States-Dominican Republic Free Trade Agreement (FTA). The TPSC is requesting written comments from the public on what should be included in the scope of the environmental review, including the potential environmental effects that might flow from the free trade agreement and the potential implications for our environmental laws and regulations. The TPSC also welcomes public views on appropriate methodologies and sources of data for conducting the review. Persons submitting written comments should provide as much detail as possible on the degree to which the subject matter they propose for inclusion in the review may raise significant environmental issues in the context of the negotiation.

DATES: Public comments should be received no later than January 30, 2004.

ADDRESSES: Submissions by electronic mail: *FR0406@ustr.gov.*

Submissions by facsimile: Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–6143.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning public comments, contact Gloria Blue, Executive Secretary, TPSC, Office of the USTR, 1724 F Street, NW., Washington, DC 20508, telephone (202) 395–3475. Questions concerning the environmental review should be addressed to David Brooks, Environment and Natural Resources Section, USTR, telephone (202) 395–7320.

SUPPLEMENTARY INFORMATION:

1. Background Information

On August 4, 2003, in accordance with section 2104(a)(1) of the Trade Act of 2002, the United States Trade Representative, Ambassador Robert B. Zoellick, notified Congress of the President's intent to enter into trade negotiations with the Dominican Republic. Ambassador Zoellick outlined the specific U.S. objectives for the FTA in the notification letters to Congress. The letters to House Speaker Dennis Hastert and Senate President Pro Tempore Ted Stevens can be found on the USTR Web site at *www.ustr.gov/new/fta/Dr/2003-08-04-notification-senate.pdf* and *www.ustr.gov/new/fta/Dr/2003-08-04-notification-house.pdf.*

Since 1984, U.S. unilateral trade preferences through the Caribbean Basin Initiative (CBI) have defined the U.S. trade relationship with the Dominican Republic. An FTA with the Dominican Republic will respond to direction from the Congress in the Caribbean Basin Trade Partnership Act to conclude comprehensive, mutually advantageous trade agreements with CBI countries. The Dominican Republic is the largest economy in the Caribbean Basin region and is the largest beneficiary of CBI preferences, accounting for more than one quarter of U.S. imports under the program. An FTA will build on the success of the CBI and expand U.S. access to the Dominican Republic's market, which already receives $4.3 billion in U.S. exports annually and approximately $1.4 billion in U.S. investment. In 2002, U.S. imports from the Dominican Republic totaled $4.2 billion.

Recognizing the benefits of strengthening the ties among the Dominican Republic, Central America, and the United States, we expect to apply essentially the same disciplines with the Dominican Republic as those we are currently negotiating with the five member countries of the Central American Economic Integration System

(Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, hereinafter ''Central America''), and to negotiate specific market access commitments with the Dominican Republic. Therefore, persons wishing to comment on the scope of the environmental review for the proposed FTA with the Dominican Republic are encouraged to make reference to the recently-released interim environmental review of the U.S.-Central America FTA, available at *www.ustr.gov/new/fta/Cafta/2003-08-22-cafta-env_review.pdf* (*see* 68 FR 51822) (August 28, 2003).

2. Environmental Review

USTR, through the TPSC, will perform an environmental review of the proposed agreement pursuant to the Trade Act of 2002 and consistent with Executive Order 13141 (64 FR 63,169) and its implementing guidelines (65 FR 79,442). Environmental reviews are used to identify potentially significant, reasonably foreseeable environmental impacts (both positive and negative), and information from the review can help facilitate consideration of appropriate responses where impacts are identified. Reviews address potential environmental impacts of the proposed agreement and potential implications for environmental laws and regulations. The focus of the review is on impacts in the United States, although global and transboundary impacts may be considered, where appropriate and prudent.

The TPSC currently expects that the environmental review of the proposed FTA with the Dominican Republic is likely to reach preliminary conclusions that are similar to those presented in the Interim Environmental Review of the US–CAFTA. In their comments on the scope for the review of the proposed FTA with the Dominican Republic, the public is requested to focus particular attention on environmental concerns other than those already addressed in the CAFTA Interim Review.

Given the current timetable for negotiations and the relevance of information and analysis contained in the CAFTA Interim Review, the TPSC may not prepare an interim environmental review of the proposed FTA with the Dominican Republic. If no interim review is prepared, all public comments submitted in response to this notice will be taken into account in the course of the negotiations and in the Final Review that will be prepared and published at the conclusion of the negotiations.

3. Requirements for Submissions

In order to facilitate prompt processing of submissions, USTR strongly urges and prefers electronic (e-mail) submissions in response to this notice.

Persons making submissions by e-mail should use the following subject line: ''United States—Dominican Republic Environmental Review'' followed by ''Written Comments.'' Documents should be submitted as either WordPerfect, MSWord, or text (.txt) files. Supporting documentation submitted as spreadsheets are acceptable as Quattro Pro or Excel. For any document containing business confidential information submitted electronically, the file name of the business confidential version should begin with the characters ''BC-'', and the file name of the public version should begin with the characters ''P-''. The ''P-'' or ''BC-'' should be followed by the name of the submitter. Persons who make submissions by e-mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. To the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Written comments submitted in response to this request will be placed in a file open to public inspection pursuant to 15 CFR 2003.5, except business confidential information exempt from public inspection in accordance with 15 CFR 2003.6. Business confidential information submitted in accordance with 15 CFR 2003.6 must be clearly marked ''BUSINESS CONFIDENTIAL'' at the top of each page, including any cover letter or cover page, and must be accompanied by a nonconfidential summary of the confidential information. All public documents and nonconfidential summaries shall be available for public inspection in the USTR Reading Room. The USTR Reading Room is open to the public, by appointment only, from 10 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday. An appointment to review the file must be scheduled at least 48 hours in advance and may be made by calling (202) 395–6186.

USTR will take into account the public comments on environmental issues submitted in response to a previous notice—dated August 28, 2003 (68 FR 51,823)—requesting comments from the public to assist USTR in formulating positions and proposals with respect to all aspects of the negotiations, including environmental issues. These comments will also be made available for public inspection.

General information concerning the Office of the United States Trade Representative may be obtained by accessing its Internet Web site (*www.ustr.gov*).

Carmen Suro-Bredie,

Chair, Trade Policy Staff Committee.

[FR Doc. 03–31618 Filed 12–23–03; 8:45 am]

BILLING CODE 3190–W3–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular; Propeller Instructions for Continued Airworthiness

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability of advisory circular.

SUMMARY: The Federal Aviation Administration (FAA) announces the availability of advisory circular (AC) numbers 35.4–1, Propeller Instructions for Continued Airworthiness.

DATES: The Engine and Propeller Directorate, Aircraft Certification Service, issued AC 35.4–1 on November 3, 2003.

FOR FURTHER INFORMATION CONTACT: Jay Turnberg, Engine and Propeller Standards Staff, ANE–110, 12 New England Executive Park, Burlington, MA 01803; telephone: (781) 238–7116; fax: (781) 238–7199; e-mail: *jay.turnberg@faa.gov.* The subject AC is available on the Internet at the following address: *http://www.airweb.faa.gov/rgl.*

SUPPLEMENTARY INFORMATION: The FAA published a notice in the **Federal Register** on January 2, 2003 (68 FR 148) to announce the availability of the proposed AC and invite interested parties to comment.

Background

The propeller type certification process requires the applicant to prepare Instructions for Continued Airworthiness (ICA) under § 35.4. The ICA provide information for proper maintenance that ensures that propellers of that type design are airworthy. This AC addresses preparing ICA for propellers.

(Authority: 49 U.S.C. 106(g), 40113, 44701–44702, 44704.)

Issued in Burlington, Massachusetts, on November 3, 2003.

Peter A. White,

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

[FR Doc. 03–31747 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice Before Waiver With Respect to Land at Front Royal-Warren County Airport, Front Royal, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent of waiver with respect to land.

SUMMARY: The FAA is publishing notice of proposed release of 0.5924 acres of land at the Front Royal-Warren County Airport, Front Royal, Virginia to the Virginia Department of Transportation for the relocation of Virginia Route 615. There are no impacts to the Airport and the land is not needed for airport development as shown on the Airport Layout Plan. The road is being relocated to provide for a standard runway safety area and the existing Route 615 right-of-way will be exchanged for the relocated road right-of-way.

DATES: Comments must be received on or before January 23, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Terry J. Page, Manager, FAA Washington Airports District Office, 23723 Air Freight Lane, Suite 210, Dulles, VA 20166.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. George W. Hodgkiss, Treasurer—Warren County Airport Commission, at the following address: Mr. David E. Labovitz, Treasurer—Warren County Airport Commission, 229 Stokes Airport Road, Front Royal, VA 22630.

FOR FURTHER INFORMATION CONTACT: Mr. Terry Page, Manager, Washington Airports District Office, 23723 Air Freight Lane, Suite 210, Dulles, VA 20166; telephone (703) 661–1354, fax (703) 661–1370, e-mail *Terry.Page@faa.gov.*

SUPPLEMENTARY INFORMATION: On April 5, 2000, new authorizing legislation became effective. That bill, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 10–181 (Apr. 5, 2000; 114 Stat. 61) (AIR 21) requires that a 30-day public notice must be provided before the Secretary may waive any condition imposed on an interest in surplus property.

Issued in Chantilly, Virginia, on December 8, 2003.

Terry J. Page,

Manager, Washington Airports District Office, Eastern Region.

[FR Doc. 03–31749 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Notice of Intent To Rule on Request To Release Airport Property at the Gunnison-Crested Butte Regional Airport, Gunnison, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request to release airport property.

SUMMARY: The FAA proposes to rule and invite public comments on the release of land at the Gunnison-Crested Butte Regional Airport under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

DATES: Comments must be received on or before January 23, 2004.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Craig A. Sparks, Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Denver Airports District Office, 26805 E. 68th Ave., Suite 224, Denver, Colorado, 80249.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Ms. Katherine L. Lucas, Administrative Director, Gunnison-Crested Butte Regional Airport, 711 West Rio Grande, Gunnison, Colorado, 81230.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Schaffer, Project Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Denver Airports District Office, 26805 E. 68th Ave., Suite 224, Denver, Colorado 80249.

The request to release property may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release property at the Gunnison-Crested Butte Regional Airport under the provisions of the AIR 21.

On July 16, 2003, the FAA determined that the request to release property at the Gunnison-Crested Butte Regional Airport submitted by the County of Gunnison, Colorado met the procedural requirements of the Federal Aviation Regulations, Part 155. The FAA may approve the request, in whole or in part, no later than January 31, 2004.

The following is a brief overview of the request: The Gunnison-Crested Butte Regional Airport requests the release of 0.44 acres of non-aeronautical airport property to the County of Gunnison, Colorado. The purpose of this release is to allow Gunnison County to sell the subject land that has been effectively severed from other airport property and no longer serves any aeronautical purpose at the airport. The sale of this parcel will provide funds for airport improvements.

Any person may inspect the request by appointment at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may inspect the application, notice and other documents germane to the application in person at the Gunnison-Crested Butte Regional Airport, 711 West Rio Grande, Gunnison, Colorado, 91230.

Issued in Denver, Colorado, on November 26, 2003.

Craig A. Sparks,

Manager, Denver Airports District Office.

[FR Doc. 03–31746 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice for Bolton Field Airport, Columbus, OH

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by the Columbus Port Authority for Bolton Field Airport under the provisions of 49 U.S.C. 47501 *et. seq.* (Aviation Safety and Noise Abatement Act) and 14 CFR part 150 are in compliance with applicable requirements.

EFFECTIVE DATE: The effective date of the FAA's determination on the noise exposure maps is December 5, 2003.

FOR FURTHER INFORMATION CONTACT: Ernest P. Gubry, Federal Aviation Administration, Great Lakes Region, Detroit Airports District Office, DET ADO–605, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174, (734) 229–2905.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds

that the noise exposure maps submitted for Bolton Field Airport are in compliance with applicable requirements of Part 150, effective December 5, 2003.

Under 49 U.S.C. section 47503 of the Aviation Safety and Noise Abatement Act (hereinafter referred to as ''the Act''), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict noncompatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by the FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) Part 150, promulgated pursuant to the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses.

The FAA has completed its review of the noise exposure maps and accompanying documentation submitted by the Columbus Airport Authority. The documentation that constitutes the ''noise exposure maps'' as defined in section 150.7 of part 150 includes: Exhibit 3 ''Exhibit (2001) Noise Exposure Map'' and Exhibit 6 ''Future (2006) Noise Exposure Map'' in the submission. The FAA has determined that these noise exposure maps and accompanying documentation for Bolton Field Airport are in compliance with applicable requirements. This determination is effective on December 5, 2003. The FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in appendix A of FAR part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 47503 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 47506 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through the FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator, which submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 47503 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR Part 150, that the statutorily required consultation has been accomplished.

Copies of the noise exposure maps and of the FAA's evaluation of the maps are available for examination at the following locations: Federal Aviation Administration, Detroit Airports District Office, 11677 South Wayne Road, Suite 107, Romulus, Michigan 48174; Bolton Field Airport, Airport Terminal Building, 2000 Norton Road, Columbus, Ohio 43228.

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Romulus, Michigan, December 5, 2003.

Winsome Lenfert,

Acting Manager, Detroit Airports District Office, FAA Great Lakes Region.

[FR Doc. 03–31751 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2003–77]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption, part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of a certain petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before January 13, 2004.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FAA–2003–16618 by any of the following methods:

- Web site: *http://dms.dot.gov.*

Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1–202–493–2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

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

FOR FURTHER INFORMATION CONTACT: Pat Siegrist (425–227–2126), Transport Airplane Directorate (ANM–113), Federal Aviation Administration, 1601 Lind Ave SW., Renton, WA 98055–4056; or John Linsenmeyer (202–267–5174), Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on December 19, 2003.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemption

Docket No.: FAA–2003–16618.

Petitioner: Israel Aircraft Industries, Ltd.

Sections of 14 CFR Affected: 14 CFR 25.783(h), 25.807(g)(1), 25.810(a)(1), 25.813(b)(3), 25.857(e), and 25.1447(c)(1).

Description of Relief Sought: Petitioner requests exemption from certain provisions of Title 14, Code of Federal Regulations (CFR), to allow carriage of two non-crewmembers on Boeing Model 737–300 airplanes when operated in a freighter configuration.

[FR Doc. 03–31730 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2002–78]

Petitions for Exemption; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains the dispositions of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

FOR FURTHER INFORMATION CONTACT: John Linsenmeyer, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. Tel. (202) 267–5174.

This notice is published pursuant to 14 CFR §§ 11.85 and 11.91.

Issued in Washington, DC, on December 19, 2003.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Dispositions of Petitions

Docket No.: FAA–2003–16212.

Petitioner: Dassault Aviation.

Section of 14 CFR Affected: 14 CFR 25.758(a).

Description of Relief Sought/Disposition: To amend a previously granted exemption regarding occupant protection requirements for persons occupying multiple-place side-facing seats during takeoff and landing on Falcon Model 2000 airplanes manufactured before January 1, 2004. The amendment would remove the limitation that restricts its applicability to airplanes manufactured before January 1, 2004.

Grant of Exemption, 12/01/2003, Exemption No. 7104A.

Docket No.: FAA–2003–14423.

Petitioner: Dassault Aviation.

Section of 14 CFR Affected: 14 CFR 25.785(b).

Description of Relief Sought/Disposition: To amend a previously granted exemption regarding occupant protection requirements for persons occupying multiple-place side-facing seats during takeoff and landing on Falcon Model 2000EX airplanes manufactured before January 1, 2004. The amendment would remove the limitation that restricts its applicability to airplanes manufactured before January 1, 2004.

Grant of Exemption, 12/01/2003, Exemption No. 8007A.

[FR Doc. 03–31731 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In November 2003, there were three applications approved. Additionally, one approved amendment to a previously approved application is listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: Allegheny County Airport Authority, Pittsburgh, Pennsylvania.

Application Number: 03–02–U–00–PIT.

Application Type: Use PFC revenue.

PFC Level: $3.00.

Total PFC Revenue To Be Used in This Decision: $125,000.

Charge Effective Date: October 1, 2001.

Estimated Charge Expiration Date: October 1, 2006.

Class of Air Carriers Not Required To Collect PFC's: No change from previous decision.

Brief Description of Project Approved for Use: Replace security fence.

Decision Date: November 3, 2003.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: Huntsville-Madison County Airport Authority, Huntsville, Alabama.

Application Number: 03–13–C–00–HSV.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $893,788.

Earliest Charge Effective Date: September 1, 2005.

Estimated Charge Expiration Date: April 1, 2006.

Classes of Air Carriers Not Required To Collect PFC's: (1) Air taxi/commercial operators; (2) certified air carriers; and (3) certified route air carriers having fewer than 500 annual passenger enplanements.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that each approved class accounts for less than 1 percent of the total annual enplanements at Huntsville International Airport.

Brief Description of Projects Approved for Collection and Use:

Aircraft rescue and firefighting vehicle.

Security enhancements.

Pavement condition index study.

Fixed base operator taxi widening and taxi lane installation.

Baggage claim/terminal renovation.

Terminal front sink hole repair.

Air traffic control tower site study.

Aircraft rescue and firefighting suit replacements.

Regional jet bridge modifications.

New jet bridge, gate 9.

Terminal front access road paving/canopy.

Airfield/ramp rehabilitation.

Decision Date: November 5, 2003.

FOR FURTHER INFORMATION CONTACT: Keafur Grimes, Jackson Airports District Office, (601) 664–9884.

Public Agency: San Francisco Airport Commission, San Francisco, California.

Application Number: 03–03–C–00–SFO.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $539,107,697.

Earliest Charge Effective Date: November 1, 2008.

Estimated Charge Expiration Date: November 1, 2018.

Class of Air Carriers Not Required To Collect PFCs: Nonscheduled/on-demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at San Francisco International Airport.

Brief Description of Projects Approved for Collection and Use at a $4.50 PFC Level:

Boarding areas A and G.

International terminal building.

Decision Date: November 7, 2003.

FOR FURTHER INFORMATION CONTACT: Marlys Lingsch, San Francisco Airports District Office, (650) 876–2806.

Amendment to PFC Approvals:

Amendment No., city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
99–01–C–03–ANC, Anchorage, AK	11/14/03	$15,000,000	$22,000,000	01/01/04	01/01/06

Issued in Washington, DC, on December 19, 2003.

JoAnn Horne,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. 03–31748 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Inyokern Airport, Inyokern, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent of rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Inyokern Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before January 23, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Bldv., Room 3024, Lawndale, CA 90261. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Ms. Nancy Bass, General Manager, Inyokern Airport at the following address: P.O. Box 634, Inyokern, CA 93527. Air carriers and foreign air carriers may submit copies of written comments previously provided to the Indian Wells Valley Airport District under section 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. David Delshad, Airports Program Engineer, Standards Section, Airports Division, 15000 Aviation Blvd., Room 3024, Lawndale, CA 90261. Telephone: (310) 725–3627. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Inyokern Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

On November 19, 2003, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Indian Wells Valley Airport District was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than February 25, 2004.

The following is a brief overview of the impose and use application No. 04–04–C–00–IYK:

Level of proposed PFC: $3.00.

Proposed charge effective date: March 1, 2004.

Proposed charge expiration date: September 1, 2004.

Total estimated PFC revenue: $36,183.

Brief Description of the proposed project: Install access gates.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Pacific States Aviation and other small certificated air taxi carriers not providing scheduled service to Inyokern Airport.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at Inyokern Airport Administration office.

Issued in Lawndale, California, on November 19, 2003.

Ellsworth Chan,

Acting Manager, Airports Division, Western-Pacific Region.

[FR Doc. 03–31745 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Cities of Chesapeake and Virginia Beach, VA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The Federal Highway Administration (FHWA) is issuing this notice to advise the public of its intent to prepare an Environmental Impact Statement in cooperation with the Virginia Department of Transportation (VDOT) for the proposed Southeastern Parkway and Greenbelt.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Myers, Planning & Environmental Program Manager, Federal Highway Administration, PO Box 10249, Richmond, Virginia 23240–0249. Telephone: (804) 775–3353.

SUPPLEMENTARY INFORMATION: The Federal Highway Administration (FHWA), in cooperation with the Virginia Department of Transportation (VDOT), will prepare an Environmental Impact Statement (EIS) for the Southeastern Parkway and Greenbelt. The study area begins in central Chesapeake and extends to north central Virginia Beach. The study window is roughly defined by the Battlefield Boulevard/Great Bridge Bypass in Chesapeake to the west; the Albemarle and Chesapeake Canal in Chesapeake and North Landing Road in Virginia

Beach to the south; Volvo Parkway in Chesapeake and Lynnhaven Parkway and Laskin Road in Virginia Beach to the north; and Bird Neck Road in Virginia Beach to the east.

The EIS will examine a range of alternatives consisting of a no-build alternative as well as transportation system management strategies, mass transit, improvements to existing facilities, and new alignment facilities. Initial studies for this project began in 1987, with a Draft EIS issued in September 1989 followed by a Supplemental Draft EIS in September 1994. Subsequently, VDOT recommended, and Virginia's Commonwealth Transportation Board endorsed, a preferred alternative. However, work was suspended prior to the completion of a Final EIS. Because of the lapse of time since the circulation of the previous drafts, the study is being reinitiated with a new Draft EIS. Previous studies will be used to the extent practical and will be updated to reflect changes in the project area. The final selection of an alternative will not be made until the alternatives' impacts and comments on the draft EIS and from the public hearing have been fully evaluated.

The scoping process is currently underway. Scoping letters describing the proposed study and soliciting input are being sent to the appropriate Federal, State and local agencies who have expressed or are known to have an interest or legal role in this proposal. A Citizen's Information Meeting will be held to enable organizations, citizens, and interest groups to provide input into the development of the EIS and identify issues that should be addressed. No formal scoping meeting is planned at this time.

A Public Hearing will be held upon completion of the Draft EIS. Notices of the Public Hearing will be given through various forums, providing the time and place of the meeting along with other relevant information. The Draft EIS will be available for public and agency review and comment prior to the Public Hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: December 17, 2003.

Kenneth R. Myers,

Planning & Environmental Program Manager.

[FR Doc. 03–31639 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Jefferson and Park Counties, CO

AGENCY: Federal Highway Administration (FHWA) and Department of Transportation (DOT).

ACTION: Notice to amend notice of intent.

SUMMARY: FHWA is issuing this notice to advise the public that an environmental assessment will be prepared for transportation improvements on US 285 in the Counties of Jefferson and Park, Colorado, rather than an environmental impact statement.

FOR FURTHER INFORMATION CONTACT: Scott Sands, Operations Engineer, FHWA, Colorado Division, 555 Zang Street, Room 250, Lakewood, CO, 80228, Telephone: (303) 969–6730 extension 362. Kamalesh (Kim) Patel, Project Manager, CDOT Region 1, 18500 East Colfax Avenue, Aurora, CO, 80011, Telephone: (303) 365–7373.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Colorado Department of Transportation (CDOT), has begun the National Environmental Policy Act (NEPA) for transportation improvements along US 285 between Conifer and Bailey, Colorado. Scoping has been completed, alternatives have been developed and evaluated and environmental impact analysis has been done.

As a result of these NEPA studies, FHWA and CDOT have determined that this project will not result in a significant impact to the environment, thus an environmental impact statement will not be prepared.

Analysis of the following areas was conducted to reach this determination: Land use and zoning; social; economic; right-of-way; air quality; noise; water resources and quality; wetlands; floodplains; wild and scenic rivers; vegetation and wildlife; threatened, endangered and sensitive species; visual quality; historic preservation; hazardous waste; utilities; parks and recreation resources; farmland; relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; irreversible and irretrievable commitments of resources; and cumulative impacts.

Comments or questions concerning this proposed action and the environmental assessment should be directed to the FHWA or the Colorado Department of Transportation at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: December 18, 2003.

Ronald Speral,

Program Delivery Engineer.

[FR Doc. 03–31668 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2003–16564]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption from the vision standard; request for comments.

SUMMARY: This notice publishes the FMCSA's receipt of applications from 29 individuals for an exemption from the vision requirement in the Federal Motor Carrier Safety Regulations. If granted, the exemptions will enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the vision standard prescribed in 49 CFR 391.41(b)(10).

DATES: Comments must be received on or before January 23, 2004.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FMCSA–2003–16564 by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building,

400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m. Monday through Friday, except Federal Holidays.

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

Instructions: All submissions must include the agency name and docket number for this notice. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

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

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Zywokarte, Office of Bus and Truck Standards and Operations, (202) 366–2987, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Participation: The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help guidelines under the ''help'' section of the DMS Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

Background

Under 49 U.S.C. 31315 and 31136(e), the FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the agency to renew exemptions at the end of the 2-year period. The 29 individuals listed in this notice have recently requested an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety.

Qualifications of Applicants

1. Lee A. Burke

Mr. Burke, age 46, has a corneal scar in his right eye due to a childhood injury. His best-corrected visual acuity in the right eye is 20/70 and in the left, 20/15. Following an examination in 2003, his ophthalmologist certified, ''In summary, it is my medical opinion that Mr. Burke has very good vision with both eyes open. I have no concern about his abilities to safely operate a commercial vehicle.'' Mr. Burke reported that he has driven straight trucks for 28 years, accumulating 112,000 miles. He holds a Class D driver's license from Wisconsin. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

2. Barton C. Caldara

Mr. Caldara, 37, has amblyopia in his right eye. His best-corrected visual acuity in the right eye is 20/150 and in the left, 20/20. His ophthalmologist examined him in 2003 and stated, ''I believe Mr. Caldara has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Caldara reported that he has driven tractor-trailer combinations for 13 years, accumulating 325,000 miles. He holds a Class ABCDM CDL from Wisconsin. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

3. Terrance F. Case

Mr. Case, 59, has amblyopia in his left eye. His best-corrected visual acuity in the right eye is 20/20 and in the left, 20/200. Following an examination in 2003, his optometrist stated, ''He has functioned normally all his life with this vision and in my professional opinion he has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Case submitted that he has driven straight trucks for 28 years, accumulating 308,000 miles, and tractor-trailer combinations for 5 years, accumulating 350,000 miles. He holds a Class A CDL from Maine. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

4. Lawrence M. Daley

Mr. Daley, 55, has had a central field defect in his left eye due to histoplasmosis since 1997. His best-corrected visual acuity in the right eye is 20/20 and in the left, 20/150. Following an examination in 2003, his ophthalmologist certified, ''In light of Mr. Daley having operated a commercial vehicle safely for the last 6 years with this condition, I feel he has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Daley reported that he has driven straight trucks for 3 years, accumulating 150,000 miles, and tractor-trailer combinations for 30 years, accumulating 300,000 miles. He holds a Class D driver's license from South Carolina. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

5. Allan Darley

Mr. Darley, 44, has amblyopia in his left eye. His best-corrected visual acuity in the right eye is 20/20 and in the left, 20/125. Following an examination in 2003, his ophthalmologist stated, ''According to findings of my examination, I feel that he would, therefore, qualify to have sufficient vision to perform his driving tasks as required for operating a commercial vehicle.'' Mr. Darley submitted that he has driven straight trucks for 23 years, accumulating 460,000 miles, and tractor-trailer combinations for 18 years, accumulating 360,000 miles. He holds a Class A CDL from Utah. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

6. Charley Davis

Mr. Davis, 50, lost his left eye due to an injury 30 years ago. His visual acuity in the right eye is 20/20. Following an examination in 2003, his optometrist certified, ''In my opinion, due to his excellent visual acuity, good peripheral vision, and many years of driving experience, he has sufficient vision for driving a commercial vehicle.'' Mr. Davis reported that he has driven tractor-trailer combinations for 29 years, accumulating 3.5 million miles. He

holds a Class A CDL from Oklahoma. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

7. Ray L. Emert

Mr. Emert, 44, lost his left eye due to an injury in 1982. His visual acuity in the right eye is 20/20. Following an examination in 2003, his optometrist certified, ''It is my opinion that Mr. Emert has sufficient and stable vision to perform any tasks needed to drive a commercial vehicle.'' Mr. Emert reported that he has driven straight trucks for 9 years, accumulating 765,000 miles, and tractor-trailer combinations for 8 years, accumulating 960,000 miles. He holds a Class AM CDL from Pennsylvania. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

8. Robin S. England

Mr. England, 40, is blind in his left eye due to an accident at age 11. The visual acuity in his right eye is 20/20. His optometrist examined him in 2003 and certified, ''In my opinion, Mr. English has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. England submitted that he has driven straight trucks and tractor-trailer combinations for 23 years, accumulating 1.2 million miles in the former and 2.9 million miles in the latter. He holds a Class A CDL from Georgia. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

9. Jessie W. Ford

Mr. Ford, 58, has a corneal scar in his right eye due to trauma 42 years ago. His visual acuity in the right eye is 20/200 and in the left, 20/20. His optometrist examined him in 2003 and certified, ''It is my medical opinion that Mr. Ford has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Ford reported that he has driven straight trucks for 39 years, accumulating 1.7 million miles, and tractor-trailer combinations for 29 years, accumulating 1.5 million miles. He holds a Class A CDL from Louisiana. His driving record shows no crashes or convictions for moving violations in a CMV during the last 3 years.

10. Richard Hailey, Jr.

Mr. Hailey, 48, is blind in his right eye due to an injury at age 9. His visual acuity in the left eye is 20/20. Following an examination in 2003, his ophthalmologist certified, ''In my opinion, Mr. Hailey has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Hailey reported that he has driven buses for 6 years, accumulating 84,000 miles. He holds a Class D operator's license from the District of Columbia currently, but at the time of his application he held a Class B CDL, now expired. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

11. Spencer N. Haugen

Mr. Haugen, 55, has amblyopia in his right eye. The visual acuity in his right eye is 20/600 and in the left, 20/20. Following an examination in 2003, his optometrist stated, ''In my opinion, he has sufficient vision to perform required driving tasks and has sufficient vision to operate a commercial vehicle.'' Mr. Haugen submitted that he has driven straight trucks and tractor-trailer combinations for 35 years, accumulating 280,000 miles in the former and 2.1 million miles in the latter. He holds a Class AM CDL from North Dakota. His driving record shows no crashes or convictions for moving violations in a CMV during the last 3 years.

12. Thomas R. Hedden

Mr. Hedden, 49, lost his right eye due to an injury in 1956. His best-corrected visual acuity in the left eye is 20/20. Following an examination in 2003, his optometrist certified, ''I certify in my medical opinion, Mr. Hedden has adequate vision in his left eye to allow him to operate a commercial vehicle safely.'' Mr. Hedden reported that he has driven straight trucks and tractor-trailer combinations for 30 years, accumulating 300,000 miles in each, and buses for 1 year, accumulating 500 miles. He holds a Class A CDL from Illinois. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

13. William G. Hix

Mr. Hix, 49, lost his left eye due to an injury in 1994. His visual acuity in the right eye is 20/15. His optometrist examined him in 2003 and certified, ''In my opinion, Mr. Hix does have sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Hix reported that he has driven straight trucks for 25 years, accumulating 200,000 miles, and tractor-trailer combinations for 20 years, accumulating 80,000 miles. He holds a Class A CDL from Arkansas. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

14. Robert V. Hodges

Mr. Hodges, 53, has amblyopia in his left eye. His visual acuity in the right eye is 20/20 and in the left, 20/800. His ophthalmologist examined him in 2003 and stated, ''To summarize, I certify that Mr. Hodges has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Hodges reported that he has driven straight trucks and tractor-trailer combinations for 32 years, accumulating 320,000 miles in the former and 1.3 million miles in the latter. He holds a Class A CDL from Illinois. His driving record shows no crashes or convictions for moving violations in a CMV during the last 3 years.

15. Jay W. Jarvis

Mr. Jarvis, 53, has amblyopia in his left eye. The best-corrected visual acuity in his right eye is 20/20 and in the left, 20/100. His optometrist examined him in 2003 and stated, ''At this time Mr. Jarvis has sufficient distance and peripheral field of vision to perform the driving tasks that he has been performing during the past nine and a half years. Mr. Jarvis' driving record shows his ability to operate commercial vehicles without any contraindications.'' Mr. Jarvis reported that he has driven tractor-trailer combinations for 18 years, accumulating 1.8 million miles. He holds a Class A CDL from Florida. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

16. George R. Knavel

Mr. Knavel, 63, experienced a retinal detachment in his left eye at age 10. The visual acuity in his right eye is 20/15 and in the left, hand motion. His ophthalmologist examined him in 2003 and certified, ''It is my medical opinion that he should be allowed to continue to drive commercially, and would request that you renew his operating license.'' Mr. Knavel reported that he has driven straight trucks for 3 years, accumulating 75,000 miles, and tractor-trailer combinations for 42 years, accumulating 4.6 million miles. He holds a Class A CDL from Utah. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

17. John R. Knott, III

Mr. Knott, 47, lost his right eye due to trauma at age 8. The visual acuity in his left eye is 20/20. Following an examination in 2003 his ophthalmologist stated, ''I informed the patient that as long as he continues to turn his head to the right in order to

fully visualize objects to his right, that he should be able to continue to operate a commercial vehicle safely.'' Mr. Knott reported that he has driven tractor-trailer combinations for 21 years, accumulating 2.0 million miles. He holds a Class AM CDL from Maryland. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

18. Duane R. Krug

Mr. Krug, 59, has amblyopia in his left eye. His best-corrected visual acuity in the right eye is 20/20 and in the left, 20/80. Following an examination in 2003, his optometrist certified, ''I certify that, in my professional opinion, Mr. Krug has adequate vision to safely operate a commercial vehicle.'' Mr. Krug reported that he has driven straight trucks for 11 years, accumulating 275,000 miles. He holds a Class B CDL from Illinois. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

19. Eric M. Moats, Sr.

Mr. Moats, 34, lost his left eye due to an injury 27 years ago. His visual acuity in the right eye is 20/15. Following an examination in 2003, his ophthalmologist certified, ''I see no difficulty in having this patient operate a commercial vehicle, since he has sufficient vision, color vision, and visual field.'' Mr. Moats reported that he has driven straight trucks for 8 years, accumulating 260,000 miles. He holds a Class B CDL from Maryland. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

20. Lester T. Papke

Mr. Papke, 61, has amblyopia in his right eye. His best-corrected visual acuity in the right eye is 20/60 and in the left, 20/20. Following an examination in 2003, his optometrist stated, ''In my opinion, this patient's vision is stable and does not restrict him in the operation of a commercial vehicle.'' Mr. Papke submitted that he has driven straight trucks for 20 years, accumulating 400,000 miles, and tractor-trailer combinations for 20 years, accumulating 1.0 million miles. He holds a Class A CDL from Montana. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

21. Edward D. Pickle

Mr. Pickle, 60, lost his left eye due to trauma at age 2. His best-corrected visual acuity in the right eye is 20/15. His optometrist examined him in 2003 and stated, ''From his past record and considering our findings, I would conclude that Mr. Pickle has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Pickle reported that he has driven straight trucks for 10 years, accumulating 250,000 miles, and tractor-trailer combinations for 10 years, accumulating 500,000 miles. He holds a Class AM CDL from Georgia. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

22. Charles D. Pointer

Mr. Pointer, 61, is blind in his left eye due to an injury at age 2. His best-corrected visual acuity in the right eye is 20/20. Following an examination in 2003, his optometrist certified, ''Visual deficiency is stable and patient does have sufficient vision to perform driving tasks required for commercial vehicle.'' Mr. Pointer reported that he has driven straight trucks and tractor-trailer combinations for 6 years, accumulating 30,000 miles in the former and 600 miles in the latter. He holds a Class A CDL from Georgia. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

23. Richard A. Pruitt

Mr. Pruitt, 46, has amblyopia in his left eye. His best-corrected visual acuity in the right eye is 20/20 and in the left, 20/60. Following an examination in 2003, his ophthalmologist certified, ''Our recommendation is that the patient should be able to drive a commercial vehicle well with use of glasses.'' Mr. Pruitt reported that he has driven tractor-trailer combinations for 18 years, accumulating 1.5 million miles. He holds a Class A CDL from Virginia. His driving record for the last 3 years shows two crashes and no convictions for moving violations in a CMV. According to the police report for the first crash, another driver failed to stop before entering the roadway from a parking lot and struck Mr. Pruitt's vehicle. The other driver was cited for ''reckless driving.'' According to the police report for the second crash, Mr. Pruitt's vehicle struck a cow. Mr. Pruitt was not cited in either crash.

24. Kent S. Reining

Mr. Reining, 30, has amblyopia in his right eye. His best-corrected visual acuity in the right eye is 20/100 and in the left, 20/15. Following an examination in 2003 his optometrist certified, ''In my medical opinion, Kent Reining has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Reining submitted that he has driven straight trucks for 10 years, accumulating 35,000 miles, and tractor-trailer combinations for 13 years, accumulating 910,000 miles. He holds a Class A CDL from Illinois. His driving record for the last 3 years shows no crashes and two convictions for moving violations—speeding and ''failure to obey a traffic sign''—in a CMV. He exceeded the speed limit by 13 mph.

25. Bruce K. Robb

Mr. Robb, 48, has amblyopia in his left eye. The visual acuity in his right eye is 20/20 and in the left, light perception. Following an examination in 2003 his optometrist certified, ''It is my medical opinion Mr. Robb has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Robb submitted that he has driven straight trucks for 8 years, accumulating 320,000 miles, and tractor-trailer combinations for 10 years, accumulating 900,000 miles. He holds a Class A CDL from South Dakota. His driving record shows no crashes or convictions for moving violations in a CMV during the last 3 years.

26. James J. Rouse

Mr. Rouse, 52, has amblyopia in his right eye. His best-corrected visual acuity in the right eye is counting fingers and in the left, 20/20. His ophthalmologist examined him in 2003 and certified, ''In my medical opinion, he has sufficient vision to continue driving commercial vehicles.'' Mr. Rouse submitted that he has driven straight trucks for 32 years, accumulating 960,000 miles, tractor-trailer combinations for 4 years, accumulating 80,000 miles, and buses for 13 years, accumulating 26,000 miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

27. Ronald D. Ulmer

Mr. Ulmer, 56, has amblyopia in his right eye. His best-corrected visual acuity in the right eye is count fingers and in the left, 20/20. Following an examination in 2003, his optometrist certified, ''In my medical opinion, I do think that Ronald has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Ulmer reported that he has driven straight trucks for 12 years, accumulating 480,000 miles. He holds a Class B CDL from Montana. His driving record for the last 3 years shows no crashes or convictions for moving violations in a CMV.

28. Mitchell A. Webb

Mr. Webb, 52, has amblyopia in his left eye. His best-corrected visual acuity in the right eye is 20/15 and in the left, 20/400. His optometrist examined him in 2003 and stated, ''In my opinion, Mr. Webb has sufficient vision to continue to perform the driving tasks required to operate a commercial vehicle.'' Mr. Webb reported that he has driven straight trucks for 30 years, accumulating 900,000 miles, and tractor-trailer combinations for 20 years, accumulating 100,000 miles. He holds a Class A CDL from Virginia. His driving record for the past 3 years shows no crashes or convictions for moving violations in a CMV.

29. Jerry L. Wilder

Mr. Wilder, 39, lost the vision in his right eye due to trauma in 1984. The visual acuity in his left eye is 20/20. Following an examination in 2003 his ophthalmologist stated, ''It is clear that Mr. Wilder has normal vision in the left eye, and I see no reason why he cannot drive safely using the mirrors that are the standard operating equipment in a truck/vehicle cab. It is clear that Mr. Wilder has been driving safely commercially for several years, and I feel that he is well adapted to continue to do so.'' Mr. Wilder reported that he has driven straight trucks for 4 years, accumulating 376,000 miles, and tractor-trailer combinations for 11 years, accumulating 1.4 million miles. He holds a Class A CDL from California. His driving record for the last 3 years shows no crashes and one conviction for a moving violation —speeding— in a CMV. He exceeded the speed limit by 10 mph.

Requests for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), the FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated earlier in the notice.

Issued on: December 12, 2003.

Rose A. McMurray,

Associate Administrator, Policy and Program Development.

[FR Doc. 03–31752 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Denial of Motor Vehicle Defect Petition, DP03–004

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Denial of petition for a defect investigation.

SUMMARY: This notice sets forth the reasons for the denial of a petition submitted to NHTSA under 49 U.S.C. 30162, requesting that the agency investigate alleged increased vehicle stopping distance due to certain failures of the EC–17, Version 2.3 (EC–17), antilock braking system electronic control unit (ABS ECU) and the Dura Drain M–12 modulator (M–12), both manufactured by Bendix Commercial Vehicle Systems, LLC (Bendix). The petition is identified as DP03–004.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan White, Office of Defects Investigation (ODI), NHTSA, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366–5226.

SUPPLEMENTARY INFORMATION: In June 2003, Mr. Jing Tang (Petitioner) filed a petition for a defect investigation alleging that potential safety defects existed in both the EC–17, Version 2.3 (EC–17), antilock braking system electronic control unit (ABS ECU) and the Dura Drain M–12 modulator (M–12), both manufactured by Bendix Commercial Vehicle Systems, LLC (Bendix). The Petitioner asserted that the defects in both components resulted in extended vehicle stopping distances. Both components are used in the pneumatic antilock braking systems of commercial type vehicles. The EC–17 is an electronic controller for the antilock braking system of large trucks, truck tractors and buses, while the M–12 is a modulator and relay valve combination used on large trailers. The Petitioner, a former staff control engineer with the Bendix Braking Control Group, cited his personal familiarity with the components as the basis for his allegations.

The Petitioner contacted ODI in September 2002 to convey his concerns regarding these components. During the intervening months, prior to the submission of his petition, ODI monitored its consumer complaint database and attempted to follow up with possible complainants.

After receiving the petition for a defect investigation, ODI reviewed and analyzed data and information from multiple sources that included material provided by the Petitioner, vehicle owner complaints contained within the NHTSA consumer complaint database, and information provided by Bendix in response to an ODI inquiry.

EC–17 ECU Issue

Background

In July 2000, Bendix initiated a recall (NHTSA #00E–041) of the EC–17 1030R ECU primarily because the unit's software was unable to differentiate false incoming signals. The controller's interpretation of the signals activated the antilock feature, which extended braking distances under certain conditions. The EC–17 1030R was manufactured between November 3, 1997 and August 16, 2000.

At the time NHTSA was notified of the recall decision, Bendix reported that they had conducted an investigation and identified the underlying issues that prompted the action. The Bendix investigation concluded that the EC–17 1030R controller was receiving ''false'' signals through the wheel speed sensor input. The controller was then interpreting these false signals as impending wheel lock-up. In response to the impending wheel lock-up interpretation, the controller would command the reduction of pneumatic pressure to the vehicle brake chamber at the affected wheel. Under such conditions, with the braking system antilock feature now activated, the vehicle could experience an extended stopping distance.

Bendix identified two potential sources of the false wheel speed signals. The first source was identified as chafing to the wheel speed sensor wire due to contact with other moving or rotating components. The other source of aberrant signals was identified as damaged or displaced wheel components, such as tone rings.

Bendix concluded that by itself, the EC–17 1030R controller was not defective, but in the presence of false or aberrant wheel speed signals, the controller lacked the sufficient software codes to differentiate these signals from otherwise valid signals. Beginning mid-June 2000, Bendix introduced the EC–17 Version 2.3,[1] which contained software that adequately addressed the issue of wheel speed signal differentiation. The EC–17 Version 2.3 controller was introduced to replace the recalled EC–17 1030R controllers. In addition, Bendix introduced the EC–30 in mid-2001 to supercede the EC–17 series. As the EC–30 controller was introduced, it

[1] Production of 210,913 units between 06/13/00 and 09/25/01.

was also used as a remedy part for the EC–17 1030R recall.

The Petitioner alleges that the algorithm used in the EC–17 Version 2.3 only corrected for potential low speed (less than 12 MPH) braking problems on rough road surfaces. His concern is that extended vehicle braking distances could otherwise occur at higher speeds on rough surfaces. To illustrate his concern, the Petitioner referenced a ''hardware-in-loop simulation'' that depicted an extended vehicle braking distance on a washboard-type surface. During the simulation, the Petitioner reported that there was no air ''pressure in the brake chamber for the first 15 seconds.'' The Petitioner also referenced a Kansas City area customer who complained of ''non-effective brakes'' when the vehicle was operated on a rough surface as a possible example of such an occurrence.

Bendix Response

Subsequent to the recall, Bendix continued to monitor complaints of extended vehicle braking distances and identified the potential for extended vehicle stopping distances on unpaved and ''severely bumpy'' road surfaces, such as those occasionally found in rural areas. The company's analysis, which included individual contact with complainants, revealed that an extended braking distance event was only likely to occur on severely rough road surfaces that extended for more than 100 feet. During field-testing, Bendix was unable to reproduce an extended braking event on a typical ''washboard'' [2] surface.

Regarding the Petitioner's allegation that extended braking distances could occur at high speeds on washboard surfaces, Bendix reported that such occurrences have not materialized in field testing or through owner complaints. Bendix advised that the Petitioner's allegations are based upon computer simulations ''involving artificially induced electronic inputs'' that ''are more extreme even than worst case scenarios.'' According to Bendix, although ''many of these signals are not realistic or real world conditions,'' they are often bench-tested with an ECU [3] to assist engineers with evaluating possible algorithm changes. Bendix concludes that although the Petitioner cites potential scenarios of extended braking distances, the basis for his conclusions involve conditions not applicable to ''real world'' conditions.

Regarding the Petitioner's allegation that a Kansas City-area complaint concerned extended vehicle braking distances on rough road surfaces, Bendix noted that at the time of the complaint, the remedy for the EC–17 1030R recall had not been performed on several vehicles from the fleet in question. Bendix reported satisfactory resolution of the complaint upon completion of the recall remedy and, for two of the vehicles, the correction of foundation brake problems.

Bendix reasserted that potential events of extended braking distances are only likely to occur on severe rough roads where the ''washboard'' surface extends more than 100 feet. The company concludes that such conditions are atypical highway conditions and that the potential can be mitigated through driver intervention. Bendix stated that investigation of the few complaints of extended braking distances revealed that the vehicles were being operated on unpaved surfaces and that by assuring increased driver awareness of ABS operation the complaints or concerns were resolved.

In consideration of these ''extreme conditions,'' Bendix introduced the EC–30 ABS controller in June 2001. The company reports that the EC–30 Version 2.02 ''provides improved performance on extreme washboard surfaces.'' In sum, Bendix asserts that there is no safety defect with the EC–17 Version 2.3 controller.

Bendix reported no knowledge of any crashes or injuries attributable to poor performance of either EC–17 version. Although Bendix did acknowledge the occurrence of a property damage collision [4] wherein an ABS-equipped bus rear ended another bus, separate investigations by law enforcement, the local school system, and Bendix all concluded that the sole cause was unrelated to the brake system operation and was attributed to driver inattention.

Bendix Complaint and Warranty History

ODI queried Bendix with regard to complaints and warranty claims that referenced the EC–17 controller, excluding those that referenced the model 1030R that was recalled. Bendix reported that it has received 18 complaints (including reports of incidents or inquiries) regarding poor performance, including extended braking distances (complaint rate equals to 8.5 per 100,000 units). Of the 18 complaints, only four specifically mentioned performance issues related to the vehicle being operated on a rough or ''washboard'' surface (corrected complaint rate 1.8 per 100,000 units). Within these complaints, where the surface condition was known, it was described as unpaved. Of the remaining 14 complaints, five were conclusively identified as unrelated to the ABS ECU. The nine remaining complaints were resolved through other component repairs or by providing additional information to the complainant (presumably the complainant used the information to resolve the complaint).

Bendix identified a total of 10th [5] warranty claims related to the EC–17 ABS control unit between September 2000 and January 2003.[6] Although the basis for the warranty claims are not identified, at least two claims were identified as involving the 1030R model in circumstances where the recall remedy had not been installed.

ODI Actions

ODI research of the NHTSA vehicle owner (or consumer) complaint database revealed no complaints regarding malfunction, failure, or extended vehicle braking distance with regard to a Bendix brand pneumatic antilock braking system component.

ODI also communicated informally with International and Blue Bird (two manufacturers that participated in the 1030R recall) and was advised that these manufacturers had not received any new complaints after the recall remedy was performed.

M–12 Modulator Issue

Background

The Petitioner alleges that his review and work on the modulator revealed that it could become ineffective at maintaining pneumatic brake pressure under cold ambient temperatures (less than 20-degrees Fahrenheit). The Petitioner stated that his research revealed that under cold ambient temperatures, the rubber diaphragm in the modulator could become rigid, thereby not permitting it to effectively seal the pilot chamber drain hole during a brake application. Should the drain not seal, sufficient pneumatic pressure may not be delivered to the brake chamber. The Petitioner reported that ''an internal test'' confirmed his suspicion of the diaphragm becoming rigid at cold temperatures.

M–12 Modulator and Relay Valve Assembly

Bendix describes the M–12 as a combination modulator and relay valve

[2] Bendix advised ODI that there is not an industry ''benchmark'' for the evaluation of rough road or ''washboard'' performance.

[3] Defined as ''hardware in loop'' simulation.

[4] March 2002, West Virginia—paved, straight, level, dry road surface at a controlled intersection.

[5] Corrected warranty rate is 3.7 per 100,000 units.

[6] As of June 2003.

assembly [7] for the pneumatic antilock brake system on large trailers. Information provided by Bendix indicates that the M–12 was manufactured between November 1997 and March 2001 with a total production of approximately 78,509 units. Additional information indicates that the M–12 underwent four modifications during the years of production. Those modifications are summarized in the table below.

Date	Modification
March 1998	Change in solenoid supplier.
August 1998	Dura Drain Feature Added.
September 1999	Housing Casting Improved.
October 2000	Dura Drain Feature Discontinued.

With regard to the defect petition, the most applicable modification would appear to be the introduction of the Dura Drain feature, which was added as a product improvement. Bendix reported an approximate production of 50,778 units (approximately 64% of the total units) with this feature. The Dura Drain feature was subsequently discontinued, reportedly as a means to reduce cost. Production of the M–12/MC–12 was discontinued approximately 5 months later (March 2001), as it was replaced by the MC–30 modulator/ECU assembly.

M–12—Bendix Response

Bendix advised ODI that with regard to the defect alleged by the Petitioner, the company conducted an investigation that consisted of multiple tests and studies. This investigation began in November 2000 after a Bendix representative, while on a routine customer contact visit, was informed of an issue that was described as ''inconsistent trailer braking.'' The customer, a vehicle fleet owner with facilities near the Bendix headquarters, regularly participated in the evaluation of Bendix products. According to Bendix, the complaint concerned reports of three fleet drivers who described an occurrence of ''trailer push,'' in which the vehicle driver senses that the trailer brakes appear to operate more slowly or less effectively than the tractor brakes. The ensuing investigation determined that the likely cause was a diminished build up of air pressure in the trailer brake system.

During the early stages of the investigation, the Petitioner's allegation and analysis that diaphragm rigidity due to cold ambient temperatures was considered as a possible cause. Bendix reported that further evaluation and testing ''cast doubt'' on the Petitioner's contentions. The company reported that there had been no similar complaints during the winter months of 1998, 1999 and early 2000. Furthermore, the compound used in the M–12 diaphragm was specified for adequate performance to −40 degrees Fahrenheit. Bendix reported that testing at cold ambient temperatures could not ''consistently replicate the predicted (poor) performance'' due to a rigid diaphragm.[8]

Nonetheless, Bendix continued to receive trailer-braking complaints, many outside of winter months. As Bendix conducted detailed inspections of the M–12 modulators, the company observed ''a strong correlation (of braking complaints) to the presence of solid or fibrous contamination in the air intake valve area.'' The company also observed that the complaints ''were regionally clustered'' and ''specific to certain vehicle (trailer) makes.'' The conclusion of their investigation was that contamination in the intake port of the valve and not the rigidity of the diaphragm was the most likely cause for a majority of the ''trailer push'' or extended braking distance complaints. Bendix also noted that an evaluation of some complaints revealed other causes such as kinked air lines or external valve damage. Regarding the source of the contamination, Bendix cited the observation of material consistent with insect infiltration or hibernation as well as possible maintenance practices.

Bendix reported no known occurrences of crashes or injuries associated with the lack of performance or failure of the M–12 modulator.

Bendix Complaint and Warranty History

ODI queried Bendix with regard to complaints and warranty claims that referenced the M–12. Bendix provided ODI with data indicating that between April 1999 and early August 2003, the company received complaints on 139 M–12 units [9] that were in use on trailers owned by seven (7) fleets. Nearly 70% of the complaints were received from one large fleet described by Bendix as one that regularly participates in product evaluations. A second large fleet accounted for approximately 18% of the complaints, revealing that nearly 88% of the complaints originated with two fleet operations.

Bendix reported that in those cases in which it was able to investigate the basis for the complaint, contamination of the air system was identified in approximately 94% of the complaints. With regard to the contamination, Bendix reported that the majority consisted of evidence of insect nesting and fibrous/cloth material likely to have been introduced during vehicle assembly or maintenance.

For all but 27 complaints, Bendix provided information on the month and year of the complaint (identified as the date of occurrence). Review of the data revealed that more than half of the complaints were received during 2001. The data also revealed that less than one half of the complaints occurred during the winter months of November through February. These trends are illustrated in the tables below.

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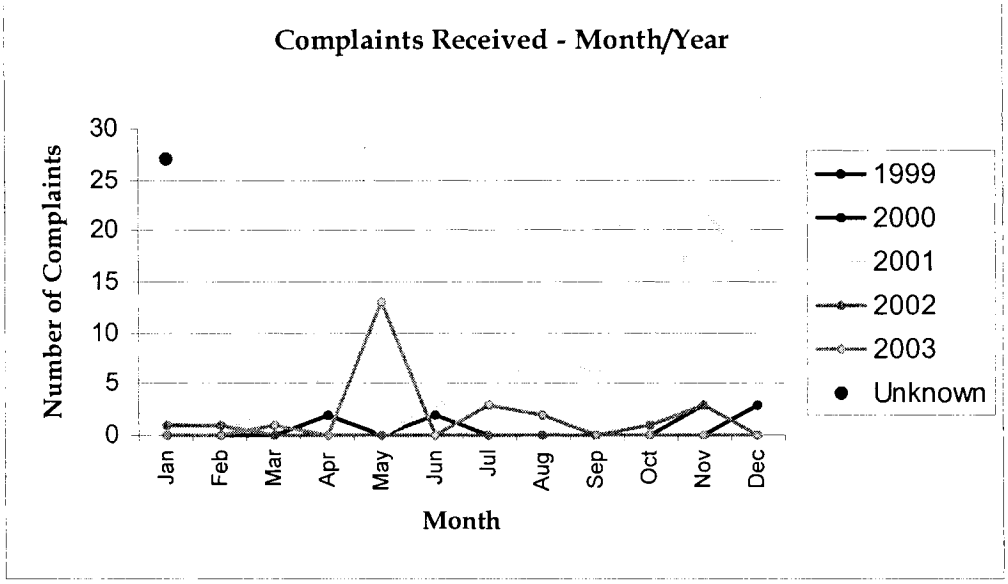
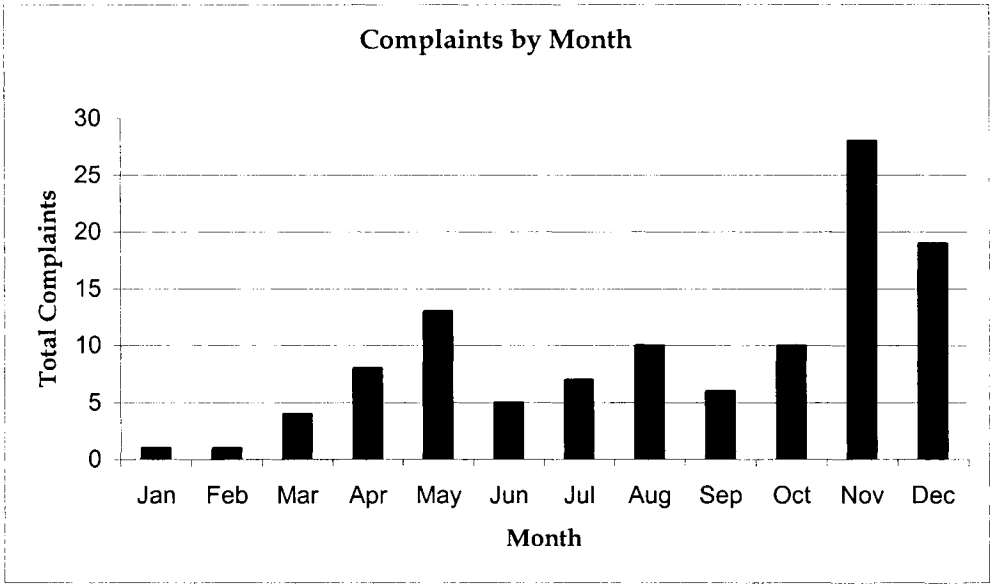
[7] The M–12 also carries the designation of MC–12 when an ECU is combined with the modulator/relay valve assembly.

[8] Data provided by Bendix does indicate that some early testing revealed occasional leakage of Dura Drain at colder temperatures when the antilock system is active. Additionally, Bendix concedes that a rigid diaphragm could lead to degradation in antilock brake performance.

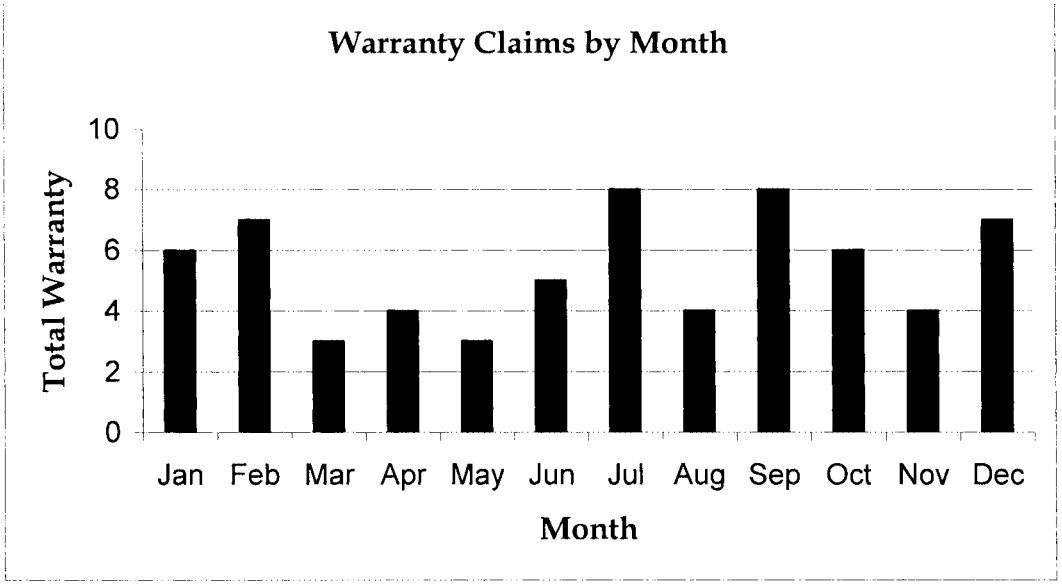
[9] Complaints appear to reflect all M–12 units. There was no differentiation between units produced with and without the Dura Drain feature, resulting in an overall complaint rate of 17.7 per 10,000 units.

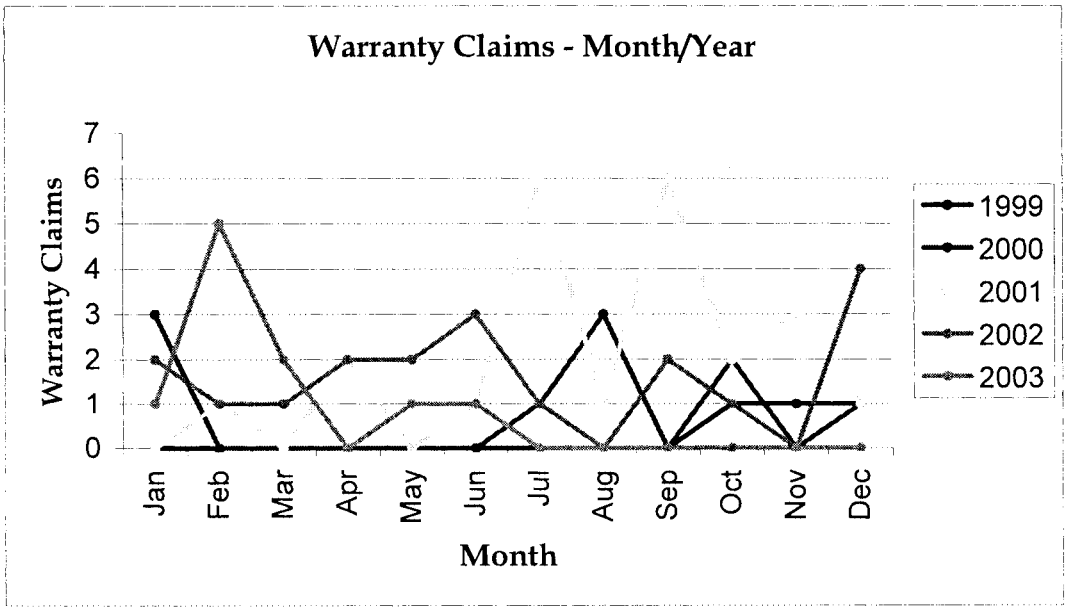




Bendix reported processing 65 warranty claims [10] between October 1999 and June 2003. Review of the data indicates that less than one half of the warranty claims were processed during the winter months of November through February. Information provided with the warranty claims offered few analytical details regarding the reason for the warranty claim. It is also noteworthy that the product descriptions for warranty claims reference both the M–12 (9.5% of the claims) and the MC–12 (90.5% of the claims). Since the MC–12 also contains the ECU, some of the claims may be related to components other than the Dura Drain feature. The warranty data provided no differentiation between units equipped or not equipped with the Dura Drain feature. Warranty trends are illustrated in the tables below.

[10] Warranty rate of 8 per 10,000 units.





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ODI Actions

Review of the NHTSA vehicle owner complaint database revealed no complaints regarding the M–12 modulator or extended trailer stopping distances. ODI staff did contact one of the vehicle fleet owners identified by the Petitioner. The fleet representative advised ODI that although Bendix evaluated the performance of their trailers, driver training appeared to be the greater problem. The fleet had no continuing concerns.

Conclusion

ODI acknowledges the Petitioner's personal involvement in the evaluation of the performance of both the EC–17 Version 2.3 ABS controller and the M–12 modulator assembly. Although the Petitioner offers information that is not entirely disputed by Bendix, his contention that the components contain defects that relate to motor vehicle safety is not supported by the available data.

With regard to the EC–17 Version 2.3 ABS controller, data provided by Bendix revealed that extended braking distances were only likely on extremely rough surfaces (over long distances) characteristic of unpaved surfaces. Although the company's next generation ECU reportedly improves performance in this type of setting, Bendix reported that enhanced vehicle driver awareness has mitigated the issue for the EC–17. ODI has no independent information that contradicts this assertion.

With regard to the M–12 modulator, data provided by Bendix revealed that although diaphragm rigidity (due to cold ambient temperatures) may degrade antilock performance (*i.e.*, extend braking distance during an ABS event), the company's investigation and analysis failed to consistently replicate the poor performance. Furthermore, Bendix provided data that showed a greater number of complaints and warranty claims occurring during warmer weather. Their analysis also identified the presence of air system contamination in an overwhelming number of complaints.

Upon review of the available data it is unlikely that NHTSA would issue an order requiring the notification and remedy of a safety-related defect in either the EC–17 Version 2.3 or the M–12 modulator at the conclusion of an investigation. Therefore, in view of the need to allocate and prioritize NHTSA's limited resources to best accomplish the agency's safety mission, the petition is denied.

Authority: 49 U.S.C. 30162(d); delegations of authority at CFR 1.50 and 501.8.

Issued on: December 18, 2003.

Kenneth N. Weinstein,

Associate Administrator for Enforcement.

[FR Doc. 03–31753 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34075]

Six County Association of Governments—Construction and Operation Exemption—Rail Line Between Juab and Salina, UT

ACTION: Notice of availability of draft Scope of Analysis for the Environmental Impact Statement.

SUMMARY: On July 30, 2001, the Six County Association of Governments (SCAOG), a regional association representing Juab, Millard, Sevier, Sanpete, Piute, and Wayne counties in central Utah, filed a Petition for Exemption with the Surface Transportation Board (Board) pursuant to 49 U.S.C. 10502 for authority for construction and operation of a new rail line between Juab and Salina, Utah. The project would involve approximately 43 miles of new rail line and ancillary facilities to serve shippers in central Utah, particularly Southern Utah Fuels Company (SUFCO) coal operations. Because the construction and operation of this project has the potential to result in significant environmental impacts, the Board's Section of Environmental Analysis (SEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate. SEA held public scoping meetings as part of the EIS process, as discussed in the Notice of Scoping Meetings and Request for Comments published by the Board on October 20, 2003. As part of the scoping process, SEA has developed a draft Scope of Analysis for the EIS.

SEA has made available for public comment the draft Scope of Analysis contained in this notice. SEA will issue a final Scope of Analysis shortly after the close of the comment period. Written comments on the Scope of Study are due January 26, 2004.

Filing Environmental Comments: Interested persons and agencies are invited to participate in the EIS scoping process. A signed original and 10 copies of comments should be submitted to: Surface Transportation Board, Case Control Unit, STB Finance Docket No. 34075, 1925 K Street, NW., Washington, DC 20423–0001, with the following designation written in the lower left-hand corner of the envelope: Attention: Phillis Johnson-Ball, Environmental Project Manager, Environmental Filing.

FOR FURTHER INFORMATION CONTACT: Ms. Phillis Johnson-Ball, Section of Environmental Analysis, Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. The Web site for the Surface Transportation Board is *www.stb.dot.gov.*

SUPPLEMENTARY INFORMATION:

Draft Scope of Analysis for the EIS

Proposed Action and Alternatives

The proposed action, known as the Central Utah Rail project, involves the construction and operation of approximately 43 miles of new rail line connecting the existing Union Pacific Railroad (UPRR) line near Juab, Utah, to a proposed coal transfer terminal facility near Salina, Utah. Implementation of the proposed project would restore rail service to the Sevier Valley, providing a more direct connection to rail service for the coal industry (primarily SUFCO), provide rail service to other shippers in the Sevier Valley, and reduce the number of trucks on highways in the Sevier Valley.

The reasonable and feasible alternatives that will be evaluated in the EIS are (1) construction and operation of the proposed project, (2) the no-action alternative, and (3) alternative alignments identified during the scoping process.

Environmental Impact Analysis

Proposed New Construction

Analysis in the EIS will address the proposed activities associated with the construction and operation of new rail facilities and their potential environmental impacts, as appropriate.

Impact Categories

The EIS will address potential impacts from the proposed construction and operation of new rail facilities on the human and natural environment. Impact areas addressed will include the categories of land use, biological resources, water resources, geology and soils, air quality, noise, energy resources, socioeconomics as they relate to physical changes in the environment, safety, transportation systems, cultural and historic resources, recreation, aesthetics, and environmental justice. The EIS will include a discussion of each of these categories as they currently exist in the project area and will address the potential impacts from the proposed project on each category as described below:

1. Land Use

The EIS will:

a. Describe existing land use patterns within the project area and identify those uses that would be potentially impacted by proposed rail line construction.

b. Describe the potential impacts associated with the proposed new rail line construction on land uses identified in the project area. Such impacts may include impacts on farming and ranching activities, incompatibility with existing land uses, and conversion of land to railroad uses.

c. Propose mitigative measures to minimize or eliminate potential project impacts on land use, as appropriate.

2. Biological Resources

The EIS will:

a. Describe existing biological resources within the project area, including vegetative communities, wildlife and fisheries, and federal and state threatened or endangered species, and the potential impacts on those resources resulting from construction and operation of proposed rail facilities.

b. Describe any wildlife sanctuaries, refuges, and national or state parks, forests, or grasslands within the project area and potential impacts on these resources resulting from construction and operation of the proposed rail line and ancillary facilities.

c. Propose mitigative measures to minimize or eliminate potential project impacts on biological resources, as appropriate.

3. Water Resources

The EIS will:

a. Describe the existing surface and groundwater resources within the project area, including lakes, rivers, streams, ponds, wetlands, and flood plains, and the potential impacts on these resources resulting from construction and operation of the proposed rail line and ancillary facilities.

b. Describe the permitting requirements for the proposed new rail line construction regarding wetlands, stream and river crossings, water

quality, and erosion and sedimentation control.

c. Describe the existing private water wells located within the project area and potential impacts, if any, to water quality due to vibration from haul trains.

d. Describe current access to irrigation water within the project area and potential impacts due to alignment location.

e. Propose mitigative measures to minimize or eliminate potential project impacts on water resources, as appropriate.

4. Geology and Soils

The EIS will:

a. Describe the geology and soils within the project area, including unique formations, problematic/hazardous geology or soils, prime or unique farmland soils, hydric soils, and the potential impacts on these resources resulting from the construction and operation of the proposed rail line.

b. Propose mitigative measures to minimize or eliminate potential project impacts on geological resources and/or soils, as appropriate.

5. Air Quality

The EIS will:

a. Describe the attainment status of the project area, including proximity to any Class I or non-attainment area as designated under the Clean Air Act. Estimates of air emissions related to the construction and operation of the proposed new rail line will be prepared.

b. Discuss and evaluate the potential air emissions changes from diversion of existing vehicle-related emissions to rail.

c. Propose mitigative measures to minimize or eliminate potential impacts related to the construction and operation of the proposed rail line.

6. Noise

The EIS will:

a. Describe the potential noise impacts of new rail line construction and operation for those sensitive receptors (houses, schools, etc.) where the increase may exceed 3 dbA Ldn or exceed a total of 65 dbA Ldn.

b. Propose mitigative measures to minimize or eliminate potential project impacts on noise receptors, as appropriate.

7. Energy Resources

The EIS will:

a. Describe the potential impact of the new rail line on the distribution of energy resources in the project area, including petroleum and gas pipelines and overhead electric transmission lines.

b. Propose mitigative measures to minimize or eliminate potential project impacts on energy resources, as appropriate.

8. Socioeconomics

The EIS will:

a. Describe the potential environmental impacts on residences, residential areas, and communities within the project area as a result of new rail line construction and operation activities.

b. Describe the potential environmental impacts on commercial and industrial activities and development in the project area as a result of new rail line construction and operation activities.

c. Propose mitigative measures to minimize or eliminate potential project impacts on socioeconomic resources, as appropriate.

9. Safety

The EIS will:

d. Describe new at-grade rail crossings that would result from construction of the rail line and the potential for an increase in accidents related to the new rail line operations, as appropriate.

e. Describe rail operations and the potential for increased probability of train accidents, as appropriate.

f. Describe safety factors, as appropriate, for rail/pipeline crossings, if any exist in the project area.

g. Describe existing trucking operations for coal hauling and the potential for accidents from those operations.

h. Describe the potential for disruption and delays to the movement of emergency vehicles due to new rail line construction and operations.

i. Propose mitigative measures to minimize or eliminate potential project impacts on safety, as appropriate.

9. Transportation Systems

The EIS will:

a. Describe the potential impacts of new rail line construction and operation on the existing transportation network in the project area, including vehicular delays at at-grade road/rail crossings.

b. Describe potential impacts on navigation associated with proposed new bridges.

c. Describe effects of current coal trucking operations on the existing road network and communities.

d. Describe current access to recreation locations within the project area and potential impacts from rail line construction and operation.

e. Propose mitigative measures to minimize or eliminate potential project impacts on transportation systems, as appropriate.

10. Cultural and Historic Resources

The EIS will:

a. Describe the potential impacts on historic structures or districts previously recorded and determined potentially eligible, eligible, or listed on the National Register of Historic Places (NRHP) that are within or immediately adjacent to the right-of-way for the proposed and alternative rail alignments.

b. Describe the potential impacts on archaeological sites previously recorded and either listed as unevaluated or determined potentially eligible, eligible, or listed on the NRHP that are within or immediately adjacent to the right-of-way for the proposed and alternative rail alignments.

c. Describe the potential impacts on historic structures or districts determined to be potentially eligible, eligible, or listed on the NRHP that are within the right-of-way for the proposed and alternative rail alignments.

d. Describe the likelihood for unrecorded, buried archaeological sites to exist within the right-of-way for the proposed and alternative rail alignments, the potential that the sites are eligible for listing on the NRHP, and the potential impact of the rail construction on the sites.

e. Describe the potential general impacts on paleontological resources in the project area due to project construction, if necessary.

f. Propose mitigative measures to minimize or eliminate potential project impacts on cultural and historic resources, as appropriate.

11. Recreation

The EIS will:

a. Describe potential impacts of the proposed new rail line construction and operation on recreational opportunities provided in the project area.

b. Propose mitigative measures to minimize or eliminate potential project impacts on recreation resources, as appropriate.

12. Aesthetics

The EIS will:

a. Describe the potential impacts of the proposed new rail line construction and operation on any areas determined to be of high visual quality.

b. Describe the potential impacts of the proposed new rail line construction and operation on any waterways designated or considered for designation as wild and scenic.

c. Propose mitigative measures to minimize or eliminate potential project impacts on aesthetics, as appropriate.

13. Environmental Justice

The EIS will:

a. Describe demographics in the project area and the immediate vicinity of the proposed new construction, including communities potentially impacted by the construction and operation of the proposed new rail line.

b. Evaluate whether proposed new rail line construction or operation would have a disproportionately high and adverse impact on minority or low-income groups.

c. Propose mitigative measures to minimize or eliminate potential project impacts on environmental justice communities, as appropriate.

14. Cumulative Impacts

The EIS will address the cumulative impacts on the environment that may result from the proposed action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency or individuals undertake such actions.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams,

Secretary.

[FR Doc. 03–31718 Filed 12–23–03; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

Agency Information Collection; Activity Under OMB Review; Report of Passengers Denied Confirmed Space—BTS Form 251

AGENCY: Bureau of Transportation Statistics (BTS), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of currently approved collections. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collection of information was published on September 22, 2003 (68 FR 55085–55086).

DATES: Written comments should be submitted by January 23, 2004.

FOR FURTHER INFORMATION CONTACT: Bernie Stankus, Office of Airline Information, K–14, Room 4125, Bureau of Transportation Statistics, 400 Seventh Street, SW., Washington, DC 20590–0001, Telephone Number (202) 366–4387, Fax Number (202) 366–3383, or e-mail *bernard.stankus@bts.gov*.

SUPPLEMENTARY INFORMATION:

Bureau of Transportation Statistics (BTS)

Title: Report of Passengers Denied Confirmed Space.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 2138–0018.

Forms: BTS Form 251.

Affected Public: U.S. and foreign air carriers that provide scheduled passenger service with aircraft having over 60 seats.

Abstract: BTS Form 251 is a one-page report on the number of passengers denied boarding voluntarily and involuntarily, whether the bumped passengers were provided alternate transportation and/or compensation, and the amount of the payment. U.S. and foreign air carriers that operate scheduled passenger service with large aircraft (over 60 seats) must submit Form 251. However, carriers do not report data from inbound international flights because the protections of Part 250 *Oversales* do not apply to these flights. The report allows the Department to monitor the effectiveness of its oversales rule and take enforcement action when necessary. The involuntary denied-boarding rate has decreased over the years from 4.38 per 10,000 passengers in 1980 to 0.89 for the nine months ended September 2003. The improvement has been made in a period when load factors and passenger enplanements have risen. These statistics demonstrate the effectiveness of the ''volunteer provision.'' The publishing of the air carriers' individual denied boarding rates has negated the need for more intrusive regulation. The rate of denied boarding can be examined as a continuing fitness factor. This rate provides an insight into a carrier's policy of treating passengers and its compliance disposition. A rapid sustained increase in the rate of denied boarding often is an indicator of operational difficulty. Because the rate of denied boarding is released quarterly, travelers and travel agents can select carriers with low bumping incidents when booking a trip. This information is made available to the public in the *Air Travel Consumer Report* and on the Web at *http://www.dot.gov/airconsumer*. The *Air Travel Consumer Report* is also sent to newspapers, magazines, and trade journals. Without Form 251, determining the effectiveness of the Department's oversales rule, would be impossible.

Estimated Annual Burden Hours: 2,200 hours.

Address: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW., Washington, DC 20503, Attention BTS Desk Officer.

Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department concerning consumer protection. Comments should address whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

The Confidential Information Protection and Statistical Efficiency Act of 2002 (44 U.S.C. 3501 note), requires a statistical agency to clearly identify information it collects for non-statistical purposes. BTS hereby notifies the respondents and the public that BTS uses the information it collects under this OMB approval for non-statistical purposes including, but not limited to, publication of both respondent's identity and its data, submission of the information to agencies outside BTS for review, analysis and possible use in regulatory and other administrative matters.

Issued in Washington, DC, on December 17, 2003.

Donald W. Bright,

Assistant Director, Office of Airline Information.

[FR Doc. 03–31727 Filed 12–23–03; 8:45 am]

BILLING CODE 4910–FE–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 6 Taxpayer Advocacy Panel (Including the States of Alaska, Arizona, Colorado, Hawaii, Idaho, Montana, New Mexico, Nevada, Oregon, Washington, and Wyoming)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 6 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is

soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. The TAP will use citizen input to make recommendations to the Internal Revenue Service.

DATES: The meeting will be held Thursday, January 15, 2004

FOR FURTHER INFORMATION CONTACT: Judi Nicholas at 1–888–912–1227, or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 6 Taxpayer Advocacy Panel will be held Thursday, January 15, 2004, from 2 p.m. Pacific time to 4 p.m. Pacific time via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Judi Nicholas, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Judi Nicholas. Ms. Nicholas can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: Various IRS issues.

Dated: December 17, 2003.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 03–31691 Filed 12–23–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0358]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 23, 2004.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0358.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0358'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Supplemental Information for Change of Program or Reenrollment After Unsatisfactory Attendance, Conduct or Progress, VA Form 22–8873.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans and other eligible persons may change their program of education under conditions prescribed by Title 38 U.S.C., Section 3691. A claimant can normally make one change of program without VA approval. If that claimant makes any additional change of program, VA approval is required. Before VA may approve benefits for a second or subsequent change of program, VA must first determine that the new program is suitable to the claimant's aptitudes, interests, and abilities, or that the cause of any unsatisfactory progress or conduct has been resolved before entering into a different program. VA Form 22–8873 is used to gather the necessary information only if the suitability of the proposed training program cannot be established from information already available in the claimant's VA education records or the results of academic or vocational counseling are not available to VA.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 14, 2003, at page 59244–59245.

Affected Public: Individuals or households.

Estimated Annual Burden: 9,150 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 18,300.

Dated: December 8, 2003.

By direction of the Secretary.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 03–31621 Filed 12–23–03; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0646]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 23, 2004.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8030, FAX (202) 273–5981 or e-mail to: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0646.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900–0646'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Medication Prescribed by Non-VA Physicians; VA Transitional Pharmacy Benefit, VA Form 10–0411.

OMB Control Number: 2900–0646.

Type of Review: Extension of a currently approved collection.

Abstract: Under existing law and regulations, a veteran desiring medical care from VA must enroll in VA's health

care system. When a veteran first enrolls in the VA system, and requests an appointment for care, VA schedules an appointment for a visit with a primary care physician. The primary care physician generally learns from the veteran what medication the veteran is taking, if any, assesses the need for the medication and writes prescriptions for any needed medication. Those prescriptions written by the VA physician are filled by a VA pharmacy. In recent years, there has been an increase in the enrollment of veterans into the health care system to obtain pharmacy benefits at no cost or at a reasonable cost. With the dramatically increased enrollment, VA has been unable to provide all enrolled veterans with health care services in a timely manner. Many of those veterans have prescriptions, written by non-VA physicians, that VA primary care physicians may subsequently confirm and renew when the veterans are able to have initial primary care visits. In an effort to ease financial burden on enrolled veterans currently waiting lengthy periods of time for their initial primary care visits, VA will provide these veterans with medication prior to their initial primary care visits at VA if these veterans present valid prescriptions from the non-VA physicians. VA will fill prescriptions written by non-VA physicians only for a period of time such veterans are awaiting a scheduled appointment with a VA health care provider. VA Form 10–0411, VA Transitional Pharmacy Benefit will be used to collect the data necessary to safely administer these medications.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 7, 2003, at pages 57955–57956.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 30,287 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 363,446.

Estimated Number of Respondents: 181,723.

Dated: December 11, 2003.

By direction of the Secretary.

Jacqueline Parks,

IT Specialist, Records Management Service.

[FR Doc. 03–31622 Filed 12–23–03; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
December 24, 2003

Part II

Securities and Exchange Commission

17 CFR Parts 270, 275, and 279
Compliance Programs of Investment Companies and Investment Advisers; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270, 275, and 279

[Release Nos. IA–2204; IC–26299; File No. S7–03–03]

RIN 3235–AI77

Compliance Programs of Investment Companies and Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; request for comments.

SUMMARY: The Securities and Exchange Commission is adopting new rules under the Investment Company Act of 1940 and the Investment Advisers Act of 1940 that require each investment company and investment adviser registered with the Commission to adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws, review those policies and procedures annually for their adequacy and the effectiveness of their implementation, and designate a chief compliance officer to be responsible for administering the policies and procedures. In the case of an investment company, the chief compliance officer will report directly to the fund board. These rules are designed to protect investors by ensuring that all funds and advisers have internal programs to enhance compliance with the federal securities laws.

DATES: *Effective Date:* February 5, 2004.

Comment Date: Comments requested in section II.F of this release should be received on or before February 5, 2004.

Compliance Date: October 5, 2004. Section III of this release contains more information on the compliance date.

ADDRESSES: To help us process and review your comments more efficiently, comments may be sent to us in either paper or electronic format. Comments should not be sent by both methods.

Comments in paper format should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments in electronic format may be submitted at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–03–03; if e-mail is used, this file number should be included on the subject line. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will also be posted on the Commission's Internet Web site *(http://www.sec.gov).*[1]

FOR FURTHER INFORMATION CONTACT: Hester Peirce, Senior Counsel, Office of Regulatory Policy at (202) 942–0690, or Jamey Basham, Special Counsel, Office of Investment Adviser Regulation at (202) 942–0719, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''SEC'' or ''Commission'') is adopting new rule 38a–1 (17 CFR 270.38a–1) under the Investment Company Act of 1940 (15 U.S.C. 80a) (''Investment Company Act''), new rule 206(4)–7 (17 CFR 275.206(4)–7) under the Investment Advisers Act of 1940 (15 U.S.C. 80b) (''Investment Advisers Act'' or ''Advisers Act''), and amendments to rule 204–2 (17 CFR 275.204–2) under the Advisers Act, and to Part 1, Schedule A, Item 2(a) of Form ADV (17 CFR 279.1).[2]

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I. Background

Earlier this year the Commission proposed rules that would require investment companies (''funds'')[3] and investment advisers to adopt written compliance procedures, review the adequacy of those procedures annually, and designate a chief compliance officer responsible for their administration.[4] We proposed the rules because it is critically important for funds and advisers to have strong systems of controls in place to prevent violations of the Federal securities laws and to protect the interests of shareholders and clients. The proposed rules were designed to foster, among other things, improved compliance by clarifying the compliance obligations of fund management and to strengthen the hand of fund boards and compliance personnel when dealing with them.[5]

In recent months, the Commission and State securities authorities have discovered unlawful conduct involving a number of fund advisers, broker-dealers, and other service providers that confirms the need for these rules. Fund advisory or distributor personnel have engaged in, or actively assisted others in engaging in, inappropriate market timing, late trading of fund shares, and the misuse of material, nonpublic information about fund portfolios.[6]

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[1] We do not edit personal or identifying information, such as names or e-mail addresses, from electronic submissions. Submit only information you wish to make publicly available.

[2] Unless otherwise noted, when we refer to rule 38a–1 or any paragraph of the rule, we are referring to 17 CFR 270.38a–1 of the Code of Federal Regulations in which the rule is published, as amended by this release; when we refer to rule 206(4)–7 or any paragraph of the rule, we are referring to 17 CFR 275.206(4)–7 of the Code of Federal Regulations in which the rule is published, as amended by this release; and when we refer to rule 204–2 or any paragraph of the rule, we are referring to 17 CFR 275.204–2 of the Code of Federal Regulations in which the rule is published, as amended by this release.

[3] In this release, we use the term ''fund'' to mean a registered investment company or a business development company, which is an unregistered closed-end investment company. *See* section 2(a)(48) of the Investment Company Act (15 U.S.C. 80a–2(a)(48)). We use the term ''mutual fund'' to mean a registered investment company that is an open-end management company defined in section 5(a) of the Investment Company Act (15 U.S.C. 80a–5(a)).

[4] Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 25925 (Feb. 5, 2003) (68 FR 7038 (Feb. 11, 2003)) (''Proposing Release'').

[5] Forty-eight commenters, most of which were investment advisers, fund management companies, and organizations representing those groups, submitted comments in response to the Proposing Release. Commenters generally supported the proposal to require funds and advisers to adopt and implement compliance programs, but many sought changes. The comment letters and a summary of comments prepared by our staff are available for public inspection and copying in the Commission's Public Reference Room, 450 5th Street, NW., Washington, DC (File No. S7–03–03). The comment summary is also available on the Commission's Internet Web site (*http://www.sec.gov/rules/extra/s70303summary.pdf.*)

[6] The Commission has already obtained settlements in a number of actions arising from such violations. *See, e.g.*, In re Putnam Investment Management, Investment Advisers Act Release No. 2192 (Nov. 13, 2003) (finding that an investment adviser failed to disclose potentially self-dealing

These personnel, including in some cases senior executives of fund advisers, have placed their personal interests or the business interests of the fund adviser ahead of the interests of fund shareholders, thus breaching their fiduciary obligations to the funds involved and their shareholders. These individuals have harmed the funds, their management organizations, and the confidence of fund investors.

Our response to these events is twofold. First, we are conducting an intensive investigation of funds, advisers, broker-dealers, and others.[7] We will aggressively pursue and punish those who have violated the Federal securities laws and breached their fiduciary obligations to clients. When appropriate, we will actively work with other Federal law enforcement authorities and State authorities to see that the full weight of the law is brought to bear against those who have betrayed mutual funds and fund investors. Second, we will review all of our rules to determine what changes may be required to prevent this type of conduct.

We are taking our first regulatory actions designed to curb the abusive practices recently uncovered and to prevent their recurrence. In companion releases, we are proposing to amend our rules regarding mutual fund share pricing and prospectus disclosure.[8] In this release, we are adopting new rules requiring advisers and funds to adopt strong compliance controls administered by a chief compliance officer.

II. Discussion

The Commission is adopting new rule 206(4)–7 under the Advisers Act and new rule 38a–1 under the Investment Company Act.[9] The new rules require each registered investment adviser and each fund to adopt and implement compliance programs that conform to the new rules. Failure of an adviser or fund to have adequate compliance policies and procedures in place will constitute a violation of our rules independent of any other securities law violation. The new rules will thus permit the Commission to address the failure of an adviser or fund to have in place adequate compliance controls, before that failure has a chance to harm clients or investors.

A. Adoption and Implementation of Policies and Procedures

1. Investment Advisers

Under rule 206(4)–7, it is unlawful for an investment adviser registered with the Commission to provide investment advice unless the adviser has adopted and implemented written policies and procedures reasonably designed to prevent violation of the Advisers Act by the adviser or any of its supervised persons.[10] The rule requires advisers to consider their fiduciary and regulatory obligations under the Advisers Act and to formalize policies and procedures to address them.[11]

Commenters generally supported these new requirements, but some expressed concerns for how they would be applied to smaller advisers. The Commission is sensitive to the burdens the rule may impose upon smaller advisory firms.[12] The rule requires only that the policies and procedures be *reasonably* designed to prevent violation of the Advisers Act, and thus need only encompass compliance considerations relevant to the operations of the adviser. We would expect smaller advisory firms without conflicting business interests to require much simpler policies and procedures than larger firms that, for example, have multiple potential conflicts as a result of their other lines of business or their affiliations with other financial service firms.[13] The preparation of these simpler policies and procedures and their administration should be much less burdensome.

Rule 206(4)–7 does not enumerate specific elements that advisers must include in their policies and procedures.[14] Commenters agreed with

securities trading by several of its employees, failed to have reasonable procedures to prevent misuse of material nonpublic information, and failed to reasonably supervise the employees who committed violations); In re Connelly, Securities Act Release No. 8304 (Oct. 16, 2003) (finding that a former executive of an investment adviser to a fund complex, in contravention of fund disclosures, approved agreements that permitted select investors to time certain funds in the complex); In re Markovitz, Securities Act Release No. 8298 (Oct. 2, 2003) (finding that a former hedge fund trader violated the Federal securities laws and defrauded investors by engaging in late trading of mutual fund shares).

[7] To date, we have brought 10 enforcement actions. *See SEC* v. *Mutuals.com, Inc.,* Civil Action No. 303 CV 2912D (N.D. Tex. Dec. 4, 2003) (alleging that dually registered broker-dealer and investment adviser, three of its executives, and two affiliated broker-dealers assisted institutional brokerage customers and advisory clients in carrying out and concealing thousands of market timing trades and illegal late trades in shares of hundreds of mutual funds); *SEC* v. *Invesco Funds Group,* Civil Action No. 03–N–2421 (PAC) (D. Colo. Dec. 2, 2003) (alleging that investment adviser, with approval of its president and chief executive officer, entered into market timing arrangements with more than 60 broker dealers, hedge funds, and advisers without disclosing these arrangements to the affected mutual funds' independent directors or shareholders); *SEC* v. *Security Trust Company,* Civil Action No. 03–2323 (D. Ariz. Nov. 24, 2003) (alleging that unregistered financial intermediary and three of its senior executives facilitated and participated in late trading and market timing schemes by a group of related hedge funds); *SEC* v. *Pilgrim,* Civil Action No. 03–CV–6341 (E.D. Penn. filed Nov. 20, 2003) (alleging that investment adviser and two senior executives permitted a hedge fund, in which one of the executives had a substantial financial interest, to engage in repeated short-term trading of several mutual funds and that one of the executives provided nonpublic portfolio information to a broker-dealer, which passed it on to its customers); *SEC* v. *Druffner,* Civil Action No. 03–12154–RCL (D. Mass. Nov. 4, 2003) (alleging that five brokers, with the assistance of their branch office manager, evaded attempts to restrict their trading and conducted thousands of market timing trades in numerous mutual funds); *SEC* v. *Scott,* Civil Action No. 03–12082–EFH (D. Mass. filed Oct. 28, 2003) (alleging that two senior investment executives of an investment adviser engaged in repeated short-term trading in their personal accounts of funds over which they had investment decision-making responsibility and about which they had access to nonpublic information); In re Sihpol, Administrative Proceeding No. 3–11261 (Sept. 16, 2003) (charging former broker with playing a key role in enabling certain hedge fund customers to engage in late trading in shares of funds). See also supra note . A number of State actions are also pending.

[8] Amendments to Rules Governing Pricing of Mutual Fund Shares, Investment Company Act Release No. 26288 (Dec. 11, 2003) (68 FR 70388 (Dec. 17, 2003)) (''Companion Late Trading Release''); Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, Investment Company Act Release No. 26287 (Dec. 11, 2003) (68 FR 70402 (Dec. 17, 2003)) (''Companion Disclosure Release'').

[9] We also are adopting related amendments to rule 204–2 under the Advisers Act and a technical amendment to Form ADV.

[10] Rule 206(4)–7(a). *See also* section 202(a)(25) of the Advisers Act (15 U.S.C. 80b–2(a)(25)) (defining ''supervised person'' as ''any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an investment adviser, or other person who provides investment advice on behalf of the investment adviser and is subject to the supervision and control of the investment adviser'').

[11] In response to several comments, we revised the text of the rule so that a violation of the rule would be deemed to be ''unlawful'' rather than ''a fraudulent, deceptive, or manipulative act, practice or course of business.'' This change, which responds to commenters' concerns regarding the optics of the rule, does not change its substance; failure to comply with its terms will result in a violation of section 206(4) of the Act.

[12] In the Proposing Release, we requested comment on whether we should except a subset of investment advisers or funds from the requirements of the rules. Some commenters suggested that we except small advisers, but we believe that the flexibility of the rules obviates the need for this exception.

[13] Even small advisers may have arrangements, such as soft dollar agreements, that create conflicts. Advisers of all sizes, in designing and updating their compliance programs, must identify these arrangements and provide for the effective control of the resulting conflicts.

[14] Advisers already are subject to requirements to maintain written compliance policies and procedures in certain areas. The new rules do not alter those requirements. *See, e.g.*, Investment Company Act rule 17j–1(c)(1) (17 CFR 270.17j–1(c)(1)) (requiring each investment adviser and principal underwriter of a fund to ''adopt a written code of ethics containing provisions reasonably necessary to prevent'' certain persons affiliated with the fund, its investment adviser or its principal underwriter from engaging in certain fraudulent,

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our assessment that funds and advisers are too varied in their operations for the rules to impose of a single set of universally applicable required elements. Each adviser should adopt policies and procedures that take into consideration the nature of that firm's operations. The policies and procedures should be designed to prevent violations from occurring, detect violations that have occurred,[15] and correct promptly any violations that have occurred.[16]

Each adviser, in designing its policies and procedures, should first identify conflicts and other compliance factors creating risk exposure for the firm and its clients in light of the firm's particular operations, and then design policies and procedures that address those risks. We expect that an adviser's policies and procedures, at a minimum, should address the following issues to the extent that they are relevant to that adviser:

- Portfolio management processes, including allocation of investment opportunities among clients and consistency of portfolios with clients' investment objectives, disclosures by the adviser, and applicable regulatory restrictions;[17]
- Trading practices, including procedures by which the adviser satisfies its best execution obligation, uses client brokerage to obtain research and other services (''soft dollar arrangements''), and allocates aggregated trades among clients;
- Proprietary trading of the adviser and personal trading activities of supervised persons;[18]
- The accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements;
- Safeguarding of client assets from conversion or inappropriate use by advisory personnel;
- The accurate creation of required records and their maintenance in a manner that secures them from unauthorized alteration or use and protects them from untimely destruction;[19]
- Marketing advisory services, including the use of solicitors;[20]
- Processes to value client holdings and assess fees based on those valuations;
- Safeguards for the privacy protection of client records and information;[21] and
- Business continuity plans.[22]

Rule 206(4)–7 does not require advisers to consolidate all compliance policies and procedures into a single document. Nor does it require advisers to memorialize every action that must be taken in order to remain in compliance with the Advisers Act. In some cases, it may be enough for the compliance policies and procedures to allocate responsibility within the organization for the timely performance of many obligations, such as the filing or updating of required forms.[23]

2. Investment Companies

Rule 38a–1 requires fund boards to adopt written policies and procedures reasonably designed to prevent the fund from violating the Federal securities laws.[24] The procedures must provide for the oversight of compliance by the fund's advisers, principal underwriters,[25] administrators,[26] and

manipulative, and deceptive actions with respect to the fund); Advisers Act rule 206(4)–6 (17 CFR 275.206(4)–6) (requiring investment advisers to adopt and implement written policies and procedures reasonably designed to ensure that the adviser votes securities in the best interest of clients); Advisers Act section 204A (15 U.S.C. 80b–4a) (requiring each adviser registered with us to have written policies and procedures reasonably designed to prevent the misuse of material nonpublic information by the adviser or persons associated with the adviser); Regulation S-P (''Privacy of Consumer Financial Information'') (17 CFR 248.30) (requiring investment advisers to ''adopt policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information'').

[15] Where appropriate, advisers' policies and procedures should employ, among other methods of detection, compliance tests that analyze information over time in order to identify unusual patterns, including, for example, an analysis of the quality of brokerage executions (for the purpose of evaluating the adviser's fulfillment of its duty of best execution), or an analysis of the portfolio turnover rate (to determine whether portfolio managers are overtrading securities), or an analysis of the comparative performance of similarly managed accounts (to detect favoritism, misallocation of investment opportunities, or other breaches of fiduciary responsibilities).

[16] In the Proposing Release, we noted that the compliance policies and procedures should be designed to prevent, detect, and correct promptly any material violation of the federal securities laws (or in the case of advisers, the Advisers Act). A number of commenters suggested that these objectives were unrealistic and recommended that the rules be designed instead to promote compliance with the securities laws. While we understand that compliance policies and procedures will not prevent every violation of the securities laws, we believe that prevention should be a key objective of all firms' compliance policies and procedures.

[17] Rule 206(4)–6 under the Advisers Act (17 CFR 275.206(4)–6) requires registered investment advisers to adopt and implement written policies and procedures that are reasonably designed to ensure that the adviser votes securities in the best interest of clients. Similarly, funds must disclose the policies and procedures that they use to determine how to vote proxies relating to portfolio securities. Form N–1A, Item 13(f) (17 CFR 239.15A; 274.11A); Form N–2, Item 18.16 (17 CFR 239.14; 274.11a–1); Form N–3, Item 20(o) (17 CFR 239.17a; 17 CFR 274.11b); and Form N–CSR, Item 7 (17 CFR 249.331; 17 CFR 274.128).

[18] Section 204A of the Advisers Act (15 U.S.C. 80b–4a) requires registered investment advisers to have written policies and procedures reasonably designed to prevent the misuse of material nonpublic information by the advisers or persons associated with the advisers. Rule 17j–1(c)(1) under the Investment Company Act (17 CFR 270.17j–1(c)(1)) requires funds and each investment adviser and principal underwriter of a fund to ''adopt a written code of ethics containing provisions reasonably necessary to prevent'' certain persons affiliated with the fund, its investment adviser or its principal underwriter from engaging in certain fraudulent, manipulative, and deceptive actions with respect to the fund.

[19] Rule 204–2(g)(3) under the Advisers Act (17 CFR 275.204–2(g)(3)) and rule 31a–2(f)(3) under the Investment Company Act (17 CFR 270.31a–2(f)(3)) require advisers and funds that maintain records in electronic formats to establish and maintain procedures to safeguard the records.

[20] Rule 206(4)–3 under the Advisers Act (17 CFR 275.206(4)–3) requires written agreements setting forth procedures to govern solicitation activities conducted by certain third parties on behalf of an adviser.

[21] Regulation S–P requires investment advisers to ''adopt policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information.'' Regulation S–P (''Privacy of Consumer Financial Information'') (17 CFR 248.30). Regulation S–P also applies to funds.

[22] We believe that an adviser's fiduciary obligation to its clients includes the obligation to take steps to protect the clients' interests from being placed at risk as a result of the adviser's inability to provide advisory services after, for example, a natural disaster or, in the case of some smaller firms, the death of the owner or key personnel. The clients of an adviser that is engaged in the active management of their assets would ordinarily be placed at risk if the adviser ceased operations.

[23] Advisers who are also registered as broker-dealers are not required to segregate their investment adviser compliance policies and procedures from their broker-dealer compliance policies and procedures.

[24] Rule 38a–1(a)(1). For purposes of rule 38a–1, ''Federal securities laws'' means the Securities Act of 1933 (15 U.S.C. 77a), the Securities Exchange Act of 1934 (15 U.S.C. 78a), the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745 (2002)), the Investment Company Act, the Advisers Act, Title V of the Gramm-Leach-Bliley Act (15 U.S.C. 6801) (governing disclosure of nonpublic personal information), any rules adopted by the Commission under any of these statutes, the Bank Secrecy Act (31 U.S.C. 5311–5314; 5316–5332) (imposing restrictions designed to prevent financial intermediaries from being used in money laundering activities) as it applies to funds, and any rules adopted thereunder by the Commission or the Department of the Treasury. Rule 38a–1(e)(1).

[25] A ''principal underwriter'' of a fund (other than a closed-end fund) is ''any underwriter who as principal purchases from such company, or pursuant to contract has the right (whether absolute or conditional) from time to time to purchase from such company, any such security for distribution, or who as agent for such company sells or has the right to sell any such security to a dealer or to the public or both, but does not include a dealer who purchases from such company through a principal underwriter acting as agent for such company.'' Section 2(a)(29) of the Investment Company Act (15 U.S.C. 80a–2(a)(29)).

[26] An ''administrator'' is ''any person who provides significant administrative or business management services to an investment company.'' Investment Company Act rule 0–1(a)(5) (17 CFR 270.0–1(a)(5)).

transfer agents [27] (collectively, ''service providers'') through which the fund conducts its activities.[28]

a. *Service Providers.* Most of the operations of funds are carried out by service providers, which have their own compliance policies and procedures. Commenters pointed out that the proposed rule appeared to require a fund to adopt, as its own, the policies and procedures of its service providers.[29] The final rule requires fund boards to approve the policies and procedures of fund service providers, and requires the fund's policies and procedures to include provisions for the fund to oversee compliance by its service providers.

Rule 38a–1 provides fund complexes with flexibility so that each complex may apply the rule in a manner best suited to its organization.[30] A fund complex could, for example, adopt compliance policies and procedures that encompass the activities of the funds, the adviser and affiliated underwriters and transfer agents, while approving the policies and procedures of other service providers, such as subadvisers, over which it has oversight responsibility under the rule. Another fund complex could adopt policies and procedures that would cover solely activities of the funds, and could approve the policies and procedures of each of its service providers.

b. *Board Approval.* Rule 38a–1 requires a fund's board, including a majority of its independent directors, to approve the policies and procedures of the fund and each of its service providers.[31] The approval must be based on a finding by the board that the policies and procedures are reasonably designed to prevent violation of the Federal securities laws by the fund and its service providers.[32]

Some commenters expressed concern that the rule would require directors to review lengthy compliance manuals and devote considerable time at each meeting to approving numerous amendments. Directors may satisfy their obligations under the rule by reviewing summaries of compliance programs prepared by the chief compliance officer, legal counsel or other persons familiar with the compliance programs. The summaries should familiarize directors with the salient features of the programs (including programs of service providers) and provide them with a good understanding of how the compliance programs address particularly significant compliance risks.[33]

In considering whether to approve a fund's or service provider's compliance policies and procedures, boards should consider the nature of the fund's exposure to compliance failures. In the case of a money market fund, for example, the board should consider whether the policies and procedures sufficiently address the fund's compliance with rule 2a–7.[34] Boards should also consider the adequacy of the policies and procedures in light of their recent compliance experiences, which may demonstrate weaknesses in the fund or service provider's compliance programs. We urge boards to also consider best practices used by other fund complexes, and to consult with fund counsel (and independent directors with their counsel), compliance specialists and other experts familiar with compliance practices successfully employed by similar funds or service providers.

The Commission understands that, in some cases, the fund may employ the services of a service provider that is not an affiliated person of the fund, such as a transfer agent or administrator, and that provides similar services to a large number of funds. In such cases, it may be impractical for the fund or its compliance officer to directly review all of the service provider's policies and procedures. In such cases, we will consider a fund's policies and procedures to have satisfied the requirements of this rule if the fund uses a third-party report on the service provider's procedures instead of the procedures themselves when the board is evaluating whether to approve the service provider's compliance program.[35] The third-party report must describe the service provider's compliance program as it relates to the types of services provided to the fund, discuss the types of compliance risks material to the fund, and assess the adequacy of the service provider's compliance controls.[36]

c. *Policies and Procedures.* Funds' or their advisers' policies and procedures should address the issues we identified for investment advisers above.[37] In

[27] Section 3(a)(25) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–(3)(a)(25)) defines a ''transfer agent'' as ''any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates.''

[28] In this release, we use the term ''service provider'' to refer only to a fund's advisers, principal underwriters, administrators, and transfer agents. By limiting the term in this manner, we are not lessening a fund's obligation to consider compliance as part of its decision to employ other entities, such as pricing services, auditors, and custodians.

[29] Some commenters urged us to permit funds to simply rely on their service providers' policies and procedures. We have not adopted this suggestion because it would permit funds and their boards to absolve themselves of responsibility for compliance activities of the service providers through which funds conduct most of their activities.

[30] In this release, we use the term ''fund complex'' to mean a group of funds that share a compliance program and a common investment adviser and/or distributor.

[31] In this release, we refer to directors who are not ''interested persons'' of the fund as ''independent directors.'' Section 2(a)(19) identifies persons who are ''interested persons'' of a fund. 15 U.S.C. 80a–2(a)(19).

[32] Rule 38a–1(a)(2). In response to comments seeking clarification of the board's responsibilities, we have added language to the rule text explicitly stating the basis for approval. If the policies and procedures of a service provider are included within the policies and procedures adopted by the fund, separate approval by the board is not required. A fund that is approving policies and procedures of service providers is required to make findings only with respect to activities of the service provider that could affect the fund.

[33] Rule 38a–1 does not require fund boards to approve amendments to policies and procedures of the fund or its service providers. Such a requirement would, as commenters pointed out, inundate fund boards with review of minor changes and detract from their ability to address significant responsibilities committed to them by the Act and our rules. Moreover, such a requirement could delay funds and their service providers from making needed changes. Instead, the rule requires the fund's chief compliance officer to discuss material changes to the compliance policies and procedures in his or her annual report to the fund board. Rule 38(a)–1(a)(4)(iii)(A). As we note below, however, serious compliance issues must be raised with the board immediately. *See infra* note 83.

[34] 17 CFR 270.2a–7.

[35] In these limited circumstances, we would also consider the fund to have satisfied the rule's requirement with regard to annual review of service providers, as discussed in section II.B.2. of this release, *supra,* and with respect to the chief compliance officer's annual report with regard to service providers, as discussed in section II.C.2. of this release, *supra,* if such reviews and reports use such third-party reports provided to the fund no less than annually. If the fund uses such reports for its approval of a service provider's compliance program or the annual review or reporting on the program, the fund must also gather and take into account other relevant information, such as its experience with the service provider.

[36] *See, e.g.*, Codification of Accounting Standards and Procedures, Statement on Auditing Standards No. 70, Reports on Processing of Transactions by Service Organizations (American Inst. of Certified Public Accountants).

[37] *See supra* text accompanying notes 17 through 22. Funds are also subject to requirements to maintain written compliance policies and procedures in certain of our rules. The new rules do not supplant these requirements. *See, e.g.*, Investment Company Act rules 2a–7(c)(7) (17 CFR 270.2a–7(c)(7)) (requiring boards of money market funds to establish written procedures ''reasonably designed * * * to stabilize the money market fund's net asset value per share'') and 17j–1(c)(1) (17 CFR 270.17j–1(c)(1)) (requiring funds to ''adopt a written code of ethics containing provisions reasonably necessary to prevent'' certain persons affiliated with the fund, its investment adviser or

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addition, we expect policies and procedures of funds (or fund service providers) to cover certain other critical areas. In light of our recent enforcement actions against a number of fund managers and service providers,[38] we are taking this opportunity to review the application of these policies and procedures to several important areas of compliance with the Federal securities laws by funds and their service providers.

• *Pricing of portfolio securities and fund shares.* The Investment Company Act requires funds to sell and redeem their shares at prices based on their current net asset value, and to pay redemption proceeds promptly.[39] The Investment Company Act requires funds to calculate their net asset values using the market value of their portfolio securities when market quotations for those securities are ''readily available,'' and, when a market quotation for a portfolio security is not readily available, by using the fair value of that security, as determined in good faith by the fund's board.[40] These pricing requirements are critical to ensuring fund shares are purchased and redeemed at fair prices and that shareholder interests are not diluted.

When fund shares are mispriced, short-term traders have an arbitrage opportunity they can use to exploit a fund and disadvantage the fund's long-term investors by extracting value from the fund without assuming any significant investment risk. Mispricing may occur with respect to portfolio securities traded on a foreign market that closes before the time at which the fund prices its shares.[41] If an event affecting the value of the portfolio securities occurs *after* the foreign market closes but *before* the fund prices its shares, the foreign market closing price for the portfolio security will not reflect the correct current value of those securities when the fund prices its shares. In 1984, we stated that, in these circumstances, a fund ''*must*, to the best of its ability, determine the fair value of the securities, as of the time'' that the fund prices its shares.[42] We believe that funds that fail to fair value their portfolio securities under such circumstances may violate rule 22c–1 under the Investment Company Act.[43] Fund directors who countenance such practices fail to comply with their statutory valuation obligations [44] and fail to fulfill their fiduciary obligation to protect fund shareholders. Accordingly, rule 38a–1 requires funds to adopt policies and procedures that require the fund to monitor for circumstances that may necessitate the use of fair value prices; establish criteria for determining when market quotations are no longer reliable for a particular portfolio security;[45] provide a methodology or methodologies by which the fund determines the current fair value of the portfolio security;[46] and regularly review the appropriateness and accuracy of the method used in valuing securities, and make any necessary adjustments.[47]

• *Processing of fund shares.* Our rules require forward pricing of fund shares.[48] An investor submitting a purchase order or redemption request must receive the price next calculated after receipt of the purchase order or redemption request.[49] Accordingly, rule 38a–1 requires that a fund have in place procedures that segregate investor orders received before the fund prices its shares (which will receive that day's price) from those that were received after the fund prices its shares (which will receive the following day's price).[50] Because fund purchase and redemption orders are ultimately transmitted to transfer agents engaged by the fund, we have expanded the service providers covered by the rule to include transfer agents.

Many funds today have contractual provisions with transfer agents and other intermediaries that obligate those

its principal underwriter from engaging in certain fraudulent, manipulative, and deceptive actions with respect to the fund); Form N–1A, Item 13(f) (17 CFR 239.15A; 274.11A) (requiring funds to disclose the policies and procedures that they use to determine how to vote proxies relating to portfolio securities); 31 CFR 103.130(c) (requiring funds to develop an anti-money laundering program, which includes the establishment and implementation of ''policies, procedures, and internal controls reasonably designed to prevent the mutual fund from being used for money laundering or the financing of terrorist activities and to achieve compliance with the applicable provisions of the Bank Secrecy Act and the implementing regulations thereunder''); Regulation S–P (''Privacy of Consumer Financial Information'') (17 CFR 248.30) (requiring funds to ''adopt policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information'').

[38] *See supra* notes 6 and 7 and accompanying text.

[39] Section 22(e) of the Investment Company Act generally prohibits mutual funds from suspending the right of redemption and prohibits funds from postponing the payment of redemption proceeds for more than seven days. 15 U.S.C. 80a–22(e). Rule 22c–1(b) under the Act generally requires that a fund's net asset value be computed at least once daily, Monday through Friday, at a time or times specified by the fund's board of directors. 17 CFR 270.22c–1(b).

[40] Section 2(a)(41) of the Investment Company Act and rule 2a41–1 (17 CFR 270.2a41–1).

[41] Mispricing may also occur when a domestic trading market in a security closes before the time the fund prices its shares, or when market quotations for a security are not reliable because, *e.g.*, sales have been infrequent or there is a thin market in the security. *See* Accounting Series Release No. 118 (Dec. 23, 1970) (35 FR 19986 (Dec. 31, 1970)). Thus, in addition to monitoring for events that may necessitate fair value pricing, funds must pay attention to circumstances that would suggest the need for using fair value pricing.

[42] Pricing of Redeemable Securities for Distribution, Redemption, and Repurchase, Investment Company Act Release No. 14244 (Nov. 21, 1984) (49 FR 46558 (Nov. 21, 1984)), at n. 7 (emphasis added) (proposing amendments to rule 22c–1). Subsequent to the issuance of this release, our staff has reminded funds of their fair valuation obligations. In 1999 and 2001, the Division of Investment Management issued interpretive letters elaborating on funds' obligations under sections 2(a)(41) of the Investment Company Act and rule 22c–1 (17 CFR 270.22c–1) thereunder. Letter from Douglas Scheidt, Associate Director and Chief Counsel, SEC Division of Investment Management, to Craig S. Tyle, General Counsel, Investment Company Institute (Dec. 8, 1999) (*http://www.sec.gov/divisions/investment/guidance/tyle120899.htm*); letter from Douglas Scheidt, Associate Director and Chief Counsel, SEC Division of Investment Management, to Craig S. Tyle, General Counsel, Investment Company Institute (Apr. 30, 2001) (*http://www.sec.gov/divisions/investment/guidance/tyle043001.htm*).

[43] 17 CFR 270.22c–1.

[44] Section 2(a)(41) (15 U.S.C. 80a–2(a)(41)) of the Investment Company Act.

[45] In some cases, funds have adopted policies and procedures requiring the use of fair value pricing in circumstances when prices may be affected by events subsequent to the close of trading, but have established criteria that result in infrequent use of fair value pricing, which provides an opportunity for price arbitrage. *See, e.g.*, Susan Lee, *The Dismal Science: The Feeling's Not Mutual,* Wall St. J., Nov. 24, 2003, at A15. As we have stated previously, funds must fair value their portfolio securities whenever market quotations become unreliable. *See supra* note 42. The failure of a fund to establish sufficiently sensitive criteria for using fair value pricing should be recognizable in subsequent reviews of the accuracy of the prices used to compute the net asset value of the fund.

[46] In determining fair value, some funds use correlations between the exchange prices of foreign securities and other appropriate instruments or indicators, such as relevant indices, American Depository Receipts, and futures contracts. Software developed by vendors is today available to assist funds to determine the fair value of portfolio securities.

[47] In a companion release, we are proposing to amend funds' disclosure requirements with respect to the use and the effects of fair value pricing. *See* Section II.B of Companion Disclosure Release, *supra* note 8.

[48] Rule 22c–1(a) (17 CFR 270.22c–1(a)).

[49] *Id.* We adopted the forward pricing requirement in 1968 to eliminate so-called ''backward pricing'' that permitted sales and purchases of fund shares at a stated price. We concluded that backward pricing resulted in dilution of the value of fund shares, and that it disrupted fund management by encouraging short-term trading in funds by speculators seeking to take advantage of fund prices that did not reflect the current value of the fund portfolio. Adoption of Rule 22c–1 under the Investment Company Act of 1940 Prescribing the Time Pricing of Redeemable Securities for Distribution, Redemption, and Repurchase, and Amendment of Rule 17a–3(a)(7) under the Securities Exchange Act of 1934 Requiring Dealers to Time-Stamp Orders, Investment Company Act Release No. 5519 (Oct. 16, 1968) (33 FR 16331 (Nov. 7, 1968)).

[50] Rule 38a–1(a)(1). In most cases, we expect these matters will be addressed by the policies and procedures of fund transfer agents. *See* Companion Late Trading Release, *supra* note 8, for a detailed discussion of how fund share transactions are processed by intermediaries.

parties to segregate orders received by time of receipt in order to prevent ''late trading'' based on a previously determined price. Reliance on those contractual provisions alone would be insufficient to meet the requirements of the new rule.[51] Funds should not only approve and periodically review the policies and procedures of transfer agents, as required by the rule, but should also take affirmative steps to protect themselves and their shareholders against late trading by obtaining assurances that those policies and procedures are effectively administered.[52]

• *Identification of Affiliated Persons.* To prevent self-dealing and overreaching by persons in a position to take advantage of the fund, the Investment Company Act prohibits funds from entering into certain transactions with affiliated persons.[53] Funds should have policies and procedures in place to identify these persons and to prevent unlawful transactions with them.

• *Protection of Nonpublic Information.* The federal securities laws prohibit insider trading, and section 204A of the Advisers Act requires advisers (including advisers to funds) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the adviser or any of its associated persons from misusing material, nonpublic information. Fund advisers should incorporate their section 204A policies into the policies required by rule 38a–1. These policies typically include prohibitions against trading portfolio securities on the basis of information acquired by analysts or portfolio managers employed by the investment adviser. A fund's compliance policies and procedures should also address other potential misuses of nonpublic information, including the disclosure to third parties of material information about the fund's portfolio,[54] its trading strategies,[55] or pending transactions, and the purchase or sale of fund shares by advisory personnel based on material, nonpublic information about the fund's portfolio.[56]

• *Compliance with Fund Governance Requirements.* A fund's board plays an important role in overseeing fund activities to ensure that they are being conducted for the benefit of the fund and its shareholders. Fund boards, among other things, are tasked with approving the fund's advisory contracts,[57] underwriting agreements,[58] and distribution plans.[59] The Investment Company Act requires that fund boards of directors be elected by fund shareholders,[60] and that a certain percentage be ''independent directors.''[61] To rely on many of our exemptive rules, independent directors must constitute a majority of the board, must be selected and nominated by other independent directors, and if they hire legal counsel, that counsel must be an independent legal counsel.[62]

The consequences of failing to meet the Investment Company Act's governance requirements are severe.[63] Therefore, a fund's policies and procedures should be designed to guard against, among other things, an

[51] In a companion release, we are proposing amendments to rule 22c–1 under the Investment Company Act that would eliminate the need for funds and their transfer agents to rely on the segregation of orders by fund intermediaries other than a registered transfer agent or clearing agency. *See* Companion Late Trading Release, *supra* note 8.

[52] We discuss methods funds can use to oversee such policies and procedures later in this Adopting Release, in connection with the chief compliance officer's oversight of service providers. *See infra* text accompanying footnote 91.

[53] *See, e.g.*, section 17(a) (15 U.S.C. 80a–17(a)) (prohibiting first and second-tier affiliates of a fund from borrowing money or other property from, or selling or buying securities or other property to or from the fund, or any company that the fund controls); section 17(d) (15 U.S.C. 80a–17(d)) (making it unlawful for first- and second-tier affiliates of a fund, the fund's principal underwriters, and affiliated persons of the fund's principal underwriters, acting as principal, to effect any transaction in which the fund or a company controlled by the fund is a joint or a joint and several participant in contravention of Commission rules); rule 17d–1(a) (270 CFR 270.17d–1(a)) (prohibiting first- and second-tier affiliates of a fund, the fund's principal underwriter, and affiliated persons of the fund's principal underwriter, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or other joint arrangement or profit-sharing plan in which any such fund or company controlled by a fund is a participant unless an application regarding such enterprise, arrangement or plan has been filed with the Commission and has been granted); section 10(f) (15 U.S.C. 80a–10(f)) (prohibiting a fund from purchasing securities in a primary offering if certain affiliated persons of the fund are members of the underwriting or selling syndicate); section 17(e) (15 U.S.C. 80a–17(e)) (limiting the remuneration that first- and second-tier affiliates of a fund may receive in transactions involving the fund, and companies that the fund controls); and section 12(d)(3) (15 U.S.C. 80a–12(d)(3)) and rule 12d3–1 (270 CFR 270.12d3–1) (together prohibiting a fund from acquiring securities issued by, among others, its own investment adviser).

[54] In a companion release, we are proposing to require funds to disclose their policies and procedures with respect to the disclosure of fund portfolio holdings. *See* Section II.C of Companion Disclosure Release, *supra* note 8.

[55] Thus, funds' and investment advisers' policies and procedures should preclude fund or advisory personnel from divulging a fund's portfolio schedule that has not been made generally available to the public. Divulging portfolio holdings to selected third parties is permissible only when the fund has legitimate business purposes for doing so and the recipients are subject to a duty of confidentiality. *See, e.g.*, Selective Disclosure and Insider Trading, Securities Act Release No. 7881 at text accompanying n. 29 (Aug. 15, 2000) (65 FR 51716 (Aug. 24, 2000)) (noting that ''issuers and their officials may properly share material nonpublic information with outsiders, for legitimate business purposes, when the outsiders are subject to duties of confidentiality''). *See also Dirks* v. *SEC,* 463 U.S. 646, 655 at n. 14 (1983) (''Under certain circumstances, such as where corporate information is revealed legitimately to an underwriter, accountant, lawyer, or consultant working for the corporation, these outsiders may become fiduciaries of the shareholders. The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.'') (citations omitted). We understand that many funds provide portfolio information in response to requests by rating agencies and similar organizations only after receiving written assurances that the information will be kept confidential and that persons with access to the information will not use the information to trade securities.

[56] We urge funds and advisers to require persons who have access to nonpublic information to trade securities of the fund exclusively through identifiable accounts to enable the fund to monitor for excessive, short-term trading. Alternatively, although not required by section 17(j) of the Investment Company Act (15 U.S.C. 80a–17(j)) or rule 17j–1 (17 CFR 270.17j–1), funds and advisers should consider amending their codes of ethics to cover, and thus require reporting of, trades by persons who have access to nonpublic information about the portfolio, including information about the accuracy of the prices of portfolio securities used to calculate net asset value.

[57] Sections 15(a) and (c) of the Investment Company Act (15 U.S.C. 80a–15(a) and (c)).

[58] Sections 15(b) and (c) of the Investment Company Act (15 U.S.C. 80a–15(b) and (c)).

[59] Section 12(b) of the Investment Company Act (15 U.S.C. 80a–12(b)) and rule 12b–1(b)(2) (17 CFR 270.12b–1(b)(2)).

[60] Section 16(a) of the Investment Company Act (15 U.S.C. 80a–16(a)).

[61] Section 10(a) of the Investment Company Act (15 U.S.C. 80a–10(a)) (prohibiting more than 60 percent of a fund's directors from being interested persons of the fund); section 10(b)(2) of the Investment Company Act (15 U.S.C. 80a–10(b)(2)) (requiring, in effect, that independent directors comprise a majority of a fund's board if the fund's principal underwriter is an affiliate of the fund's investment adviser); section 15(f)(1) of the Investment Company Act (15 U.S.C. 80a–15(f)(1)) (providing a safe harbor for the sale of an advisory business if directors who are not interested persons of the investment adviser constitute at least 75 percent of a fund's board for at least three years following the assignment of the advisory contract). *See also* rule 6e–3(T)(b)(15) (17 CFR 270.6e–3(T)(b)(15)) (exempting certain funds underlying insurance products from various Investment Company Act provisions provided that independent directors constitute a majority of the boards of those funds).

[62] *See* rule 10f–3 (17 CFR 270.10f–3), rule 12b–1 (17 CFR 270.12b–1), rule 15a–4 (17 CFR 270.15a–4), rule 17a–7 (17 CFR 270.17a–7), rule 17d–1(d)(7) (17 CFR 270.17d–1(d)(7)), rule 17e–1 (17 CFR 270.17e–1), rule 17g–1(j) (17 CFR 270.17g–1(j)), rule 18f–3 (17 CFR 270.18f–3), and rule 23c–3 (17 CFR 270.23c–3). *See also* rule 0–1(a)(6) (17 CFR 270.0–1(a)(6)) (defining ''independent legal counsel'').

[63] *See, e.g.*, In re Charles G. Dyer, Investment Company Act Release No. 25107 (Aug. 9, 2001) and SEC v. Centurion Growth Fund, No. 94–8199–CIV–UNGARO–BENAGES, (S.D. Fla. Apr. 22, 1994), Litigation Release No. 14063 (Apr. 28, 1994) (56 SEC Docket 1776).

improperly constituted board,[64] the failure of the board to properly consider matters entrusted to it, and the failure of the board to request and consider information required by the Investment Company Act from the fund adviser and other service providers.[65]

• *Market Timing.* In a companion release today, we are proposing amendments to our mutual fund disclosure rules to require funds to disclose their policies on ''market timing,'' *i.e.*, the excessive short-term trading of mutual fund shares that may be harmful to the fund.[66] Many funds' prospectuses already disclose market timing policies, and failure to adhere to those disclosed policies violates the antifraud provisions of the Federal securities laws.[67] Moreover, a fund adviser that waives or disregards those policies for the benefit of itself or a third party has breached its fiduciary responsibilities to the fund.[68] Thus, under rule 38a–1 a fund must have procedures reasonably designed to ensure compliance with its disclosed policies regarding market timing. These procedures should provide for monitoring of shareholder trades or flows of money in and out of the funds in order to detect market timing activity, and for consistent enforcement of the fund's policies regarding market timing.[69] If the fund permits any waivers of those policies, the procedures should be reasonably designed to prevent waivers that would harm the fund or its shareholders or subordinate the interests of the fund or its shareholders to those of the adviser or any other affiliated person or associated person of the adviser. In this regard, we strongly urge fund boards to require fund advisers, or other persons authorized to waive market timing policies, to report to the board at least quarterly all waivers granted, so that the board can determine whether the waivers were proper.

B. Annual Review

1. Investment Advisers

Rule 206(4)–7 requires each registered adviser to review its policies and procedures annually to determine their adequacy and the effectiveness of their implementation.[70] The review should consider any compliance matters that arose during the previous year, any changes in the business activities of the adviser or its affiliates, and any changes in the Advisers Act or applicable regulations that might suggest a need to revise the policies or procedures. For example, an adviser that is acquired by a broker-dealer or by the corporate parent of a broker-dealer should assess whether its policies and procedures are adequate to guard against the conflicts that arise when the adviser uses that broker-dealer to execute client transactions, or invests client assets in funds or other securities distributed or underwritten by the broker-dealer.

Although the rule requires only annual reviews, advisers should consider the need for interim reviews in response to significant compliance events, changes in business arrangements, and regulatory developments. For example, we expect all registered advisers will begin reviewing their policies and procedures in light of our adoption of these rules.

2. Investment Companies

Similarly, rule 38a–1 requires a fund to review its policies and procedures, as well as those of its service providers, annually.[71] The rule does not require a fund board to conduct the review; the board would, however, have the benefit of the review in the report submitted by the compliance officer. We expect all funds will begin reviewing their compliance policies and procedures currently, not only in light of the adoption of these rules, but also in light of the recent revelations of unlawful practices involving fund market timing, late trading, and improper disclosures and use of nonpublic portfolio information.

C. Chief Compliance Officer

1. Investment Advisers

Rule 206(4)–7 requires each adviser registered with the Commission to designate a chief compliance officer to administer its compliance policies and procedures.[72] An adviser's chief compliance officer should be competent and knowledgeable regarding the Advisers Act and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the firm.[73] Thus, the compliance officer should have a position of sufficient seniority and authority within the organization to compel others to adhere to the compliance policies and procedures.[74]

[64] A board lacking a sufficient number of disinterested directors, for example, would be improperly constituted. To avoid this, fund procedures should provide for a process of determining that independent director candidates are not ''interested persons'' and, after their election, for a periodic reassessment that they continue not to be interested persons. *See* rule 31a–2 (17 CFR 270.31a–2(a)(4)) under the Investment Company Act (requiring the maintenance of ''any record of the initial determination that a director is not an interested person of the investment company and each subsequent determination that the director is not an interested person * * * includ[ing] any questionnaire and any other document used to determine that a director is not an interested person of the company'').

[65] Section 15(c) requires fund directors ''to request and evaluate * * * such information as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company.'' A board that fails to acquire sufficient information about the advisory fee and other fund expenses will be unable to negotiate effectively on behalf of the fund. As a result, the fund may pay a higher than necessary advisory fee, fail to benefit from economies of scale as a result of insufficient breakpoints in the advisory fee, or bear too many operating expenses.

[66] *See* Section II.A. of the Companion Disclosure Release, *supra* note 8.

[67] Failure to adhere to statements made in the prospectus may render the prospectus disclosure materially misleading and thus violate provisions of the Federal securities laws that prohibit fraud. *See, e.g.*, section 17(a) of the Securities Act (15 U.S.C. 77q), section 10(b) of the Securities Exchange Act (15 U.S.C. 78j) and rule 10b–5 (17 CFR 240.10b–5) thereunder, and section 34(b) of the Investment Company Act (15 U.S.C. 80a–33(b)).

[68] An investment adviser has a fiduciary duty to act in the best interests of a fund it advises. Section 206 under the Advisers Act (15 U.S.C. 80b–6) and section 36(a) under the Investment Company Act (15 U.S.C. 80a–35(a)). *See also Rosenfeld* v. *Black,* 445 F.2d 1337 (2d Cir. 1971); *Brown* v. *Bullock,* 194 F. Supp. 207, 229, 234 (S.D.N.Y.), aff'd, 294 F.2d 415 (2d Cir. 1961); In re Provident Management Corp., Securities Act Release No. 5115 (Dec. 1, 1970) at text accompanying note 12.

[69] *See, e.g.*, C. Meyrick Payne, *Strengthening the Role of Mutual Fund Directors after the Canary Scandal,* Management Practice Bulletin (Oct. 2003) (*http://www.mfgovern.com/reports/2_canaryscandal.html*) (explaining that ''periodic sales and redemption data'' are useful for detecting practices such as late trading and market timing).

[70] Rule 206(4)–7(b).

[71] Rule 38a–1(a)(3).

[72] Rule 206(4)–7(c). We are also making a technical amendment to the item related to chief compliance officers on Form ADV, the registration form that advisers use to register with us under the Advisers Act. Form ADV, Part 1, Schedule A, Item 2(a) (17 CFR 279.1). The revision requires each registered adviser and each applicant for registration as an adviser to identify a *single* compliance officer.

[73] Having the title of chief compliance officer does not, in and of itself, carry supervisory responsibilities. Thus, a chief compliance officer appointed in accordance with rule 206(4)–7 (or rule 38a–1) would not necessarily be subject to a sanction by us for failure to supervise other advisory personnel. A compliance officer who does have supervisory responsibilities can continue to rely on the defense provided for in section 203(e)(6) of the Advisers Act (15 U.S.C. 80b–3(e)(6)). Section 203(e)(6) provides that a person shall not be deemed to have failed to reasonably supervise another person if: (i) The adviser had adopted procedures reasonably designed to prevent and detect violations of the federal securities laws; (ii) the adviser had a system in place for applying the procedures; and (iii) the supervising person had reasonably discharged his supervisory responsibilities in accordance with the procedures and had no reason to believe the supervised person was not complying with the procedures.

[74] The rule does not require advisers to hire an additional executive to serve as compliance officer, but rather to designate an individual as the adviser's chief compliance officer. Several commenters who complained of the burdens this proposed requirement would impose on them

2. Investment Companies

Rule 38a–1 requires each fund to appoint a chief compliance officer who is responsible for administering the fund's policies and procedures approved by the board under the rule.[75] A fund's chief compliance officer should be competent and knowledgeable regarding the Federal securities laws and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the fund. The chief compliance officer of a fund, like the chief compliance officer of an investment adviser, should have sufficient seniority and authority to compel others to adhere to the compliance policies and procedures.

The rule contains several provisions, some of which were not included in our proposal, designed to promote the independence of the chief compliance officer from the management of the fund.[76] First, the chief compliance officer will serve in her position at the pleasure of the fund's board of directors, which can remove her if it loses confidence in her effectiveness. The fund board (including a majority of independent directors) must approve the designation of the chief compliance officer, and must approve her compensation (or any changes in her compensation).[77] The board (including a majority of the independent directors) can remove the chief compliance officer from her responsibilities at any time,[78] and can prevent the adviser or another service provider from doing so.[79]

Second, the chief compliance officer will report directly to the board of directors. She must annually furnish the board with a written report on the operation of the fund's policies and procedures and those of its service providers.[80] The report must address, at a minimum: (i) The operation of the policies and procedures of the fund and each service provider since the last report, (ii) any material changes to the policies and procedures since the last report,[81] (iii) any recommendations for material changes to the policies and procedures as a result of the annual review,[82] and (iv) any material compliance matters since the date of the last report.[83] We have added a definition of the term ''material compliance matter'' to the rule, to clarify that the report should inform the board of those compliance matters about which the fund's board reasonably needs to know in order to oversee fund compliance.[84]

Third, we are requiring that the chief compliance officer meet in executive session with the independent directors at least once each year, without anyone else (such as fund management or interested directors) present.[85] The executive session creates an opportunity for the chief compliance officer and the independent directors to speak freely about any sensitive compliance issues of concern to any of them, including any reservations about the cooperativeness or compliance practices of fund management.

Fourth, we have added a provision to protect the chief compliance officer from undue influence by fund service providers seeking to conceal their or others' non-compliance with the federal securities laws. Rule 38a–1 prohibits the fund's officers, directors, employees or its adviser, principal underwriter, or any person acting under the direction of these persons, from directly or indirectly taking any action to coerce, manipulate, mislead or fraudulently influence the fund's chief compliance officer in the performance of her responsibilities under the rule.[86]

The appointment of a chief compliance officer with overall responsibility for management of a fund complex's compliance program is a key element of the investor protections we are today adopting. Some commenters representing fund management companies urged us to permit funds to continue to use multiple compliance managers employed by different service providers, rely on the policies of the fund service providers, and omit the requirement that fund boards approve the compliance officer. These commenters would have us maintain funds' current approach to compliance management. Current practices, however, balkanize responsibility for fund compliance and isolate fund boards from compliance personnel, thus impeding boards' abilities to exercise their oversight responsibilities effectively. We decline to accept current practices, which we believe have contributed to the serious compliance lapses that are now the subject of our enforcement actions.

We have observed that executives at service providers have overruled their own compliance personnel because of business considerations. For example, some fund advisers have continued to permit investors with whom they had other business relationships to engage in harmful market timing in fund shares after compliance personnel and portfolio managers brought the market timing activity to their attention. These compliance personnel may not have had access to fund directors or, having been overruled by their own management,

appeared to have assumed that they would be required to hire an additional person to fill the position of chief compliance officer.

[75] Rule 38a–1(a)(4).

[76] In the Proposing Release we requested comment on whether the chief compliance officer should be a senior manager of the fund because such a person would be in a better position to compel compliance with the fund's policies and procedures, and would less likely be intimidated in the performance of her duties. We are not adopting such a requirement because, as several commenters pointed out to us, it is very difficult to ascertain who is a ''senior manager'' in some organizations. Instead, we have described the authority we believe an individual must possess to be designated as a chief compliance officer, and have added a provision to the rule making it unlawful to exert undue influence on the chief compliance officer in the performance of her duties (*see infra* text accompanying note 86).

[77] Rule 38a–1(a)(4)(i). These requirements were not included in proposed rule 38a–1. Compensation would include any bonus. In approving a change in compensation, the board should assure itself that the chief compliance officer is not denied any customary cost of living increase or any full customary bonus and that fund managers are not otherwise retaliating against the chief compliance officer for having informed the board of a compliance failure or for having taken aggressive actions to ensure compliance with the federal securities laws by the fund or service provider.

[78] Rule 38a–1(a)(4)(ii).

[79] In a change from the proposed rule, the chief compliance officer can only be discharged from her responsibilities with the approval of the board. Rule 38a–1(a)(4)(ii).

[80] If the fund is a unit investment trust, the fund's principal underwriter or depositor must approve the chief compliance officer, must receive all annual reports, and must approve the removal of the chief compliance officer from his or her responsibilities. Rule 38a–1(b).

[81] A change would be ''material'' in this context if it is a change that a fund director would reasonably need to know in order to oversee fund compliance.

[82] *Id.* The report should also discuss the fund's particular compliance risks and any changes that were made to the policies and procedures to address newly identified risks.

[83] Rule 38a–1(a)(4)(iii). Our proposal would have required the report to include only compliance matters that resulted in remedial action; our final rule contains no such limitation because we are concerned that a fund or its service providers might abuse the limitation and fail to impose remedial actions in order to avoid having to report a compliance failure to the board.

[84] Rule 38a–1(e)(2). Serious compliance issues must, of course, always be brought to the board's attention promptly, and cannot be delayed until an annual report. In addition, individual compliance matters that, taken in isolation, may not be material may collectively suggest a material compliance matter, such as a material weakness in the compliance programs of the fund or its service providers. *See, e.g.*, Personal Investment Activities of Investment Company Personnel, Investment Company Act Release No. 23958, at n. 25 (Aug. 20, 1999) (64 FR 46821 (Aug. 27, 1999)).

[85] Rule 38a–1(a)(4)(iv). Independent counsel to the independent directors may be present.

[86] Rule 38a–1(c). This prohibition is similar to the prohibition on unduly influencing auditors found in section 303(a) of the Sarbanes-Oxley Act (Pub. L. 107–204, 116 Stat. 745 (2002)) and rule 13b2–2(b)(1) (17 CFR 240.13b2–2(b)(1)) under the Securities Exchange Act.

may have felt they were not in a position to approach the board.

To address these concerns, rule 38a–1 provides fund boards with direct access to a single person with overall compliance responsibility for the fund who answers directly to the board. The rule provides the board with a powerful tool to exercise its oversight responsibilities over fund compliance matters. The new rule also strengthens the hand of compliance personnel by establishing a direct line of reporting to fund boards that is not controlled by management.[87] We have observed that compliance failures have occurred when a fund service provider has denied information to the fund's board, or has been less than forthright, because the service provider viewed full disclosure as detrimental to its own interests. Under the new rule, the chief compliance officer will be responsible for keeping the board apprised of significant compliance events at the fund or its service providers and for advising the board of needed changes in the fund's compliance program.

We expect that a fund's chief compliance officer will often be employed by the fund's investment adviser or administrator.[88] We are not adopting a requirement that the chief compliance officer be employed by only the fund because we believe that such a provision would actually weaken her effectiveness. Funds today typically have no employees, and delegate management and administrative functions, including the compliance function, to one or more service providers. If we were to preclude the chief compliance officer from being an employee of an adviser or any other service provider, she would be divorced from all fund operations.[89] The adviser's chief compliance officer would continue to administer the adviser's compliance programs, and the role of the fund's chief compliance officer would be limited to oversight of the service providers' compliance policies and providing advice to the board on their operation. As a result, the fund's chief compliance officer would be almost entirely dependent on information filtered through the senior management of the fund's adviser rather than, for example, information received directly from a trading desk. Moreover, fund management would be unlikely to consult with an ''outside'' compliance officer on a prospective business decision to ascertain the compliance implications.

We recognize, however, that a chief compliance officer who is an employee of the fund's investment adviser might be conflicted in her duties, and that the investment adviser's business interests might discourage the adviser from making forthright disclosure to fund directors of its compliance failures. The rule, as adopted, is designed to address these concerns by requiring a fund's chief compliance officer to report directly to the board. The board, and the board alone, can discharge the officer if she fails to live up to the position. Thus, a chief compliance officer who fails to fully inform the board of a material compliance failure, or who fails to aggressively pursue non-compliance within the service provider, would risk her position. She would also risk her career, because it would be unlikely for another board of directors to approve such a person as chief compliance officer.[90]

The chief compliance officer, in exercising her responsibilities under the rule, will oversee the fund's service providers, which will have their own compliance officials. A chief compliance officer should diligently administer this oversight responsibility by taking steps to assure herself that each service provider has implemented effective compliance policies and procedures administered by competent personnel. The chief compliance officer should be familiar with each service provider's operations and understand those aspects of their operations that expose the fund to compliance risks. She should maintain an active working relationship with each service provider's compliance personnel. Arrangements with the service provider should provide the fund's chief compliance officer with direct access to these personnel, and should provide the compliance officer with periodic reports and special reports in the event of compliance problems. In addition, the fund's contracts with its service providers might also require service providers to certify periodically that they are in compliance with applicable federal securities laws, or could provide for third-party audits arranged by the fund to evaluate the effectiveness of the service provider's compliance controls.[91] The chief compliance officer could conduct (or hire third parties to conduct) statistical analyses of a service provider's performance of its duties to detect potential compliance failures.[92]

D. Recordkeeping

New rule 38a–1 (for funds) and amendments to rule 204–2 (for advisers) require firms to maintain copies of all policies and procedures that are in effect or were in effect at any time during the last five years.[93] In addition, new rule 38a–1 will require funds to maintain materials provided to the board of directors in connection with their approval of the fund's and its service providers' policies and procedures and the annual written reports by the fund's chief compliance officer.[94] New rule 38a–1 and amended

[87] Rules 38a–1(a)(4)(ii) (providing that the board's approval is required to remove the chief compliance officer) and 38a–1(a)(4)(iii) (requiring the chief compliance officer to provide a written compliance report to the board).

[88] Indeed, she is likely to be the chief compliance officer of that organization inasmuch as the duties of the positions will have significant overlap. Alternatively, the chief compliance officer of the fund may be another member of the adviser or administrator's legal or compliance departments.

[89] Internalizing the compliance function while retaining an externalized management function would also raise a number of practical issues, such as whether the chief compliance officer could use the adviser's office space and other resources, including support staff. In addition, it would be costly for funds, particularly small funds, to hire a chief compliance officer and pay her benefits. Those costs would be borne by investors.

[90] If such a person were approved by another fund, our staff would enhance its scrutiny of the fund accordingly.

[91] Mutual funds already rely on these types of measures in connection with their responsibility to ensure that their service providers carry out anti-money laundering compliance programs. Rules under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107–56 (USA PATRIOT Act) require funds to maintain procedures reasonably designed to prevent them from being used for money laundering or the financing of terrorist activities. *See, e.g.,* Anti-Money Laundering Programs for Mutual Funds, 67 FR 21117, 21119 (Apr. 29, 2002) (mutual fund may contractually delegate functions under 31 CFR 103.130 to a service provider, but must take steps to ensure that the service provider's compliance program is reasonably designed, and to monitor its implementation and ensure its effectiveness).

[92] In the case of an insurance company separate account, the principal service providers typically will be the sponsoring insurance company. Therefore, the chief compliance officer must oversee the insurance company's compliance program with respect to the separate accounts, including the processing of new account applications, premium payments, and exchanges.

[93] Rules 38a–1(d)(1) and 204–2(a)(17)(i). As discussed above, the required policies and procedures do not all need to be contained in a single document. *See supra* text following note 22. We understand many firms issue policies and procedures in loose-leaf form, distributing revised sections periodically within their firms. These firms may comply with the recordkeeping requirements by keeping the current policies and procedures and retaining the superseded section(s) for the requisite period of time, so long as the firm can indicate to our examinating staff the version of compliance policies and procedures that were in effect as of a given date.

[94] Rule 38a–1(d)(2). In a change from proposed rule 38a–1, funds will have to maintain materials provided to the board of directors in connection with their approval of service providers' policies and procedures in addition to the annual compliance report. These records must be maintained for at least five years after the end of the fiscal year in which the documents were

rule 204–2 will require funds and advisers to keep any records documenting their annual review.[95] Our rules permit funds and advisers to maintain these records electronically.[96] These new recordkeeping requirements will assist our examination staff in determining whether the adviser or fund is adhering to the new rules and in identifying weaknesses in the compliance program if violations do occur or are uncorrected.

E. Private Sector Initiatives

In the Proposing Release, we requested that commenters consider four additional approaches that we might take to require the private sector to assume greater responsibility for compliance with the Federal securities laws. These possible approaches included: (i) A requirement that funds and advisers undergo third-party compliance reviews; (ii) an expansion of the role of independent public accountants to include the performance of certain compliance reviews; (iii) the formation of one or more self-regulatory organizations for advisers or funds; and (iv) the requirement that certain advisers obtain fidelity bonds from reputable insurance companies.

We appreciate the many comments we received. Although we are not moving forward with any of these approaches at this time, we continue to regard them as viable options should the measures we are taking today fail to adequately strengthen the compliance programs of funds and advisers. In particular, we may reconsider whether to propose rules requiring funds and advisers to obtain compliance reviews from third-party compliance experts. Such compliance audits could be a useful supplement to our examination program and would assure the frequent examination of advisers and funds.

F. Additional Request for Comment

Rule 38a–1 includes provisions designed to promote the chief compliance officer's independence from fund management while still maintaining her effectiveness. The fund's board of directors must approve the chief compliance officer's designation and compensation, and has the sole power to remove her from her position.[97] The chief compliance officer reports directly to the board, and must meet with the independent directors in executive session at least annually.[98] The rule also protects the chief compliance officer by prohibiting persons from coercing or fraudulently influencing her in the course of her responsibilities.[99] Today, in addition to adopting rule 38a–1, we request comment on these provisions. Are there other measures (or refinements to these provisions) that would further enhance the independence and effectiveness of chief compliance officers under the rule? We also request comment whether our definition of the ''material compliance matters'' that must be reported to fund boards by chief compliance officers adequately addresses our concern that fund boards receive compliance information they reasonably need to know in order to oversee fund compliance.[100]

III. Effective Date

New rules 38a–1 and 206(4)–7 and the amendments to rule 204–2 will be effective on February 5, 2004. The compliance date of the new rules and rule amendments is October 5, 2004. On or before the compliance date, all funds and advisers must have designated a chief compliance officer and fund boards must have approved the chief compliance officer. In addition, on or before the compliance date, funds and advisers must adopt compliance policies and procedures that satisfy the requirements in the new rules. In the case of funds, these policies and procedures must have been approved by the board on or before the compliance date. Funds and advisers must complete their first annual review of the compliance policies and procedures no later than 18 months after the adoption or approval of the compliance policies and procedures. The chief compliance officer of a fund must submit the first annual report to the board within 60 calendar days of the completion of the annual review.

Our allowance for a nine month transition period does not reduce the immediacy of the need for all funds, including those that already have compliance policies in place, to undertake a review of their policies and procedures, in light of recent revelations of unlawful practices involving market timing, late trading, and improper disclosures of nonpublic portfolio information.

IV. Cost-Benefit Analysis

We are sensitive to the costs and benefits that result from our rules. The new rules require each fund and adviser to adopt and implement policies and procedures reasonably designed to prevent violations of the securities laws, to review these annually, and to designate an individual as chief compliance officer. In the Proposing Release, we identified possible costs and benefits of the rules and requested comment on our analysis.

A. Benefits

We expect that fund investors, advisory clients, funds, and advisers will benefit from the new rules. Commenters generally agreed that comprehensive compliance programs are beneficial. Although many funds and advisers already have such programs in place, the new rules will make this standard practice for all funds and advisers. One commenter, a compliance officer, noted that the benefits of the new measures in the form of increased investor protection would far exceed the costs.

Requiring funds and investment advisers to design and implement a comprehensive internal compliance program will serve to reduce the risk

provided to the board, the first two years in an easily accessible place. Funds already are required to document in the fund board's minute books the board's deliberations in connection with the approval of the compliance policies and procedures and their annual review of the chief compliance officer's report. Board minute books must be maintained pursuant to rule 31a–1(b)(4) under the Investment Company Act (17 CFR 270.31a–1(b)(4)). All reports required by our rules are meant to be made available to the Commission and the Commission staff and, thus, they are not subject to the attorney-client privilege, the work-product doctrine, or other similar protections.

[95] Rules 38a–1(d)(3) and 204–2(a)(17)(ii). In a change from proposed rule 38a–1, funds will have to maintain any records documenting their annual review for at least five years after the end of the fiscal year in which the annual review was conducted, the first two years in an easily accessible place. Advisers will have to maintain any records documenting their annual review in an easily accessible place for at least five years after the end of the fiscal year in which the review was conducted, the first two years in an appropriate office of the investment adviser. Rule 204–2(e)(1).

[96] *See* rules 31a–2(f) (17 CFR 270.31a–2(f)) and 204–2 (17 CFR 275.204–2(g)). Funds and advisers that maintain records electronically must provide those records to our staff in electronic format upon request. Rule 31a–2(f)(2)(ii)(A) under the Investment Company Act (17 CFR 270.31a–2(f)(2)(ii)(A)) and rule 204–2(g)(2)(ii)(A) under the Investment Advisers Act (17 CFR 275.204–2(g)(2)(ii)(A)).

[97] Rule 38a–1(a)(4)(i)–(ii). *See supra* notes 76–79 and accompanying text.

[98] Rule 38a–1(a)(4)(iii)–(iv). *See supra* notes 80–85 and accompanying text.

[99] Rule 38a–1(c) prohibits the fund's officers, directors, employees, or its adviser or principal underwriter or any person acting under the direction of these persons, from directly or indirectly taking any action to coerce, manipulate, mislead, or fraudulently influence the fund's chief compliance officer in the performance of compliance responsibilities under the rule. *See supra* note 86 and accompanying text, and note 76.

[100] Rule 38a–1(e)(2) defines the term ''material compliance matter'' to mean those compliance matters—including violations of the federal securities laws or compliance policies and procedures by the fund or its service providers, as well as weaknesses in the design or implementation of those policies and procedures—about which the fund's board reasonably needs to know in order to oversee fund compliance. *See supra* note 84 and accompanying text.

that fund investors and advisory clients (collectively, ''investors'') will be harmed by violations of the securities laws. With limited exception, commenters agreed that comprehensive written compliance programs are the first line of defense in investor protection. Recent allegations of violations related to market timing and late trading confirm the need for strong compliance programs that do not permit compliance objectives to be subordinated to the business objectives of fund advisers or their affiliated persons.

The appointment of a chief compliance officer for each fund will also provide important investor protection benefits. Funds currently rely on multiple compliance personnel working for different service providers. Fund boards do not receive compliance information directly from these compliance officers; it is filtered through the management of the fund's investment adviser or other service providers. We believe these structures have contributed to serious compliance lapses that are now the subject of our enforcement actions. Rule 38a–1, by requiring each fund to have a compliance officer who serves at the pleasure of the fund's board and who is responsible for oversight of these service providers, and who cannot be unduly influenced will strengthen the hand of compliance personnel by giving them a direct line of reporting to the fund board that is not controlled by management.

The rules will also benefit funds and investment advisers by diminishing the likelihood of securities violations, Commission enforcement actions, and private litigation. For a fund or adviser, the potential costs associated with a securities law violation may consist of much more than merely the fines or other penalties levied by the Commission or civil liability. The reputation of a fund or adviser may be significantly tarnished, resulting in redemptions (in the case of an open-end fund) or lost clients. Advisers may be denied eligibility to advise funds.[101] In addition, advisers could be precluded from serving in other capacities.[102]

The designation of a chief compliance officer also should enhance the efficiency of funds' and advisers' operations by centralizing responsibility for the compliance function. While many commenters agreed that fund and investment adviser compliance benefits from clear allocation of compliance responsibilities, they argued that large firms would benefit little from requiring a single person to be designated. We believe that the designation of a single officer will increase the coordination with which distributed compliance functions are executed.

In addition, because the new rules complement our examination program for investment advisers and for fund complexes, they will enhance our ability to protect investors. The existence of a structured compliance program at funds and investment advisers, together with the designation of a chief compliance officer to serve as a point of contact, will facilitate the examination staff's efforts to conduct each examination in an organized and efficient manner and thus to allocate resources to maximize investor protection. Most commenters noted that the proposed rules would enhance the effectiveness of the Commission's examination program and oversight of funds and advisers.

B. Costs

The new rules will result in some additional costs for funds and investment advisers, which, in the case of funds, we expect would be passed on to investors. A number of commenters expressed concern about the costs that the new rules would impose.[103] One commenter, noting that existing compliance mandates place a significant burden on investment advisers, expressed concern that the costs of new compliance obligations might outweigh the benefits. However, because all funds and most investment advisers currently have some written compliance policies and procedures in place, the costs of the new rules in many instances already are reflected in the fees investors currently pay.

We would expect that funds and advisers with substantial commitments to compliance would incur only minimal costs in connection with the adoption of the new rules as they reviewed their internal compliance programs for adequacy. Funds and larger advisory firms typically have adopted and implemented comprehensive, written policies and procedures. Many of these funds and advisers also have well-staffed compliance departments. Many conduct periodic reviews of their compliance programs and some hire independent compliance experts to review the adequacy of their compliance programs and the effectiveness of their implementation.

A number of commenters expressed particular concern about the relative cost of the new rules for small investment advisers.[104] This concern is consistent with our experience that investment advisers (as well as small funds) are less likely than their larger counterparts to have comprehensive, written internal compliance programs in place. Based on our examination experience, we estimate that as many as one half of SEC-registered investment advisers do not have comprehensive, written internal compliance programs in place.

However, we expect a number of factors will enable small investment advisers to control and minimize these costs. Because small firms typically engage in a limited number and range of transactions and have one or two employees, their internal compliance programs would be markedly less complex than those of their large firm counterparts.[105] In addition, we anticipate that these firms will turn to a variety of industry representatives, commentators, and organizations that have developed outlines and model programs that these firms can tailor to fit their own situations.[106] If these firms need individualized outside assistance, we expect that the number of independent compliance experts will grow to fill this demand at competitive

[101] Section 9(a) of the Investment Company Act (15 U.S.C. 80a–9(a)) prohibits a person from serving as an adviser to a fund if, within the past 10 years, the person has been convicted of certain crimes or is subject to an order, judgment, or decree of a court prohibiting the person from serving in certain capacities with a fund, or prohibiting the person from engaging in certain conduct or practice.

[102] *See, e.g.*, 29 U.S.C. 1111(a) (prohibiting a person from acting in various capacities for an employee benefit plan, if within the past 13 years, the person has been convicted of, or has been imprisoned as a result of, any crime described in section 9(a)(1) of the Investment Company Act (15 U.S.C. 80a–9(a)(1)).

[103] We believe that many of these concerns stemmed from the incorrect perception that the new rules would require the adoption and implementation of one-size-fits-all compliance programs. As discussed above, the new rules require each firm to adopt a compliance program that conforms with the scope and nature of its operations, thus eliminating concerns that the new rules will require duplicative or excessively detailed compliance programs.

[104] The Investment Counsel Association of American (''ICAA''), for example, noted that in small firms with few employees, the responsibility for developing a compliance program, if done in-house, would likely be borne by a highly-paid employee.

[105] The ICAA estimated that, depending on an adviser's size and complexity, the adviser could purchase an off-the-shelf compliance manual for under $1,000, but would have to spend time adjusting the manual to correspond to its organizational structure. Alternatively, the ICAA also estimated that the adviser could enlist the assistance of a third-party compliance firm to draft a firm-specific manual for a small to mid-size firm for between $2,500 and $3,500. The ICAA also estimated that a law firm would charge between $10,000 and $120,000 to draft procedures (and an accounting firm would charge between $50,000 and $200,000), depending on the size and complexity of the adviser's operations.

[106] Firms will incur a cost in tailoring these programs to their specific needs.

prices, as has been the case in comparable situations. Estimates of the cost of developing compliance policies and procedures vary greatly depending on the type of help that an investment adviser seeks.[107]

The requirement that each investment adviser designate a chief compliance officer likely will impose only a minimal cost. Many investment advisers already have large compliance staffs headed by an individual who officially or effectively serves as a chief compliance officer.[108] For other investment advisers, costs associated with designating a chief compliance officer also would be minimized by the fact that the new rules would not require firms to hire an individual exclusively charged with serving in this capacity.[109] One commenter characterized the chief compliance officer requirement as unduly burdensome because it would conflict with the complex and varied organizational structures of investment advisers. As noted above, we believe that it is important for each firm to have one person who coordinates compliance efforts on behalf of the firm, even though that individual may rely heavily on others within and outside the firm for assistance. The cost to funds of appointing a chief compliance officer also should not be significant. Like many investment advisers, many fund complexes already have large compliance staffs headed by an individual who officially or effectively serves as a chief compliance officer. We expect this individual will typically be qualified to serve the fund's board of directors as the fund's chief compliance officer.[110]

We anticipate that costs associated with the annual review requirement also will be limited. Many large funds and investment advisers with comprehensive compliance programs periodically review portions of their compliance programs. These firms may incur a cost associated with transforming their periodic reviews into a more systematic annual review, but this cost is difficult to quantify. Most of the firms without any review mechanism in place are small. For these firms, the annual review requirement likely will be less extensive and, therefore, less costly than for their larger counterparts. We have determined that requiring more frequent reviews would impose unnecessary costs on funds and advisers.

Several commenters stated that there would be a substantial cost associated with the requirement that fund boards approve the compliance policies and procedures and review the annual report prepared by the chief compliance officer. We have clarified in this release that the new rules do not require the board of directors to read every policy and procedure. The board may make its decisions about the adequacy of the compliance policies and procedures based on summary reports. Similarly, the board's review of the chief compliance officer's annual report should focus on ensuring that the compliance programs of the fund and its service providers are reasonably designed and functioning effectively. In light of these clarifications, we do not believe that funds will incur excessive costs in connection with board oversight of compliance under the new rules.

One commenter, a large fund complex, suggested that there would be substantial recordkeeping costs associated with the new rules, and suggested that firms be required to maintain for five years copies of only those policies and procedures that form the backbone of the firm's compliance program. Because records may be maintained electronically, the cost of maintaining copies of all compliance policies and procedures in place during the past five years will be contained.

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

Section 2(c) of the Investment Company Act (15 U.S.C. 80a–2(c)) and section 202(c) of the Advisers Act (15 U.S.C. 80b–2(c)) mandate that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

As discussed above, the new rules would require funds and investment advisers to adopt and implement written policies and procedures designed to prevent violations of the Federal securities laws, and review those policies and procedures at least annually. Although we recognize that a compliance program may divert resources from funds' and advisers' primary businesses, we expect that the new rules may indirectly increase efficiency in a number of ways. These compliance programs should increase efficiency by deterring Federal securities law violations, or by facilitating the fund's or adviser's early intervention to decrease the severity of any violations that do occur. In addition, funds and advisers will be required to carry out their internal compliance functions in an organized and systematic manner, which may be more efficient than their current approach to these functions. The existence of an industry-wide compliance program requirement may enhance efficiency further by encouraging third parties to create new informational resources and guidance to which industry participants can refer in establishing and improving their compliance programs.

Since the new rules apply equally to all funds and advisers, we do not anticipate that they will introduce any competitive disadvantages. To the contrary, the new rules may encourage competition on a more level basis than exists in the current environment, in which compliance-oriented industry participants incur greater costs to maintain compliance programs than other firms. Several commenters cautioned, however, that the new rules could have anti-competitive effects on the advisory industry because they would disproportionately burden small advisers and could even force them to merge with their larger, more established counterparts or go out of business. While small advisers will incur the largest relative costs as a result

[107] One commenter stated that prohibitive costs may be the reason that some firms, particularly small firms, do not have compliance programs. The Financial Planning Association, however, estimated, based on discussions with a number of compliance vendors, a small adviser (with five employees) would spend $675 to purchase compliance software and customize it in-house. Alternatively, the FPA estimated that such an adviser could purchase a turn-key manual customized for the adviser for $1,500. Finally, the FPA estimated that the adviser could retain an outside consultant to develop a written compliance manual for $3,900.

[108] The ICAA noted that most of its members have employees responsible for compliance and many of these have designated a chief compliance officer.

[109] Several commenters expressed concern about the cost to small firms of hiring a chief compliance officer. The rules that we are adopting do not require funds or investment advisers to hire a separate chief compliance officer, and we expect that many small investment advisers will designate a principal or employee of the firm to serve as chief compliance officer. However, a firm that does not currently have a person qualified to serve as chief compliance officer will incur costs associated with training someone in the firm.

[110] The requirement that fund boards approve the designation and compensation of the chief compliance officer, or take action to remove a chief compliance officer, will impose minimal costs, if any, beyond the current costs incurred to prepare briefing materials for directors and convene board meetings. With rare exception, fund boards should be able to take up these issues during their existing schedule of meetings.

of the new rules, the rule's requirements are essential for the protection of small advisers' clients. Moreover, the existence of a strong compliance program may assist small advisers to attract client assets.

We anticipate that the new rules will indirectly foster capital formation by bolstering investor confidence. It has been our experience that funds and advisers with effective compliance programs are less likely to violate the Federal securities laws and harm to investors is less likely to result. To the extent such an environment enhances investor confidence in funds and client confidence in investment advisers, investors and clients are more likely to make assets available through these intermediaries for investment in the capital markets.

VI. Paperwork Reduction Act

As we discussed in the Proposing Release, the new rules and amendments would impose ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[111] These collections of information are mandatory. Two of the collections of information are new. The titles of these new collections are ''Rule 38a–1'' and ''Rule 206(4)–7.'' The Commission submitted these new collections to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The other collection of information takes the form of amendments to a currently approved collection titled ''Rule 204–2,'' under OMB control number 3235–0278. The Commission also submitted the amendments to this collection to the OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The collection of information under rule 38a–1 is necessary to ensure that investment companies maintain comprehensive internal programs that promote the companies' compliance with the federal securities laws. This collection of information is mandatory. The respondents are investment companies registered with us and business development companies. Our staff, conducting the Commission's examination and oversight program, will use the information collected to assess funds' compliance programs. Responses provided to the Commission in the context of its examination and oversight program are generally kept confidential.[112] Rule 38a–1 requires that certain records be retained for at least five years.[113]

The collection of information under rule 206(4)–7 is necessary to ensure that investment advisers maintain comprehensive internal programs that promote the advisers' compliance with the Advisers Act. This collection of information is mandatory. The respondents are investment advisers registered with us. Our staff, conducting the Commission's examination and oversight program, will use the information collected to assess investment advisers' compliance programs. Responses provided to the Commission in the context of its examination and oversight program are generally kept confidential.[114]

The collection of information under rule 204–2 is necessary for the Commission staff to use in its examination and oversight program. This collection of information is mandatory. The respondents are investment advisers registered with us. Responses provided to the Commission in the context of its examination and oversight program are generally kept confidential.[115] The records that an adviser must keep in accordance with the new rules must be retained for at least five years.[116]

A. Rule 38a–1

We estimated in the Proposing Release that there are approximately 5,030 registered investment companies and 53 business development companies (or a total of approximately 5,083 funds) that will be subject to rule 38a–1.[117] We estimated that the average annual hour burden for a fund to document the policies and procedures that make up its compliance program as required by rule 38a–1 would be 60 hours.[118] We further estimated that each fund would spend five hours annually, on average, documenting the conclusions of its annual compliance review for its board of directors as required by rule 38a–1.

We also estimated that each fund would spend 0.5 hours annually, on average, maintaining copies of their compliance policies and procedures and chief compliance officer's annual reports for five years as required by rule 38a–1. In adopting rule 38a–1, we have expanded this recordkeeping requirement to also include copies of briefing materials provided to a fund's board of directors in connection with their approval of the fund and its service providers' compliance programs and board review of the chief compliance officer's annual reports, and to include copies of any records documenting a fund's annual review. Since these changes only require funds to retain copies of a limited number of records they have already created (rather than requiring funds to record any new information), we continue to estimate that the average annual hour burden for each adviser is 0.5 hours.

Most commenters addressing the paperwork burden of rule 38a–1 supported them as reasonable, though one large fund management firm predicted funds would find it burdensome to maintain copies of their compliance policies and procedures for five years as required by the rule. Because of the importance of these copies to our examination and oversight program, we are adopting rule 38a–1 without removing this requirement.

Therefore, our total hour burden estimate for the collections of information under rule 38a–1 remains 332,936.5 burden hours, as we estimated in our proposal.[119]

B. Rule 206(4)–7

In the Proposing Release, we estimated the total annual average burden hours for advisers to document the policies and procedures that make up their compliance programs, as required by rule 206(4)–7, would be 623,200 hours, based on 7,790 investment advisers registered with us spending an annual average of 80 hours on such documentation.[120]

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[111] 44 U.S.C. 3501 to 3520.

[112] *See* section 31(c) of the Investment Company Act (15 U.S.C. 80a–30(c).

[113] *See* rule 38a–1(c).

[114] *See* section 210(b) of the Advisers Act (15 U.S.C. 80b–10(b)).

[115] *Id.*

[116] *See* rules 204–2(a)(17)(i) and (ii) and rule 204–2(e)(1) (17 CFR 275.204–2(e)(1)).

[117] These numbers are based on Commission filings as of January 2003.

[118] While each fund would be required to maintain written policies and procedures under rule 38a–1, this average estimate took into account that many fund complexes already have written policies and procedures documenting their compliance programs and can draw on a number of outlines and model programs available from a variety of industry representatives, commentators, and organizations to supplement these programs, if necessary. The estimate also took into account that most funds are located within a fund complex, and would be able to draw extensively from the fund complex's ''master'' compliance program.

[119] 5,083 funds (5,030 registered investment companies + 53 business development companies) × (60 hours for documenting compliance policies and procedures + 5 hours for documenting conclusions of annual compliance review + 0.5 hours for maintaining records) = 332,936.5 burden hours.

[120] 7,790 was the number of investment advisers registered with us on our Investment Adviser Registration Depository System as of January 14, 2003. 7,790 registered investment advisers x 80 annual average burden hours = 623,200 hours.

This 80 hour average estimate took into account that many advisers would be the primary drafters of compliance policies and procedures for funds under rule 38a–1, and would be able to draw extensively from their fund compliance programs to supplement, as necessary, compliance policies and procedures for the advisory firm. Our estimate also took into account that approximately half of the investment advisers registered with us already have drafted procedures addressing many aspects of their compliance programs, and many investment advisers in this group have drafted comprehensive procedures.

Our 80 hour estimate also took into account that a significant number of smaller registered investment advisers—who typically employ one or a few persons and have complete oversight of their business operations—have not adopted written policies and procedures, but can draw on a number of outlines and model programs, and can develop less complex programs because they often do not participate in arranging or effectuating securities transactions that they recommend to their clients. Comments from a trade association representing many smaller advisers generally supported our underlying assessment in this regard. Comments from another investment adviser trade association noted that it would likely be the owner of (or senior person at) a smaller firm who tailors a model compliance program to suit the firm's particular business, and use of this person's time would be more costly to the firm than the compliance personnel used by larger firms.

We are adopting rule 206(4)–7 without change to its paperwork collection requirements. Accordingly, our estimate of the annual aggregate burden of collection for the amended rule remains 623,200 hours.

C. Rule 204–2

In the Proposing Release, we estimated that the amendments to rule 204–2 requiring investment advisers to maintain copies of their compliance policies and procedures and copies of any records documenting the adviser's annual review of those policies, as required by rule 206(4)–2, would increase each registered investment adviser's average annual collection burden under rule 204–2 by 0.5 hours to 211.98 hours. We further estimated the amendments would increase the rule's annual aggregate burden by 3,895 hours.[121] One commenter objected that it would be onerous for advisers to maintain copies of records generated by the adviser's annual compliance review. Because of the importance of these copies to our examination and oversight program, we are adopting the amendments to rule 204–2 without change.[122]

VII. Summary of Final Regulatory Flexibility Analysis

We have prepared a Final Regulatory Flexibility Analysis (''FRFA'') in accordance with 5 U.S.C. 604, related to the new rules and rule amendments that we are adopting today. A summary of the Initial Regulatory Flexibility Analysis (''IRFA''), which was prepared in accordance with 5 U.S.C. 603, was published in the Proposing Release. Copies of the FRFA and the IRFA may be obtained by contacting Hester Peirce, Senior Counsel, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0506.

The FRFA summarizes the background of the new rules and rule amendments and discusses why these regulatory changes are needed to enhance compliance with the Federal securities laws by funds and advisers. These issues are addressed above. The FRFA also discusses comments received in response to the IRFA, the effect of the new rules and rule amendments on small entities, and the Commission's efforts at minimizing the effect on small entities. These issues are summarized below.

The FRFA explains that the new rules and rule amendments will govern all registered investment companies, business development companies, and advisers registered with the Commission, including small entities. For purposes of the Regulatory Flexibility Act,[123] a fund is a small entity if the fund, together with other funds in the same group of related funds, has net assets of $50 million or less as of the end of its most recent fiscal year.[124] The staff estimates, based on Commission filings, that there are approximately 186 small open- and closed-end investment companies, 18 small unit investment trusts, and 29 small business development companies.[125]

For purposes of the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year.[126] The Commission estimates that, as of October 14, 2003, there were approximately 571 small investment advisers registered with us.[127]

The FRFA discusses the comments that we received in response to issues raised in the IRFA.[128] Several commenters, including one trade association for investment advisers, cautioned that the new rules would impose significant costs on small advisers. Another trade association for advisers acknowledged that small advisers would bear a higher relative cost than their larger counterparts, but anticipated that the cost to small advisers would be offset by the fact that compliance policies and procedures would not have to cover as broad a range of activities as the policies and procedures of their larger counterparts.[129] A third commenter, however, noted that even though small firms might have less complex policies and procedures, the cost of drafting the basic policies and procedures would be the same as for larger firms and for some small firms the cost would be prohibitive.

Commenters recommended the following accommodations for small

[121] 7,790 registered investment advisers x 0.5 hours = 3,895 hours.

[122] Accordingly, our estimate in the Proposing Release of the annual aggregate burden of collection for the amended rule remains 1,651,324.2 hours. This estimate was based on the OMB's approved burden of 1,625,638.5 hours before the amendments (shared by 7,687 investment advisers at an annual average of 211.48 hours per adviser), plus an increase of 21,790.7 hours attributable to an increase in the number of investment advisers registered with us to 7,790 as of January 2003, (each incurring an average annual burden of 211.48 hours) and an increase of 3,895 additional burden hours associated with the amendments to rule 204–2 (7,790 registered investment advisers × 0.5 hours).

[123] 5 U.S.C. 601–612.

[124] 17 CFR 270.0–10.

[125] The number of small entities, which is current as of June 2003, is derived from analyzing information from Form N–SAR and various databases including Lipper. Some or all of these entities may contain multiple series or portfolios. If a registered investment company is a small entity, the portfolios or series it contains are also small entities.

[126] 17 CFR 275.0–7(a).

[127] The number of small investment advisers is derived from the Commission's Investment Adviser Registration Depository.

[128] The comment letters and a summary of comments prepared by our staff are available for public inspection and copying in the Commission's Public Reference Room, 450 5th Street, NW., Washington, DC (File No. S7–03–03). The comment summary is also available on the Commission's Internet Web site (*http://www.sec.gov/rules/extra/s70303summary.pdf*).

[129] The Financial Planning Association estimated that it would cost a small firm with five employees between $675 and $3,900 to develop a compliance program.

entities: (i) Exempt small firms from the requirement to designate a chief compliance officer, (ii) exempt small advisers from all of the new requirements, (iii) identify procedures that are relevant to small firms, (iv) identify issues that do not apply to small advisers or advisers that do not manage assets and therefore would not have to be addressed in their compliance policies and procedures, (v) create a template that firms could adapt to fit their unique characteristics, or (vi) permit small advisers to maintain records outside their office space in an easily accessible location.

The FRFA explains that the rules do not introduce new reporting requirements, but do introduce new compliance requirements, including new recordkeeping obligations. The FRFA sets forth the requirements of the rule (which are described above in detail) and explains that all funds and advisers, regardless of size, are subject to the compliance requirements. The FRFA also explains that while most firms already have instituted a compliance program and have designated someone charged with implementing it, small advisers are disproportionately represented among the firms that have not taken such steps. The FRFA notes that these firms will bear costs in developing and implementing policies and procedures.[130] The FRFA explains that the new rules and rule amendments are designed to achieve their objectives without imposing undue costs on affected firms.

The FRFA discusses the alternatives considered by the Commission in adopting the new rules and rule amendments that might minimize adverse effects on small advisers, including: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rules, or any part thereof, for small entities.

We do not presently believe that the establishment of special compliance requirements or timetables for small entities is feasible or necessary.[131] Modifying these requirements for small funds or advisers would place their clients at unnecessary risk. The requirement that each fund or adviser implement written policies and procedures reasonably designed to prevent violation of the Federal securities laws, is essential to promote systematic and organized reviews by funds and advisers of their operations and activities. The requirement that funds obtain board approval of their programs and annually report about the programs to their boards is necessary to preserve the crucial oversight role of fund boards of directors.[132] Annual reviews are integral to detecting and correcting any gaps in the program before irrevocable or widespread harm is inflicted upon investors. The required designation of a chief compliance officer is necessary to achieve centralized supervisory authority over all aspects of the compliance program and to reduce the likelihood of gaps in the compliance program. The requirement that funds and advisers keep file copies of their written policies, procedures, reports, and other records for five years, imposes an inconsequential burden on small funds and advisers. The establishment of a special compliance timetable to allow a transition period of more than six months would delay the rules' investor protection benefits without assisting small funds and advisers.

The Commission does not presently believe that clarification, consolidation, or simplification of compliance requirements for small entities is feasible or necessary. The compliance requirements, which are integral to the effectiveness of the rules, are not technical or complex in any sense. The FRFA explains that some commenters requested more specific guidance about the type of compliance policies and procedures that would be required. In the Proposing Release and in this release, we have provided illustration and guidance to firms about the topics that should be addressed by their compliance policies and procedures. Because of the great variety across firms, any template that we could provide would be voluminous and would require extensive tailoring to the unique characteristics of each firm. Thus, it does not appear that Commission templates would effectuate significant burden reduction.

The FRFA explains that the new rules, to the greatest extent possible, embody performance rather than design standards. The rules do not enumerate specific required elements of the policies and procedures, but will allow all firms, including small firms, to tailor their internal compliance programs to the nature and scope of their own business. The FRFA explains that the rules do not set forth a list of attributes that the chief compliance officer must possess and permit firms to designate an existing employee with other responsibilities to fill that role, which the staff anticipates that most small firms will do.

The FRFA explains that we do not believe that the objectives of the rules could be achieved if small entities were exempted from coverage of any part of the proposals. It has been our experience that strong internal compliance programs are essential to investor protection in funds and advisers of all sizes.

VIII. Statutory Authority

We are adopting new rule 38a–1 under the Investment Company Act pursuant to the authority set forth in sections 31(a) and 38(a) of the Act (15 U.S.C. 80–30(a) and 80a–37(a)).[133] We are adopting new rule 206(4)–7 pursuant to the authority set forth in sections 206(4) and 211(a) under the Advisers Act (15 U.S.C. 80b–6(4) and 80b–11(a)).[134] We are adopting

[130] The staff estimates that approximately half of these firms will develop these policies internally, while the remaining firms will seek outside assistance from compliance consultants, the number of which is expected to rise after the new rules are adopted.

[131] As stated above, the rules impose no reporting requirements.

[132] In the case of investment advisers, for which such governance issues are not present, we have not included comparable requirements.

[133] Section 38(a) authorizes the Commission to ''make * * * such rules and regulations * * * as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in (the Investment Company Act).'' We are adopting rule 38a–1 as necessary and appropriate to the exercise of the authority specifically conferred on us elsewhere in the Act, including sections 9(b) (authority to prohibit certain persons from serving in certain capacities with respect to investment companies), 31(b) (authority to examine funds), 36(a) (authority to bring actions for the breach of fiduciary duty); and 42 (authority to enforce the provisions of the Investment Company Act) of the Investment Company Act (15 U.S.C. 80a–9(b), 80a–30(b), and 80a–41). Further, requiring the maintenance of internal compliance policies and procedures and an annual compliance report falls under the authority granted to us under section 31(a), which authorizes us to require funds to maintain and preserve records, including memoranda, books, and other documents.

[134] Section 206(4) permits the Commission to define and prescribe rules to prevent conduct that is unlawful under section 206. Rule 206(4)–7 defines an activity that is unlawful under section 206. Further, section 211(a) of the Advisers Act authorizes the Commission to ''make * * * such rules and regulations * * * as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in (the Act).'' We are adopting rule 206(4)–7 as necessary and appropriate to the exercise of the authority specifically conferred on us elsewhere in the Act, including sections 203(e) (authority to censure, place limitations on, suspend, or revoke the registration of certain investment advisers), 204

amendments to rule 204–2 pursuant to the authority set forth in sections 204 and 211 of the Advisers Act (15 U.S.C. 80b–4 and 80b–11).

We are amending rule 279.1, Form ADV, under section 19(a) of the Securities Act of 1933 (15 U.S.C. 77s(a)), sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78w(a) and 78bb(e)(2)), section 319(a) of the Trust Indenture Act of 1939 (15 U.S.C. 77sss(a)), section 38(a) of the Investment Company Act of 1940 (15 U.S.C. 78a–37(a)), and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)).

List of Subjects

17 CFR Part 270

Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 275 and 279

Reporting and recordkeeping requirements, Securities.

Text of Rules

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

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 1. The authority citation for part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

■ 2. Section 270.38a–1 is added to read as follows:

§ 270.38a–1 Compliance procedures and practices of certain investment companies.

(a) Each registered investment company and business development company (''fund'') must:

(1) *Policies and procedures.* Adopt and implement written policies and procedures reasonably designed to prevent violation of the Federal Securities Laws by the fund, including policies and procedures that provide for the oversight of compliance by each investment adviser, principal underwriter, administrator, and transfer agent of the fund;

(2) *Board approval.* Obtain the approval of the fund's board of directors, including a majority of directors who are not interested persons of the fund, of the fund's policies and procedures and those of each investment adviser, principal underwriter, administrator, and transfer agent of the fund, which approval must be based on a finding by the board that the policies and procedures are reasonably designed to prevent violation of the Federal Securities Laws by the fund, and by each investment adviser, principal underwriter, administrator, and transfer agent of the fund;

(3) *Annual review.* Review, no less frequently than annually, the adequacy of the policies and procedures of the fund and of each investment adviser, principal underwriter, administrator, and transfer agent and the effectiveness of their implementation;

(4) *Chief compliance officer.* Designate one individual responsible for administering the fund's policies and procedures adopted under paragraph (a)(1) of this section:

(i) Whose designation and compensation must be approved by the fund's board of directors, including a majority of the directors who are not interested persons of the fund;

(ii) Who may be removed from his or her responsibilities by action of (and only with the approval of) the fund's board of directors, including a majority of the directors who are not interested persons of the fund;

(iii) Who must, no less frequently than annually, provide a written report to the board that, at a minimum, addresses:

(A) The operation of the policies and procedures of the fund and each investment adviser, principal underwriter, administrator, and transfer agent of the fund, any material changes made to those policies and procedures since the date of the last report, and any material changes to the policies and procedures recommended as a result of the annual review conducted pursuant to paragraph (a)(3) of this section; and

(B) Each Material Compliance Matter that occurred since the date of the last report; and

(iv) Who must, no less frequently than annually, meet separately with the fund's independent directors.

(b) *Unit investment trusts.* If the fund is a unit investment trust, the fund's principal underwriter or depositor must approve the fund's policies and procedures and chief compliance officer, must receive all annual reports, and must approve the removal of the chief compliance officer from his or her responsibilities.

(c) *Undue influence prohibited.* No officer, director, or employee of the fund, its investment adviser, or principal underwriter, or any person acting under such person's direction may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the fund's chief compliance officer in the performance of his or her duties under this section.

(d) *Recordkeeping.* The fund must maintain:

(1) A copy of the policies and procedures adopted by the fund under paragraph (a)(1) that are in effect, or at any time within the past five years were in effect, in an easily accessible place; and

(2) Copies of materials provided to the board of directors in connection with their approval under paragraph (a)(2) of this section, and written reports provided to the board of directors pursuant to paragraph (a)(4)(iii) of this section (or, if the fund is a unit investment trust, to the fund's principal underwriter or depositor, pursuant to paragraph (b) of this section) for at least five years after the end of the fiscal year in which the documents were provided, the first two years in an easily accessible place; and

(3) Any records documenting the fund's annual review pursuant to paragraph (a)(3) of this section for at least five years after the end of the fiscal year in which the annual review was conducted, the first two years in an easily accessible place.

(e) *Definitions.* For purposes of this section:

(1) *Federal Securities Laws* means the Securities Act of 1933 (15 U.S.C. 77a–aa), the Securities Exchange Act of 1934 (15 U.S.C. 78a–mm), the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745 (2002)), the Investment Company Act of 1940 (15 U.S.C. 80a), the Investment Advisers Act of 1940 (15 U.S.C. 80b), Title V of the Gramm-Leach-Bliley Act (Pub. L. No. 106–102, 113 Stat. 1338 (1999), any rules adopted by the Commission under any of these statutes, the Bank Secrecy Act (31 U.S.C. 5311–5314; 5316–5332) as it applies to funds, and any rules adopted thereunder by the Commission or the Department of the Treasury.

(2) A *Material Compliance Matter* means any compliance matter about which the fund's board of directors would reasonably need to know to oversee fund compliance, and that involves, without limitation:

(i) A violation of the Federal securities laws by the fund, its investment adviser, principal underwriter, administrator or transfer agent (or officers, directors, employees or agents thereof),

(ii) A violation of the policies and procedures of the fund, its investment

(authority to examine advisers), and 209 (authority to enforce the provisions of the Advisers Act) of the Advisers Act (15 U.S.C. 80b–3(e), 80b–4, and 80b–9).

adviser, principal underwriter, administrator or transfer agent, or

(iii) A weakness in the design or implementation of the policies and procedures of the fund, its investment adviser, principal underwriter, administrator or transfer agent.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 3. The authority citation for part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(F), 80b–2(a)(17), 80b–3, 80b–4, 80b–6(4), 80b–6a, 80b–11, unless otherwise noted.

* * * * *

■ 4. Section 275.204–2 is amended by adding new paragraph (a)(17) and by revising paragraph (e)(1). The additions and revisions read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

(a) * * *

(17)(i) A copy of the investment adviser's policies and procedures formulated pursuant to § 275.206(4)–7(a) of this chapter that are in effect, or at any time within the past five years were in effect, and

(ii) Any records documenting the investment adviser's annual review of those policies and procedures conducted pursuant to § 275.206(4)–7(b) of this chapter.

* * * * *

(e)(1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1)(i), inclusive, and (c)(2) of this section (except for books and records required to be made under the provisions of paragraphs (a)(11), (a)(16), and (a)(17)(i) of this section), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.

* * * * *

■ 5. Section 275.206(4)–7 is added to read as follows:

§ 275.206(4)–7 Compliance procedures and practices.

If you are an investment adviser registered or required to be registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3), it shall be unlawful within the meaning of section 206 of the Act (15 U.S.C. 80b–6) for you to provide investment advice to clients unless you:

(a) *Policies and procedures.* Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Act and the rules that the Commission has adopted under the Act;

(b) *Annual review.* Review, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation; and

(c) *Chief compliance officer.* Designate an individual (who is a supervised person) responsible for administering the policies and procedures that you adopt under paragraph (a) of this section.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 6. The authority citation for part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.*

■ 7. Form ADV (referenced in 279.1) is amended by:

In Part 1, Schedule A, revising Item 2(a), to read ''each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer (Chief Compliance Officer is required and cannot be more than one individual), director and any other individuals with similar status or functions;''

Dated: December 17, 2003.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31544 Filed 12–23–03; 8:45 am]

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Wednesday,
December 24, 2003

Part III

Securities and Exchange Commission

17 CFR Parts 239 and 274
Disclosure of Breakpoint Discounts by Mutual Funds; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239 and 274

[Release Nos. 33–8347; 34–48939; IC–26298; File No. S7–28–03]

RIN 3235–AI95

Disclosure of Breakpoint Discounts by Mutual Funds

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing amendments to Form N–1A under the Securities Act of 1933 and the Investment Company Act of 1940 to require an open-end management investment company to provide enhanced disclosure regarding breakpoint discounts on front-end sales loads. Under the proposed amendments, an open-end management investment company would be required to describe in its prospectus any arrangements that result in breakpoints in sales loads and to provide a brief summary of shareholder eligibility requirements.

DATES: Comments must be received on or before February 13, 2004.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by one method only. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following E-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–28–03; this file number should be included in the subject line if electronic mail is used. All comments received will be posted on the Commission's Internet Web site (*http://www.sec.gov*) and made available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.[1]

FOR FURTHER INFORMATION CONTACT: Christian L. Broadbent, Senior Counsel, or Paul G. Cellupica, Assistant Director, Office of Disclosure Regulation, Division of Investment Management, (202) 942–0721, or with respect to questions about disclosure by financial intermediaries, Joseph P. Corcoran, Special Counsel, Office of Chief Counsel, Division of Market Regulation, at (202) 942–0073, at the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''Commission'') is proposing for comment amendments to Form N–1A (17 CFR 239.15A and 274.11A), the registration form used by open-end management investment companies to register under the Investment Company Act of 1940 (''Investment Company Act'') and to offer their securities under the Securities Act of 1933 (''Securities Act'').

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I. Introduction and Background

The shares of open-end management investment companies (''mutual funds'') are sold to investors in a variety of ways. Many shares are sold without a sales load, including shares sold directly by the fund and those sold through retirement plans. An estimated 37% of mutual fund shareholders purchase shares through a broker-dealer or another financial intermediary.[2] Fund shares sold through a broker-dealer or other intermediary often are subject to a front-end sales load. A front-end sales load is a sales charge that applies at the time the fund shares are purchased to compensate the broker-dealer that sells the fund shares, and is based on a percentage of the purchase price.

Mutual funds with a front-end sales load typically establish a schedule of sales load percentages that are used to calculate the sales load that an investor pays. Some mutual funds that charge front-end sales loads will charge lower sales loads for larger investments. For example, a fund might charge a 5% front-end sales load for investments up to $50,000, but charge a load of 4% for investments between $50,000 and $100,000 and 3% for investments exceeding $100,000. The investment levels required to obtain a reduced sales load are commonly referred to as ''breakpoints.'' [3] A broker-dealer who sells fund shares to retail customers must disclose breakpoint information to its customers and must have procedures reasonably designed to ascertain information necessary to determine the availability and appropriate level of breakpoints.[4]

Each mutual fund company establishes its own formula for how it will calculate whether an investor is entitled to receive a breakpoint. Funds typically offer investors two principal options that enable them to take advantage of breakpoints in sales loads for purchases made over time: a letter of intent and a right of accumulation. A letter of intent is a written statement by an investor to a fund in which the investor states that he or she intends to purchase a stated dollar amount of fund shares over a specified period (frequently, 13 months). As a result, the investor is charged the reduced sales charge that applies to the total amount of the investor's intended purchase on his or her first purchase and all subsequent purchases. If a shareholder fails to fulfill his or her obligation to purchase the intended total dollar amount of fund shares, the shareholder must reimburse the discount.

A right of accumulation permits an investor to aggregate shares owned in related accounts in some or all funds in a fund family to reach a breakpoint discount. Funds typically allow

[1] We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

[2] Investment Company Institute, 2001 Profile of Mutual Fund Shareholders 13–14 (Fall 2001).

[3] Information for investors concerning mutual fund breakpoints—including how funds calculate breakpoints and the steps investors can take if they fail to receive the benefit of a breakpoint to which they were entitled—is available on the Commission's Web site at *http://www.sec.gov/answers/breakpt.htm.*

[4] *NASD Special Notice to Members 02–85* (Dec. 23, 2002) (directing all member firms to immediately review the adequacy of their existing policies and procedures to ensure that investors are charged the correct sales load on mutual fund transactions); *NASD Notice to Members 94–16* (Mar. 1994) (discussing the obligation of member firms to ensure that communications with customers are accurate and complete regarding mutual fund breakpoints). *See* NASD Conduct Rule 2110 (Standards of Commercial Honor and Principles of Trade) and NASD Conduct Rule IM–2830–1 (''Breakpoint'' Sales); *In the Matter of Application of Harold R. Fenocchio for Review of Disciplinary Action Taken by the NASD,* 46 SEC 279 (1976) (sustaining NASD's finding of violation of its Rules of Fair Practice where registered representatives failed to have customers execute a letter of intent or to inform them of their rights of accumulation in connection with mutual fund purchases).

investors to aggregate fund shares owned by a person or group of persons related to the investor (*e.g.,* family members). This option also gives a fund shareholder the ability to count earlier purchases of shares of funds in his or her accounts and in related accounts towards the reduction of the sales charge on a current purchase. A right of accumulation may often be combined with a letter of intent for further benefits.

Typically, a mutual fund values accounts in order to determine whether aggregate holdings have reached a sales load breakpoint using one of three methods: net asset value, public offering price, and historical cost. Most mutual fund families use the net asset value of an investor's holdings to determine whether a breakpoint discount is available. Some fund families, however, permit an investor's holdings to be valued using the public offering price, which is determined by adding the maximum front-end sales load charged to the net asset value. In addition, some fund families permit holdings to be valued based on the greater of market value (net asset value or public offering price) and historical cost, which is what the investor actually paid for a mutual fund at the time of purchase.

A mutual fund that offers breakpoint discounts must disclose its schedule of breakpoints in its prospectus.[5] A fund must disclose its aggregation rules for determining breakpoints, such as letters of intent and rights of accumulation, in either its prospectus or statement of additional information (''SAI'').[6]

In late 2002, the staffs of the Commission and the NASD identified concerns regarding the extent to which mutual fund investors were receiving breakpoint discounts, which were first uncovered by NASD's routine examination program. As a result, the Commission and NASD launched a multifaceted action plan to address these concerns.[7] First, broker-dealers were required to review the adequacy of their policies and procedures in this area, make necessary changes, and report information concerning their mutual fund businesses. Second, the Commission and NASD, along with the New York Stock Exchange (''NYSE''), initiated an examination sweep of 43 broker-dealers that sell front-end sales load mutual funds to evaluate whether samples of transactions received the sales load discounts offered by the fund. Third, NASD, the Securities Industry Association (''SIA''), and the Investment Company Institute (''ICI'') formed a task force to recommend ways in which the mutual fund and broker-dealer industries could prevent breakpoint problems in the future.

The Commission, NASD, and NYSE conducted their examination sweep of broker-dealers between November 2002 and January 2003. The examination revealed that most firms, in some instances, did not provide investors with breakpoint discounts for which they appeared to have been eligible.[8] Of the more than 9,000 transactions reviewed, examiners identified 5,515 transactions that appeared to be eligible for a reduced sales charge. Of these 5,515 transactions, examiners found 1,757 transactions that did not receive a breakpoint discount or appeared to have incurred other unnecessary sales charges (representing 20% of all the transactions reviewed, and 32% of the transactions that were eligible for a discount). For these 1,757 transactions, the average discount not provided was $364 per transaction. The most frequent causes for not providing a breakpoint discount involved problems with rights of accumulation, including not linking a customer's ownership of different funds in the same mutual fund family, not linking shares owned in a fund or fund family in all of a customer's accounts at the firm, and not linking shares owned in the same fund or fund family by persons related to the customer (*e.g.,* spouse, children) in accounts at the firm.[9]

The NASD formed the Joint NASD/Industry Task Force on Breakpoints together with the SIA and ICI in February 2003, to recommend ways in which the mutual fund and brokerage industries can assure that investors are not overcharged when they purchase funds with front-end sales loads.[10] The Task Force issued its report in July 2003.[11] Consistent with the findings of the joint examination sweep of broker-dealers, the Task Force reported that many of the significant challenges in applying breakpoints correctly were with respect to rights of accumulation. The Task Force explained that to deliver breakpoint discounts based on rights of accumulation, the parties involved with the transaction must be able to link the accounts containing shares eligible to be aggregated and to ascertain the value of the accounts in order to determine whether a shareholder has met sales load breakpoints. The Task Force identified particular challenges to delivering breakpoints based on investors' rights of accumulation. First, broker-dealers have experienced difficulty in accessing and understanding the terms upon which mutual funds allow investors to aggregate both their holdings and those of related parties to reach breakpoints. Second, broker-dealers and mutual funds must communicate to investors the terms concerning rights of accumulation, and broker-dealers must obtain from investors necessary information regarding accounts eligible to be linked and, if applicable, historical costs.[12]

To address the challenges in providing correct breakpoint discounts to investors, the Task Force provided 13 recommendations, including: That mutual fund companies take steps to make investors aware of the availability of breakpoint discounts; that broker-dealers adopt policies and practices to gather the appropriate information from investors so that they can take advantage of all available breakpoint discounts; that transfer agents and broker-dealers modify the systems used to execute mutual fund transactions; and that regulators and the mutual fund and securities industries continue to educate investors about breakpoint opportunities. Two of the recommendations called for Commission rules that would require a fund to disclose certain information regarding breakpoints in its prospectus

[5] Item 8(a)(1) of Form N–1A. Rule 22d–1 under the Investment Company Act (17 CFR 270.22d–1) permits a mutual fund to sell shares at prices reflecting scheduled breakpoints if it meets certain requirements, such as furnishing to existing shareholders and prospective investors the information regarding breakpoints required by applicable registration statement form requirements.

[6] Items 8(a)(2) and 18(a) of Form N–1A. The SAI is part of a fund's registration statement and contains information about a fund in addition to that contained in the prospectus. The SAI is required to be delivered to investors upon request and is available on the Commission's Electronic Data Gathering, Analysis, and Retrieval System.

[7] *SEC and NASD Action Plan on Mutual Fund Sales Load Charges,* Securities and Exchange Commission Press Release, Jan. 16, 2003, *http://www.sec.gov/news/press/2003–7.htm.*

[8] Securities and Exchange Commission *et al.*, Joint SEC/NASD/NYSE Report of Examinations of Broker-Dealers Regarding Discounts on Front-End Sales Charges on Mutual Funds 14–15 (Mar. 2003) (hereinafter Joint Report), available at *http://www.sec.gov/spotlight/breakpoints.htm.*

[9] *Id.* at 1–2, 14–17.

[10] *NASD Announces Joint NASD/Industry Breakpoint Task Force,* NASD News Release, Feb. 18, 2003, *http://www.nasdr.com/news/pr2003/release_03_006.html.*

[11] *Joint NASD/Industry Breakpoint Task Force Issues Report,* NASD News Release, July 22, 2003, *http://www.nasdr.com/news/pr2003/release_03_030.html.*

[12] NASD *et al.,* Report of the Joint NASD/Industry Task Force on Breakpoints 5 (July 2003) (hereinafter Task Force Report), available at *http://www.nasdr.com/pdf-text/breakpoints_report.pdf.*

and on its Web site.[13] First, the Task Force recommended that the Commission require a mutual fund to provide critical data regarding pricing methods, breakpoint schedules, and linkage rules in its prospectus and on its website, in a prominent and clear format.[14] Second, the Task Force recommended that the Commission require a fund to disclose in its prospectus that an investor may need to provide his or her broker-dealer with the information and records necessary to take full advantage of breakpoint discounts. The information and records could be used to aggregate, for example, holdings in retirement accounts, holdings of related parties, and holdings in accounts at other broker-dealers. In addition, the Task Force recommended that, if funds permit investors to rely on historical costs, the Commission require the prospectus to advise the investor to keep records necessary to demonstrate historical costs.[15]

Today, the Commission is proposing rules that would implement these recommendations. Specifically, we are proposing to require a mutual fund to describe briefly in its prospectus any arrangements that result in breakpoints in sales loads, including a summary of shareholder eligibility requirements. In addition, we are proposing to require a mutual fund to describe in its prospectus the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints. We are also proposing to require a mutual fund to state in its prospectus, if applicable, that in order to obtain a breakpoint discount, it may be necessary for a shareholder to provide information and records, such as account statements, to a mutual fund or financial intermediary. Our proposals would also require a mutual fund to state in its prospectus whether it makes available on or through its website information regarding its sales loads and breakpoints. This enhanced disclosure is intended to assist investors in understanding the breakpoint opportunities available to them, and to alert investors as to the information that they may need to provide to funds and broker-dealers to take full advantage of all available breakpoint discounts. It also should help broker-dealers to access information about available breakpoint discounts.

II. Discussion

The Commission is proposing amendments to Form N–1A, the registration form for mutual funds, that would require enhanced disclosure regarding breakpoint discounts on front-end sales loads. These proposed disclosure requirements are intended to assist investors in receiving the benefit of any breakpoint discounts to which they are entitled. Nothing in the proposed amendments would eliminate, or diminish in any respect, a broker-dealer's obligations to its customers with respect to mutual fund breakpoints, including its obligations to disclose information about breakpoints.[16]

A. Disclosure of Arrangements That Result in Breakpoints in Sales Loads

We are proposing to revise Form N–1A to require a mutual fund to provide a brief description in its prospectus of arrangements that result in sales load breakpoints, including a summary of shareholder eligibility requirements. Currently, Item 8(a)(2) of Form N–1A requires disclosure of arrangements that result in breakpoints in, or elimination of, sales loads, including letters of intent and rights of accumulation. Item 8(a)(2) also requires that each class of individuals or transactions to which the arrangements apply be identified and that each different breakpoint be stated as a percentage of both the offering price and the amount invested. This information may be provided in either the prospectus or the SAI.

The proposed amendments would require that a mutual fund include the description required by Item 8(a)(2) of arrangements that result in breakpoints in, or elimination of, sales loads in its prospectus and not the SAI. We believe that information regarding breakpoints, which can significantly affect the cost of a shareholder's investment, should be included in the prospectus that is delivered to all shareholders. This will provide greater prominence to breakpoint disclosure than inclusion in the SAI, which is delivered to investors upon request. Our proposals would direct that prospectus disclosure regarding breakpoints be brief, in order to avoid overwhelming investors with excessively detailed information. Proposed Item 8(a)(2) would not require the prospectus to include the information currently required in the SAI regarding breakpoints for affiliated persons of the fund and breakpoints in connection with a reorganization.[17] This information would continue to be required in the SAI.

We are proposing to amend Item 18(a) of Form N–1A to require that information regarding breakpoint arrangements that is not included in the prospectus be included in the SAI. We are also proposing to modify Item 18(a) to conform the enumeration of types of special purchase plans or methods in that Item to the enumeration in Item 8(a)(2) of types of arrangements that result in breakpoints, so that references to ''dividend reinvestment plans,'' ''employee benefit plans,'' and ''redemption reinvestment plans'' would be added to Item 18(a) and ''services in connection with retirement

[13] The Task Force also made a number of recommendations to the NASD, NYSE, and mutual fund and brokerage industries. Working groups have been formed to address the other Task Force recommendations. *See, e.g., Breakpoints Training Outline, http://www.nasdr.com/breakpoints_training_outline.asp* (last modified Nov. 19, 2003) (training outline developed by NASD and working group in response to recommendation that broker-dealers provide enhanced training regarding mutual fund breakpoint discounts); *Breakpoints Checklist and Worksheet, http://www.nasdr.com/breakpoints_checklist.asp* (last modified Nov. 3, 2003) (checklist and worksheet designed by NASD and working group to assist member firms in implementing recommendations that broker-dealers require registered representatives to complete standardized checklists or worksheets, which record relevant account data, when executing transactions that carry front-end sales loads).

In addition, the NASD is heading an Omnibus Account Task Force consisting of members of the fund and brokerage industries, as well as other intermediaries, to study the issue of trading through omnibus accounts. Statement of William H. Donaldson, Chairman, U.S. Securities and Exchange Commission, Testimony Before the Senate Committee on Banking, Housing and Urban Affairs 14 (Nov. 18, 2003). Typically, a brokerage firm has one omnibus account with each of the mutual funds with which it does business and through which all of its brokerage customers purchase and redeem shares of those mutual funds. Consequently, these mutual funds do not have information on the identity of the underlying brokerage customer who is purchasing or redeeming the funds' shares. In the breakpoint context, omnibus accounts make it difficult for funds to track information about the underlying shareholder that might have entitled the shareholder to breakpoint discounts.

[14] Task Force Report, *supra* note 12, at 10.

[15] *Id.* at 13–14.

[16] *See supra* note 4 and accompanying text; *In re Russell C. Turek,* Exchange Act Release No. 45459 (Feb. 20, 2002) (Commission sanctioned registered representative for, among other violations, failing to inform customers of the availability of breakpoint discounts); *In re Mason, Moran & Co.,* Exchange Act Release No. 4832 (Apr. 23, 1953) (registrant claimed it complied with disclosure requirements of the federal securities laws by furnishing the customer with a prospectus which included breakpoint information; Commission held that while the prospectus requirements were intended to provide the investor with more information than had theretofore been generally available in the ordinary securities transaction, these requirements were not intended to abrogate the greater disclosure duties traditionally imposed on brokers and dealers in a fiduciary position).

[17] Proposed Instruction 3 to Item 8(a)(2) of Form N–1A. Item 13(d) of Form N–1A requires that a mutual fund disclose any arrangements that result in breakpoints in, or elimination of, sales loads for directors and other affiliated persons of the fund. Item 18(b) of Form N–1A requires that a mutual fund disclose any arrangements that result in breakpoints in, or elimination of, sales loads in connection with the terms of a merger, acquisition, or exchange offer made under a plan of reorganization.

plans'' would be eliminated from Item 18(a). The proposals would also add ''waivers for particular classes of investors'' to the enumeration in both Items 8(a)(2) and 18(a). To assist investors and financial intermediaries in finding all information about breakpoints, the prospectus would be required to state, if applicable, that additional information concerning sales load breakpoints is available in the SAI.

Our proposed amendments would add an instruction to require that the description of arrangements resulting in breakpoints include a brief summary of shareholder eligibility requirements. This summary would be required to include a description or list of the types of accounts (*e.g.,* retirement accounts, accounts held at other financial intermediaries), account holders (*e.g.,* immediate family members, family trust accounts, solely-controlled business accounts), and fund holdings (*e.g.,* funds held within the same fund complex) that may be aggregated for purposes of determining eligibility for sales load breakpoints. We believe that requiring such a summary of the eligibility requirements for sales load breakpoints in the mutual fund prospectus would assist investors and financial intermediaries in better understanding the ways in which investors may take full advantage of breakpoint opportunities.

We request comment generally on the proposed requirement to disclose in the prospectus arrangements that result in breakpoints in sales loads, including a summary of shareholder eligibility requirements, and specifically on the following issues:

- Is the proposed requirement for a brief description in the prospectus of arrangements that result in breakpoints in, or elimination of, sales loads appropriate or necessary? Should this description include a brief summary of shareholder eligibility requirements with respect to sales load breakpoints? Is there any additional information that we should require? Would these proposed requirements benefit investors or other parties?
- As discussed above, our proposals would require a mutual fund to provide a brief description of arrangements that result in breakpoints in its prospectus, and would require any additional details regarding these arrangements in the SAI. Is this proposed division of disclosure regarding breakpoints appropriate? Is there information that would be required in the prospectus under our proposals that is more appropriate for the SAI, or vice versa? Is the information regarding breakpoints for affiliated persons of the fund and breakpoints in connection with a reorganization more appropriately included in the SAI or in the prospectus? Should we permit a mutual fund to choose whether to include information regarding breakpoints in either its prospectus or SAI? Should we require that all information regarding breakpoints be included in the prospectus? Would the breakpoint information that we propose to require in the prospectus detract from other important information in the prospectus? How should we strike a balance between requiring enhanced disclosure and not overwhelming investors with information that they do not consider important?
- Should the information we are proposing to require in the prospectus be required in another location, such as the confirmation, account statement, document provided by a financial intermediary prior to share purchases, or shareholder report?

B. Disclosure of Methods Used to Value Accounts

We are also proposing to require a mutual fund to describe in its prospectus the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints, including the circumstances in which and the classes of individuals to whom each method applies.[18] The methods required to be disclosed, if applicable, would include historical cost, net amount invested, and offering price.[19] We believe that requiring a mutual fund to describe in its prospectus the methods that it uses to value accounts in determining breakpoint eligibility would assist investors and financial intermediaries in more effectively determining investors' eligibility.

We request comment generally on the proposed requirement to describe the methods used to value accounts and specifically on the following issues:

- Is our proposed requirement that a mutual fund describe the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints appropriate? Would our proposals provide sufficient information to investors? Should we require any additional information about these methods?
- Is the prospectus the most appropriate location for a description of the methods used to value accounts? Should we require or permit this disclosure to be included in the SAI, confirmation, account statements, shareholder reports, document provided by a financial intermediary prior to share purchase, or some other location?

C. Disclosure Regarding Information and Records Necessary to Aggregate Holdings

The proposals would also require a mutual fund to state in its prospectus, if applicable, that, in order to obtain a breakpoint discount, it may be necessary at the time of purchase for a shareholder to inform the fund or his or her financial intermediary of the existence of other accounts in which there are holdings eligible to be aggregated to meet sales load breakpoints.[20] In addition, a mutual fund would be required to describe any information or records, such as account statements, that may be necessary for a shareholder to provide to the fund or his or her financial intermediary in order to verify his or her eligibility for a breakpoint discount. The description would be required to include, if applicable:

- Information or records regarding shares of the fund or other funds held in all accounts (*e.g.,* retirement accounts) of the shareholder at the financial intermediary;[21]
- Information or records regarding shares of the fund or other funds held in any account of the shareholder at another financial intermediary;[22] and
- Information or records regarding shares of the fund or other funds held at any financial intermediary by related parties of the shareholder, such as members of the same family or household.[23]

In addition, if a mutual fund permits breakpoints to be determined based on historical cost, it would be required to state in its prospectus that a shareholder should retain any records necessary to substantiate historical costs because the fund, its transfer agent, and financial intermediaries may not maintain this information.[24]

We believe that prospectus disclosure regarding the information or records that may be necessary for a shareholder to provide would facilitate the correct application of breakpoint discounts in transactions in which shares are

[18] Proposed Item 8(a)(3) of Form N–1A.

[19] *See* Section I, ''Introduction and Background,'' *supra* (discussing net asset value, public offering price, and historical cost methods of valuing accounts). We refer here to ''net amount invested'' rather than ''net asset value,'' and to ''offering price'' rather than ''public offering price,'' because these are the terms currently used in Form N–1A. *See* Instruction 3(a) and (b) to Item 8(a)(1) of Form N–1A.

[20] Proposed Item 8(a)(4)(i) of Form N–1A.

[21] Proposed Item 8(a)(4)(i)(A) of Form N–1A.

[22] Proposed Item 8(a)(4)(i)(B) of Form N–1A.

[23] Proposed Item 8(a)(4)(i)(C) of Form N–1A.

[24] Proposed Item 8(a)(4)(ii) of Form N–1A.

aggregated to meet sales load breakpoints. As the Task Force report noted, in order to deliver breakpoint discounts where investor eligibility is based on rights of accumulation, financial intermediaries must obtain the necessary information from investors regarding accounts that may be linked (and, if applicable, historical costs).[25] In addition, our proposed disclosure may heighten investors' awareness of the importance of maintaining records when breakpoints are determined using the historical cost method. The Task Force reported that broker-dealers would not generally have historical cost information for customer positions transferred into their firm or for positions held at another firm that a customer may be able to link in order to receive a breakpoint discount.[26] In addition, the fund and its transfer agent may not have historical cost information for shareholders, for example, in the many cases where a financial intermediary places an omnibus order to purchase and sell fund shares on behalf of all its customers without identifying individual customer transactions.

We request comment generally on the proposed disclosure requirement regarding information or records that may be necessary for a shareholder to provide and specifically on the following issues:

- Should we require a mutual fund to state in its prospectus that it may be necessary for a shareholder to inform the fund or a financial intermediary of the existence of accounts that are eligible to be aggregated to meet sales load breakpoints? Should we require a mutual fund to describe the information and records that it may be necessary for a shareholder to provide in order to verify his or her eligibility for breakpoint discounts? Is there any additional information that we should require in this description?
- Do the proposed disclosure requirements reflect the appropriate allocation of responsibility among the mutual fund, the financial intermediary, and the shareholder for ensuring that the shareholder obtains a breakpoint discount to which he or she is entitled? Will the proposed disclosures be adequate to enable shareholders to obtain the breakpoint discounts for which they are eligible, or would this proposed approach place too great a burden on shareholders?
- Is the prospectus the most appropriate location for the proposed disclosure regarding the need for a shareholder to inform the fund or his or her financial intermediary of the existence of other accounts in which there are holdings eligible to be aggregated, and the information and records necessary to aggregate holdings? Should we require or permit any, or all, of this disclosure to be included in the SAI? Should this disclosure be required in shareholder reports, confirmations, account statements, or a document delivered by a financial intermediary prior to a purchase of mutual fund shares? Should shareholders be notified periodically, *e.g.,* in shareholder reports or account statements, that it is their responsibility to monitor whether they have qualified for breakpoint discounts?

D. Disclosure of Availability of Sales Load and Breakpoint Information on Fund's Web Site

We are proposing to require that a mutual fund state in its prospectus whether it makes available free of charge, on or through its Web site at a specified Internet address, and in a clear and prominent format, the information that would be required regarding the fund's sales loads and breakpoints in the prospectus and SAI pursuant to Items 8(a) and 18(a), including whether the Web site includes hyperlinks that facilitate access to the information.[27] A mutual fund that does not make the sales load and breakpoint information available in this manner would be required to disclose the reasons why it does not do so (including, where applicable, that the fund does not have an Internet Web site).

This proposal is intended to encourage mutual funds to provide accessible Web site disclosure regarding the availability of breakpoint discounts to complement the prospectus disclosure regarding breakpoints that we are proposing. Modernizing the disclosure system under the Federal securities laws involves recognizing the importance of the Internet in fostering prompt and more widespread dissemination of information.[28] We believe that mutual fund disclosure should be more readily available to investors in a variety of locations to facilitate investor access to that information. We also believe that it is important for funds to make investors aware of the different sources that provide access to information about a fund. In addition, we believe that encouraging website disclosure of information regarding breakpoint discounts may assist broker-dealers and other financial intermediaries to more easily access and understand the terms upon which mutual funds allow investors to aggregate their holdings and the holdings of related parties.

Our proposal would require that the disclosure about website availability of sales load and breakpoint information indicate whether the information is in a clear and prominent format, including whether the website includes hyperlinks that facilitate access to the information. We believe that it is important for website disclosure regarding sales loads and breakpoint discounts to be clear and prominent, in order to help investors and financial intermediaries to find this information easily. Hyperlinks that facilitate access to the information may contribute to a clear and prominent presentation. Thus, websites could provide sales load and breakpoint information in a clear and prominent format by, for example, using clear and prominent hyperlinks that provide direct linkage to the relevant portions of the fund's prospectus and SAI or the specific pages on a third-party website containing the information.[29]

We request comment on the proposed requirement to disclose whether sales load and breakpoint information is available on or through a fund's website and specifically on the following issues:

- Is the proposed requirement for a mutual fund to state in its prospectus whether the required information regarding its sales loads and breakpoints is available on or through its Web site necessary or appropriate? Should a mutual fund that does not maintain a Web site be required to state that it does not make this information available because it does not have a Web site? What other disclosures in this area, if any, should funds be required to make?
- Is the prospectus the appropriate location for a mutual fund to provide the proposed disclosure regarding Web site availability? Would this disclosure be more appropriately located in the SAI, Form N–CSR, shareholder reports, account statements, confirmations, a document provided by a financial intermediary prior to share purchase, or another location?
- Should we require mutual funds with Web sites to include sales load and

[25] Task Force Report, *supra* note 12, at 5.

[26] *Id.* at 5 n.7.

[27] Proposed Item 8(a)(5) of Form N–1A.

[28] *See* Securities Act Release No. 8128 (Sept. 5, 2002) (67 FR 58480 (Sept. 16, 2002)) (adopting requirement for an operating company to disclose in its annual report on Form 10–K whether it makes available free of charge on or through its Web site its annual reports on Form 10–K, quarterly reports on Form 10–Q, current reports on Form 8–K, and amendments).

[29] *See* Securities Act Release No. 8128 (Sept. 5, 2002) (67 FR 58480, 58493 (Sept. 16, 2002)). We direct funds to this release for guidance concerning satisfaction of this requirement through hyperlinking to a third-party Web site.

breakpoint disclosure information on their Web sites?

• Are there other measures that we should consider in order to encourage mutual funds to provide disclosure regarding sales loads and breakpoints on their Web sites in a prominent and readily accessible manner?

• Are there other mechanisms besides prospectus and Web site disclosure to better inform investors about breakpoints to which they may be entitled (*e.g.,* requiring a financial intermediary to provide a document prior to share purchase that describes breakpoint discounts, or requiring this information to be included in shareholder reports, account statements, or confirmations)?

E. Presentation Requirements

Our proposals would require that the disclosure in Item 8(a)(2) regarding arrangements resulting in breakpoints in, or elimination of, sales loads, and all other sales load disclosure required by Item 8(a), be adjacent to the table of sales loads and breakpoints required by Item 8(a)(1).[30] This would include the description of sales loads required by Item 8(a)(1), as well as the information about breakpoints, including valuation methods, shareholder information and records, and Web site availability that would be required by proposed Items 8(a)(3), (4), and (5). The proposals also would require that a mutual fund present the information required by Item 8(a) in a clear, concise, and understandable manner, and include tables, schedules, and charts as expressly required by Item 8(a)(1) or where doing so would facilitate understanding.[31] These requirements are intended to encourage mutual funds to present information regarding sales loads and breakpoints in an integrated manner that will be easily understood by investors, which would address the Task Force recommendation that critical data regarding pricing methods, breakpoint schedules, and linkage rules be presented in a prominent and clear format.

General Instruction C.3.(a) to Form N–1A currently requires the information required by Item 8 to be in one place in the prospectus. This includes the information about sales loads and breakpoints required by Item 8(a)(1), information about 12b–1 fees required by Item 8(b), and information about multiple class and master-feeder funds required by Item 8(c). It does not include the information on breakpoints required by Item 8(a)(2) because this information may be included in the SAI or in a separate purchase and redemption document pursuant to Item 7(f). Item 7(f) of Form N–1A permits a mutual fund to omit from the prospectus information about purchase and redemption procedures required by Items 7(b)–(d)[32] and 8(a)(2) and provide it in a separate disclosure document if the fund delivers the document with the prospectus, incorporates the document into the prospectus by reference and files the document with the prospectus, and provides disclosure explaining that the information disclosed in the document is part of, and incorporated into, the prospectus.

Under our proposals, Item 7(f) would continue to permit the information required by Item 8(a)(2) to be included in a separate purchase and redemption document.[33] In addition, we are proposing to amend Item 7(f) to permit the information about breakpoints required by proposed Items 8(a)(3), (4), and (5) (*i.e.,* valuation methods, shareholder information and records, and Web site availability) to be included in the separate purchase and redemption document. We are also proposing to amend General Instruction C.3.(a) to Form N–1A to make it clear that this information may be disclosed in a separate purchase and redemption document, provided that all the information required by paragraphs 8(a)(2), (3), (4), and (5) is included in the separate document. This instruction will also clarify that if the information required by paragraphs 8(a)(2)–(5) is disclosed in a separate purchase and redemption document, the table of sales loads and breakpoints required by Item 8(a)(1) must be included in the separate purchase and redemption document, as well as the prospectus, in order to comply with the proposed requirement that all disclosure required by Item 8(a) be adjacent to the table of sales loads and breakpoints.

We request comment generally on the proposed requirements for presentation of information about sales loads and breakpoints and specifically on the following:

• Will our proposal to require that the disclosure regarding sales loads and breakpoints required by Item 8(a)(1) and (a)(2) be presented in a clear, concise, and understandable manner, and include tables, schedules, and charts where expressly required by Item 8(a)(1) or where doing so would facilitate understanding result in disclosure that is easily understood by investors? Are there additional requirements that we should adopt regarding the presentation of this information?

• Should we require that the sales load and breakpoint information required by Item 8 be adjacent to the table of sales loads and breakpoints required by Item 8(a)(1)? Are there other ways to ensure that all information related to breakpoints is provided in an integrated manner that will facilitate investor understanding? Should we adopt a ''close proximity'' or other standard instead of an ''adjacent'' standard?

• For a mutual fund that includes information about breakpoints in a separate purchase and redemption document, would the requirement that the table of sales load and breakpoint information required by Item 8(a)(1) appear in both the prospectus and the separate document result in unnecessary duplication? If so, how should we address this duplication, which arises from the existing requirement that the table be included in the prospectus along with other information currently required by Item 8 and the proposed requirement that all information about breakpoints be adjacent to the table? If we do not require the information about breakpoints required by proposed Items 8(a)(2)–(5) to be adjacent to the table, how should we address the Task Force recommendation that we require a mutual fund to provide critical data regarding pricing methods, breakpoint schedules, and linkage rules in a prominent and clear format? Should we require all information required by Item 8 to be in the prospectus? Should we permit all information required by Item 8 to be in the separate purchase and redemption document?

• Should we continue to permit the separate purchase and redemption document? Does this document facilitate investor understanding of the information it contains? We note that, in a recent release, we proposed to amend Item 7 to require new disclosure regarding frequent purchases and redemptions to be included in the prospectus and not a separate purchase and redemption document.[34] To what extent do funds currently use the separate purchase and redemption document? If we should continue to permit this document, what information

[30] Proposed Instruction to Item 8(a) of Form N–1A.

[31] *Id. Cf.* rule 421 under the Securities Act of 1933 (17 CFR 230.421) (plain English requirements for prospectuses).

[32] Items 7(b)–(d) require a description of the procedures for purchasing and redeeming the fund's shares, as well as the fund's policy with respect to dividends and distributions.

[33] We are, however, proposing to eliminate, as duplicative, the reference to this procedure in Item 8(a)(2).

[34] Investment Company Act Release No. 26287 (Dec. 11, 2003).

should it be permitted to include? Are there other means for effectively communicating purchase and redemption information to investors?

F. Compliance Date

If we adopt the proposed disclosure requirements, we expect to require all new registration statements, and all post-effective amendments that are either annual updates to effective registration statements or that add a new series, filed on or after the effective date of the amendments to comply with the proposed amendments. The Commission requests comment on this proposed compliance date.

III. General Request for Comments

The Commission requests comment on the amendments proposed in this release, whether any further changes to our forms are necessary or appropriate to implement the objectives of our proposed amendments, and on other matters that might have an effect on the proposals contained in this release.

IV. Paperwork Reduction Act

Certain provisions of the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), and the Commission is submitting the proposed collection of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for the collection of information is: ''Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Open-End Management Investment Companies.'' 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.

Form N–1A (OMB Control No. 3235–0307) was adopted pursuant to section 8(a) of the Investment Company Act (15 U.S.C. 80a–8) and section 5 of the Securities Act (15 U.S.C. 77e). We are proposing amendments to Form N–1A to require a mutual fund to describe briefly in its prospectus any arrangements that result in breakpoints in sales loads, including a summary of shareholder eligibility requirements. In addition, we are proposing to require a mutual fund to describe in its prospectus the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints. We are also proposing to require a mutual fund to state in its prospectus, if applicable, that in order to obtain a breakpoint discount, it may be necessary for a shareholder to provide information and records, such as account statements, to a mutual fund or financial intermediary. Our proposals would also require a mutual fund to state in its prospectus whether it makes available on or through its Web site, and in a clear and prominent format, information regarding its sales loads and breakpoints. In addition, our proposals would require a mutual fund to provide prospectus disclosure regarding sales loads and breakpoints adjacent to the table of sales loads and breakpoints, and to present the information in a clear, concise, and understandable manner. This enhanced disclosure is intended to assist investors in understanding the breakpoint opportunities available to them, and to alert investors to the information that they may need to provide to funds and broker-dealers to take full advantage of all available breakpoint discounts.

Form N–1A, including the proposed amendments, contains collection of information requirements. The likely respondents to this information collection are open-end funds registering with the Commission. Compliance with the disclosure requirements of Form N–1A is mandatory. Responses to the disclosure requirements are not confidential.

The current hour burden for preparing an initial Form N–1A filing is 809 hours per portfolio. The current annual hour burden for preparing post-effective amendments of Form N–1A is 101 hours per portfolio. The Commission estimates that, on an annual basis, registrants file initial registration statements on Form N–1A covering 483 portfolios, and file post-effective amendments on Form N–1A covering 6,542 portfolios. Additional burdens of 6,524 hours for the preparation and filing of initial registration statements and 49,065 hours for the filing of post-effective amendments are expected to result from the Commission's recent proposed rules relating to ''fund of funds'' arrangements, and the recent proposed rule relating to frequent purchases and redemptions of fund shares and selective disclosure of portfolio holdings.[35] Thus, the Commission estimates that the current total annual hour burden for the preparation and filing of Form N–1A is 1,107,078 hours.[36]

We estimate that the proposed amendments would increase the hour burden per portfolio per filing of an initial registration statement on Form N–1A by 2 hours and would increase the hour burden per portfolio per filing of a post-effective amendment to a registration statement on Form N–1A by 1 hour. We also estimate that 30% of mutual fund portfolios would be affected by the proposed amendments.[37] The additional incremental hour burden resulting from the proposed amendments would be 2,252 hours (2 hours for initial registration statements × 483 portfolios × 30%) + (1 hour per post-effective amendment × 6,542 portfolios × 30%). Thus, if the proposed amendments to Form N–1A are adopted, the total annual hour burden for all funds for preparation and filing of initial registration statements and post-effective amendments to Form N–1A would be 1,109,330 hours (2,252 hours + 1,107,078 hours).

Request for Comments

We request your comments on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive

[35] *See* Investment Company Act Release No. 26198 (Oct. 2, 2003) (68 FR 58226 (Oct. 8, 2003)); Investment Company Act Release No. 26287 (Dec. 11, 2003).

[36] This estimate is based on the following calculation: (809 hours × 483 portfolios) + (101 hours × 6,542 portfolios) = 1,051,489 hours. An additional annual hour burden of 24,591 hours (1,694 hours for initial registration statements and 22,897 hours for post-effective amendments) resulting from the proposed rules described in the fund of funds proposing release, and an additional annual hour burden of 30,998 hours (4,830 hours for initial registration statements and 26,168 hours for post-effective amendments) resulting from the proposed rule relating to market timing and selective disclosure, yield a total annual hour burden of 1,107,078 hours.

[37] This estimate is based on information regarding the number of mutual fund portfolios with one or more classes of shares that have front-end sales loads, derived by the staff from Commission filings and third-party information sources.

Office Building, Washington, DC 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0609, with reference to File No. S7–28–03. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this Release.

V. Cost/Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. Our proposals would require mutual funds to provide enhanced disclosure regarding breakpoint discounts on front-end sales loads. Specifically, the proposals would:

- Require a mutual fund to describe briefly in its prospectus any arrangements that result in breakpoints in sales loads, including a summary of shareholder eligibility requirements;
- Require a mutual fund to describe in its prospectus the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints;
- Require a mutual fund to state in its prospectus, if applicable, that in order to obtain a breakpoint discount, it may be necessary for a shareholder to provide information and records, such as account statements, to a mutual fund or financial intermediary;
- Require a mutual fund to state in its prospectus whether it makes available on or through its Web site, and in a clear and prominent format, information regarding its sales loads and breakpoints; and
- Require a mutual fund to provide prospectus disclosure regarding sales loads and breakpoints adjacent to the table of sales loads and breakpoints, and to present the information in a clear, concise, and understandable manner.

A. Benefits

The proposed form amendments are expected to benefit mutual fund investors by providing them with enhanced disclosure about breakpoint discounts on front-end sales loads. This enhanced disclosure is intended to assist investors in understanding the breakpoint opportunities available to them, and to alert investors to the information that they may need to provide to funds and financial intermediaries to take full advantage of all available breakpoint discounts. An examination sweep by the Commission, the NASD, and the NYSE between November 2002 and January 2003 found that in 32% of the transactions reviewed that appeared to be eligible for a reduced sales charge, investors did not receive a breakpoint discount or appeared to have incurred other unnecessary sales charges.[38] The average discount not provided was $364 per transaction.[39] We anticipate that our proposals, if adopted, may result in a decrease in the number of transactions in which investors do not receive breakpoint discounts to which they are entitled.

Specifically, we believe that the proposed amendments relating to disclosure of arrangements that result in breakpoints in sales loads would benefit investors by requiring that information regarding breakpoints, which can significantly affect the cost of a shareholder's investment, be included in the prospectus that is delivered to all shareholders. In addition, the proposed requirement that this prospectus disclosure include a summary of the eligibility requirements for sales load breakpoints may assist investors in better understanding the ways in which they may take full advantage of breakpoint opportunities.

The proposed amendments relating to disclosure of methods used to value accounts in determining breakpoint eligibility also may benefit investors by assisting them and their financial intermediaries in more effectively determining investors' eligibility. Also, the proposed disclosure relating to information and records necessary to aggregate holdings may benefit investors because prospectus disclosure regarding the information or records that it may be necessary for a shareholder to provide may facilitate the correct application of breakpoint discounts in transactions in which shares are aggregated to meet sales load breakpoints. In addition, the proposed disclosure may heighten investors' awareness of the importance of maintaining records when breakpoints are determined using the historical cost method.

The proposed amendments relating to disclosure regarding the availability of sales load and breakpoint information on a mutual fund's Web site may benefit investors by encouraging mutual funds to provide accessible Web site disclosure regarding the availability of breakpoint discounts to complement the proposed prospectus disclosure regarding breakpoints. In addition, the proposed amendments relating to the presentation of disclosure regarding breakpoints may benefit investors by encouraging mutual funds to present information regarding sales loads and breakpoints in an integrated manner that will be easily understood by investors.

We seek comment on the benefits of the proposed amendments (and any alternatives suggested by commenters) as well as any data quantifying those benefits.

B. Costs

The proposals would impose new requirements on mutual funds that have front-end sales loads to provide several new prospectus disclosures regarding breakpoint discounts on these front-end sales loads. We estimate that complying with the proposed new disclosures would entail a relatively small financial burden. The information regarding breakpoint discounts should be available to management and the board of directors of a fund, and mutual funds already disclose much of the breakpoint disclosure that would be required by the proposed amendments in their registration statements (although they are not required to include this information in their prospectuses). Therefore, we expect that the cost of compiling and reporting this information should be limited.

Specifically, we are proposing amendments to Form N–1A to require a mutual fund to describe briefly in its prospectus any arrangements that result in breakpoints in sales loads, including a summary of shareholder eligibility requirements. In addition, we are proposing to require a mutual fund to describe in its prospectus the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints. We are also proposing to require a mutual fund to state in its prospectus, if applicable, that in order to obtain a breakpoint discount, it may be necessary for a shareholder to provide information and records, such as account statements, to a mutual fund or financial intermediary. Our proposals would also require a mutual fund to state in its prospectus whether it makes available on or through its Web site, and in a clear and prominent format, information regarding its sales loads and breakpoints.

The costs of adding these new prospectus disclosures may include both internal costs (for attorneys and other non-legal staff of a fund, such as computer programmers, to prepare and review the required disclosure) and external costs (for printing and typesetting of the disclosure). For purposes of the Paperwork Reduction Act, we have estimated that the proposed new disclosure requirements would add 2,252 hours to the total

[38] Joint Report, *supra* note 8, at 14–15.

[39] *Id.* at 16.

annual burden of completing Form N–1A.[40] We estimate that this additional burden would equal total internal costs of $101,903 annually, or approximately $48 per fund portfolio.[41]

We expect the external costs of providing the new prospectus disclosure will be limited, because the amendments relating to disclosure of arrangements that result in breakpoints in sales loads require the description of the arrangements to be brief. We expect that the proposed disclosure would not add significant length to the prospectus. We request comment on the nature and magnitude of our estimates of the costs of the additional disclosure that would be required if our proposals were adopted.

C. Request for Comments

We request comments on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed amendments. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VI. Consideration of Effects on Efficiency, Competition, and Capital Formation

Section 2(c) of the Investment Company Act (15 U.S.C. 80a–2(c)) and section 2(b) of the Securities Act (15 U.S.C. 77(b)) require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The proposed amendments are intended to provide greater transparency for mutual fund shareholders regarding breakpoint discounts on front-end sales loads. These changes may improve efficiency. The enhanced disclosure requirements are intended to assist investors in understanding the breakpoint opportunities available to them, and to alert investors to the information that they may need to provide to funds and financial intermediaries to take full advantage of all available breakpoint discounts, which could promote more efficient allocation of investments among mutual funds. The proposed amendments may also improve competition, as enhanced disclosure regarding the ways in which investors can aggregate holdings to meet sales load breakpoints may prompt investors to seek out mutual funds that offer the most favorable breakpoint schedules and aggregation rules for their particular circumstances, and may prompt funds to compete for the business of these better informed investors. Finally, the effects of the proposed amendments on capital formation are unclear.

Although, as noted above, we believe that the proposed amendments would benefit investors, the magnitude of the effect of the proposed amendments on efficiency, competition, and capital formation, and the extent to which they would be offset by the costs of the proposals, are difficult to quantify. We note that, with respect to our proposals, in many cases mutual funds currently provide disclosure in their registration statements regarding breakpoint discounts on front-end sales loads.

We request comment on whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

VII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603, and relates to the Commission's proposed form amendments under the Securities Act and the Investment Company Act to require mutual funds to provide enhanced disclosure about breakpoint discounts on front-end sales loads. Specifically, the proposals would:

- Require a mutual fund to describe briefly in its prospectus any arrangements that result in breakpoints in sales loads, including a summary of shareholder eligibility requirements;
- Require a mutual fund to describe in its prospectus the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints;
- Require a mutual fund to state in its prospectus, if applicable, that in order to obtain a breakpoint discount, it may be necessary for a shareholder to provide information and records, such as account statements, to a mutual fund or financial intermediary;
- Require a mutual fund to state in its prospectus whether it makes available on or through its Web site, and in a clear and prominent format, information regarding its sales loads and breakpoints; and
- Require a mutual fund to provide prospectus disclosure regarding sales loads and breakpoints adjacent to the table of sales loads and breakpoints, and to present the information in a clear, concise, and understandable manner.

A. Reasons for, and Objectives of, Proposed Amendments

The Commission is proposing rules to address the concerns that have been identified regarding the extent to which mutual fund investors receive breakpoint discounts. An examination sweep by the Commission, the NASD, and the NYSE between November 2002 and January 2003 found that in 32% of the transactions reviewed that appeared to be eligible for a reduced sales charge, investors did not receive a breakpoint discount or appeared to have incurred other unnecessary sales charges.[42] The enhanced disclosure that would be required by the Commission's proposed rules is intended to assist investors in understanding the breakpoint opportunities available to them, and to alert investors to the information that they may need to provide to funds and broker-dealers to take full advantage of all available breakpoint discounts.

B. Legal Basis

The Commission is proposing amendments to Form N–1A pursuant to authority set forth in sections 5, 6, 7, 10, and 19(a) of the Securities Act (15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)), and sections 8, 24(a), 30, and 38 of the Investment Company Act (15 U.S.C. 80a–8, 80a–24(a), 80a–29, and 80a–37).

C. Small Entities Subject to the Rule

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same

[40] This estimate is based on the following calculation: (2 hours per initial registration statement × 483 portfolios × 30% of portfolios) + (1 hour per post-effective amendment × 6,542 portfolios × 30% of portfolios) = 2,252 hours.

[41] These figures are based on a Commission estimate that approximately 781 registered investment companies, with 2,108 portfolios, would file initial registration statements or post-effective amendments annually that would be subject to the proposed disclosure requirements, and an estimated hourly wage rate of $45.25. The estimate of the number of investment companies is based on data derived from the Commission's EDGAR filing system. The estimated wage figure is based on published compensation for compliance attorneys outside New York City ($37.60) and programmers ($29.44), and the estimate that attorneys and programmers would divide time equally on compliance with the proposed disclosure requirements, yielding a weighted wage rate of $33.52 (($37.60 × .50) + (29.44 × .50)) = $33.52). *See* Securities Industry Association, *Report on Management & Professional Earnings in the Securities Industry 2002* (Sept. 2002). This weighted wage rate was then adjusted upward by 35% for overhead, reflecting the costs of supervision, space, and administrative support, to obtain the total per hour internal cost of $45.25 (33.52 × 1.35) = $45.25.

[42] Joint Report, *supra* note 8, at 14–15.

group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[43] Approximately 145 investment companies registered on Form N–1A meet this definition.[44]

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendments would require mutual funds that have front-end sales loads to provide several new prospectus disclosures regarding breakpoint discounts on these sales loads, as described above.

The Commission estimates some one-time formatting and ongoing costs and burdens that would be imposed on all mutual funds, including funds that are small entities. We note, however, that in many cases funds currently provide disclosure in their registration statements regarding breakpoint discounts. For purposes of the Paperwork Reduction Act, we have estimated that the proposed new disclosure requirements would increase the hour burden per portfolio per filing of an initial registration statement on Form N–1A by 2 hours and would increase the hour burden per portfolio per filing of a post-effective amendment to a registration statement by 1 hour. We estimate that this additional burden would increase total internal costs of filing an initial registration statement by $91 per affected mutual fund portfolio annually, and would increase total internal costs of filing a post-effective amendment by $45 per affected mutual fund portfolio annually.[45]

We expect the external costs of providing the new prospectus disclosure will be limited, because some funds currently provide some of this information in their registration statements, and we do not expect that the disclosure will add significant length to the prospectus. The Commission solicits comment on the effect the proposed amendments would have on small entities.

E. Duplicative, Overlapping or Conflicting Federal Rules

There are no rules that duplicate, overlap, or conflict with the proposed amendments.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small issuers. In connection with the proposed amendments, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed amendments for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. The proposed disclosure amendments would provide shareholders with greater transparency of breakpoint discounts on front-end sales loads. Different disclosure requirements for mutual funds that are small entities may create the risk that the shareholders in these funds would not be as able as investors in larger funds to assess the terms upon which breakpoint discounts in sales loads are offered. We believe it is important for the disclosure that would be required by the proposed amendments to be provided to shareholders by all mutual funds, not just funds that are not considered small entities.

We have endeavored through the proposed amendments to minimize the regulatory burden on all funds, including small entities, while meeting our regulatory objectives. Small entities should benefit from the Commission's reasoned approach to the proposed amendments to the same degree as other investment companies. Further clarification, consolidation, or simplification of the proposals for funds that are small entities would be inconsistent with the Commission's concern for investor protection. Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context.

G. Solicitation of Comments

The Commission encourages the submission of written comments with respect to any aspect of this analysis. Comment is specifically requested on the number of small entities that would be affected by the proposed amendments and the likely impact of the proposals on small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following E-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–28–03; this file number should be included on the subject line if E-mail is used. All comments received will be posted on the Commission's Internet Web site (*http://www.sec.gov*) and made available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549–0102.[46]

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[47] a rule is ''major'' if it results or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

The Commission requests comment on the potential impact of the proposed amendments on the U.S. economy on an annual basis. Commenters are requested to provide empirical data to support their views.

IX. Statutory Authority

The Commission is proposing amendments to Form N–1A pursuant to authority set forth in sections 5, 6, 7, 10, and 19(a) of the Securities Act (15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)) and sections 8, 24(a), 30, and 38 of the Investment Company Act (15 U.S.C. 80a–8, 80a–24(a), 80a–29, and 80a–37).

[43] 17 CFR 270.0–10.

[44] This estiamte is based on analysis by the Division of Investment Management staff of information from databases compiled by third-part information providers, including Morningstar, Inc., and Lipper.

[45] These figures are based on an estimated hourly wage rate of $45.25. *See supra* note 41.

[46] We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

[47] Pub. L. 104–21, Title II, 110 Stat. 857 (1996).

List of Subjects

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Proposed Form Amendments

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

2. The authority citation for part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

3. Form N–1A (referenced in §§ 239.15A and 274.11A) is amended by:

a. Replacing the final sentence of General Instruction C.3.(a) with two new sentences;

b. Revising the introductory language to Item 7(f);

c. Revising Item 8(a)(2);

d. Adding new Instructions to Items 8(a)(1) and (2);

e. Adding new Items 8(a)(3), (4), and (5);

f. Adding a new Instruction to Item 8(a); and

g. Revising Item 18(a).

These additions and revisions read as follows:

Note: The text of Form N–1A does not, and these amendments will not, appear in the Code of Federal Regulations.

Form N–1A

* * * * *

General Instructions

* * * * *

C. Preparation of the Registration Statement

* * * * *

3. Additional Matters:

(a) * * * Disclose the information required by Item 8 (Distribution Arrangements) in one place in the prospectus, except that the information required by paragraphs 8(a)(2), (3), (4), and (5) may be disclosed in a separate purchase and redemption document pursuant to Item 7(f), provided that all the information required by paragraphs 8(a)(2), (3), (4), and (5) is included in the separate document. If the information required by paragraphs 8(a)(2), (3), (4), and (5) is disclosed in a separate purchase and redemption document, the table required by paragraph 8(a)(1) must be included in the separate purchase and redemption document, as well as the prospectus, in order to comply with the Instruction to Item 8(a), which states that all information required by paragraph 8(a) must be adjacent to the table required by paragraph 8(a)(1).

* * * * *

Item 7. Shareholder Information

* * * * *

(f) *Separate Disclosure Document.* A Fund may omit from the prospectus information about purchase and redemption procedures required by Items 7(b)–(d) and 8(a)(2)–(5) and provide it in a separate document if the Fund:

* * * * *

Item 8. Distribution Arrangements

(a) * * *

(2) Unless disclosed in response to paragraph (a)(1), briefly describe any arrangements that result in breakpoints in, or elimination of, sales loads (*e.g.*, letters of intent, accumulation plans, dividend reinvestment plans, withdrawal plans, exchange privileges, employee benefit plans, redemption reinvestment plans, and waivers for particular classes of investors). Identify each class of individuals or transactions to which the arrangements apply and state each different breakpoint as a percentage of both the offering price and the net amount invested. If applicable, state that additional information concerning sales load breakpoints is available in the Fund's SAI.

Instructions.

1. The description, pursuant to paragraph (a)(1) or (a)(2) of this Item 8, of arrangements that result in breakpoints in, or elimination of, sales loads should include a brief summary of shareholder eligibility requirements, including a description or list of the types of accounts (*e.g.*, retirement accounts, accounts held at other financial intermediaries), account holders (*e.g.*, immediate family members, family trust accounts, solely-controlled business accounts), and fund holdings (*e.g.*, funds held within the same fund complex) that may be aggregated for purposes of determining eligibility for sales load breakpoints.

2. The description pursuant to paragraph (a)(2) of this Item 8 need not contain any information required by Items 13(d) and 18(b).

(3) Describe, if applicable, the methods used to value accounts in order to determine whether a shareholder has met sales load breakpoints, including the circumstances in which and the classes of individuals to whom each method applies. Methods that should be described, if applicable, include historical cost, net amount invested, and offering price.

(4)(i) State, if applicable, that, in order to obtain a breakpoint discount, it may be necessary at the time of purchase for a shareholder to inform the Fund or his or her financial intermediary of the existence of other accounts in which there are holdings eligible to be aggregated to meet sales load breakpoints. Describe any information or records, such as account statements, that it may be necessary for a shareholder to provide to the Fund or his or her financial intermediary in order to verify his or her eligibility for a breakpoint discount. This description must include, if applicable:

(A) Information or records regarding shares of the Fund or other funds held in all accounts (*e.g.*, retirement accounts) of the shareholder at the financial intermediary;

(B) Information or records regarding shares of the Fund or other funds held in any account of the shareholder at another financial intermediary; and

(C) Information or records regarding shares of the Fund or other funds held at any financial intermediary by related parties of the shareholder, such as members of the same family or household.

(ii) If the Fund permits eligibility for breakpoints to be determined based on historical cost, state that a shareholder should retain any records necessary to substantiate historical costs because the Fund, its transfer agent, and financial intermediaries may not maintain this information.

(5) State whether the Fund makes available free of charge, on or through the Fund's website at a specified Internet address, and in a clear and prominent format, the information required by paragraphs (a)(1) through (a)(4) and Item 18(a), including whether the website includes hyperlinks that facilitate access to the information. If the Fund does not make the information

required by paragraphs (a)(1) through (a)(4) and Item 18(a) available in this manner, disclose the reasons why it does not do so (including, where applicable, that the Fund does not have an Internet website).

Instruction. All information required by paragraph (a) of this Item 8 must be adjacent to the table required by paragraph (a)(1) of this Item 8; must be presented in a clear, concise, and understandable manner; and must include tables, schedules, and charts as expressly required by paragraph (a)(1) of this Item 8 or where doing so would facilitate understanding.

* * * * *

Item 18. Purchase, Redemption, and Pricing of Shares

(a) *Purchase of Shares.* To the extent that the prospectus does not do so, describe how the Fund's shares are offered to the public. Include any special purchase plans or methods not described in the prospectus or elsewhere in the SAI, including letters of intent, accumulation plans, dividend reinvestment plans, withdrawal plans, exchange privileges, employee benefit plans, redemption reinvestment plans, and waivers for particular classes of shareholders.

* * * * *

By the Commission.

Dated: December 17, 2003.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03–31545 Filed 12–23–03; 8:45 am]

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Federal Register

Wednesday,

December 24, 2003

Part IV

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 635

Atlantic Highly Migratory Species; Atlantic Shark Management Measures; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 635

[Docket No. 030721180–3316–02; I.D. 010903D]

RIN 0648–AQ95

Atlantic Highly Migratory Species; Atlantic Shark Management Measures

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

ACTION: Final rule; fishing season notification.

SUMMARY: This final rule is necessary to ensure that shark regulations are based on the results of the 2002 stock assessments for large coastal sharks (LCS) and small coastal sharks (SCS). The results of these stock assessments indicate that the LCS complex continues to be overfished, and overfishing is occurring; that sandbar sharks are not overfished, but overfishing is occurring; that blacktip sharks are rebuilt and healthy; that the SCS complex is healthy; and that finetooth sharks are not overfished, but overfishing is occurring. Based on these results, NMFS is revising the rebuilding timeframe for LCS to 26 years from 2004, changing some of the commercial regulations, changing some of the recreational regulations, implementing measures to reduce bycatch and bycatch mortality including a time/area closure, removing the deepwater/other sharks from the management unit, establishing criteria regarding adding or removing sharks from the prohibited species group, and establishing a display permit for fishermen who wish to harvest highly migratory species (HMS) for public display. NMFS also updates essential fish habitat (EFH) identifications for sandbar, blacktip, finetooth, dusky, and nurse sharks. NMFS also notifies eligible participants of the opening and closing dates for the Atlantic large coastal, small coastal, and pelagic shark fishing seasons.

DATES: This final rule is effective February 1, 2004, except for the amendments to §§ 635.20(e), 635.22(c), and 635.27(b) which are effective on December 30, 2003.

Fishing Season Opening and Closing Dates

The fishery opening for large coastal sharks (LCS) in the North Atlantic region is effective January 1, 2004, through 11:30 p.m., local time, April 15, 2004, and the closure is effective 11:30 p.m., local time, April 15, 2004, through June 30, 2004. The fishery opening for LCS in the South Atlantic region is effective January 1, 2004, through 11:30 p.m., local time, February 15, 2004, and the closure is effective 11:30 p.m., local time, February 15, 2004, through June 30, 2004. The fishery opening for LCS in the Gulf of Mexico region is effective January 1, 2004, through 11:30 p.m., local time, February 29, 2004, and the closure is effective 11:30 p.m., local time, February 29, 2004, through June 30, 2004. The fishery opening for small coastal sharks (SCS) in all regions, pelagic sharks, blue sharks, and porbeagle sharks is effective January 1, 2004, through June 30, 2004, unless otherwise modified or superseded through publication of a closure notification in the **Federal Register**.

ADDRESSES: For copies of Amendment 1 to the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (Amendment 1) and its Final Environmental Impact Statement/ Regulatory Impact Review/Final Regulatory Flexibility Analysis (FEIS/ RIR/FRFA), contact Karyl Brewster-Geisz at NMFS Highly Migratory Species Management Division, 1315 East-West Highway, Silver Spring, MD 20910 or at (301) 713–1917 (fax). Copies can also be obtained on the web at *http://www.nmfs.noaa.gov/sfa/hms/.* Comments regarding the collection-of-information requirements contained in this rule should be sent to the HMS Management Division at the address noted above and to the Office of Management and Budget (OMB) by e-mail to *David_Rostker@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz, Heather Stirratt, or Chris Rilling at 301–713–2347 or fax 301–713–1917 or Greg Fairclough at 727–570–5741 or fax 727–570–5656.

SUPPLEMENTARY INFORMATION: The Atlantic shark fisheries are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP), finalized in 1999, and Amendment 1 to the HMS FMP are implemented by regulations at 50 CFR part 635.

NMFS published a Notice of Intent to conduct an EIS and draft Amendment 1 to the HMS FMP on November 15, 2003 (67 FR 69180). On January 27, 2003, NMFS announced the availability of an Issues and Option paper and scheduled seven scoping meetings (68 FR 3853). On August 1, 2003, NMFS published the proposed rule regarding Amendment 1 (68 FR 45196) and announced the availability of the Draft EIS (68 FR 45237). NMFS held six public hearings and one Advisory Panel meeting during the public comment period, which was extended to October 3, 2003, due to Hurricane Isabel (68 FR 47904, August 12, 2003; 68 FR 51560, August 27, 2003; 68 FR 54885, September 19, 2003). Additionally, NMFS attended several Fishery Management Council meetings regarding Amendment 1 and its proposed rule.

Information regarding the management history of Atlantic sharks, Exempted Fishing Permits (EFP), and EFH and the alternatives considered in Amendment 1 was provided in the preamble of the proposed rule and is not repeated here. Additional information can be found in the Final Amendment 1 available from NMFS (*see* **ADDRESSES**). A description of the changes to the proposed rule can be found after the response to comments, followed by information on the available quota and the length of the first 2004 fishing season.

Most of the measures in this rule, such as the requirement to carry and use linecutters and dipnets, the change in authorized gear in the recreational fishery, and the removal of deepwater and other sharks from the management unit, will be effective on February 1, 2004. However, some of the management measures that relieve restrictions, such as the changes to the commercial quotas (including the quota level for large coastal sharks (LCS), small coastal sharks (SCS), and establishment of regional quotas (§ 635.27(b))), changes to the recreational bag and size limit (§§ 635.22(c) and 635.20(e)), and changes to the commercial minimum size (§ 635.20(e)), will be effective on December 30, 2003. Additionally, in order to give fishermen time to adjust to the new regulations and, if necessary, revise their business plans, some of the final measures will be implemented after February 1, 2004. For instance, the Mid-Atlantic shark closure off of North Carolina (§ 635.21(d)(1)) and the trimester seasons for the commercial fisheries (§ 635.27(b)(1)(i)) will be effective on January 1, 2005. Furthermore, the requirements of installing and activating a vessel monitoring system (VMS) for bottom longline and gillnet vessels (§ 635.69(a)(2) and (3)) and possessing and using a dehooking device (§ 635.21(d)(3)(ii)) are delayed indefinitely pending type approval

notifications to be published at a later date in the **Federal Register**.

Response to Comments

A number of individuals and groups provided both written and verbal comments during the public comment period. The comments are summarized below together with NMFS' responses. Additionally, several questions were raised during the waiting period for the FEIS. While not required, NMFS has, along with the other comments below, provided further clarification to respond to some of the questions raised. All comments are grouped in a layout similar to the layout of the preamble of the proposed rule.

1. LCS Rebuilding Time Frame

Comment 1: The proposed rebuilding time frame is illegal and runs counter to the precautionary approach. The LCS complex can and must be rebuilt within the 10-year time limit envisioned by Congress.

Response: The National Standard 1 Guidelines, 50 CFR § 600.310, specify two strategies for determining the rebuilding time frame. First, if a stock can rebuild in less than 10 years, the rebuilding time frame can be no longer than 10 years. Second, if a stock will take 10 years or more to rebuild, the rebuilding time frame can be as long as the time to rebuild with no fishing plus a mean generation time. The HMS FMP specifies that, because of their slow growth and low reproductive potential, a 70-percent probability should be used for rebuilding the stock for sharks. The HMS FMP states that a 70-percent probability should be used as a guide to ensure that the intended results of management actions are realized and to assess the relative merits of one rebuilding time frame over another (*see* the HMS FMP at 3–61 and 3–289). The HMS FMP also uses a low probability of a negative outcome (less than 20-percent probability) as a guide for evaluating management measures.

Under the 70-percent probability, the amount of time required for rebuilding under no fishing is 10 years or greater. Thus, the second rebuilding strategy, discussed above, would apply. After taking into account the biology of the stocks, the results of the 2002 LCS stock assessment, the requirements of the Magnuson-Stevens Act and the National Standard Guidelines, the criteria in the HMS FMP, and the status of the fishing communities that rely on economic activities involving the capture of these fish, NMFS does not believe that a 10-year rebuilding period is appropriate for the LCS complex. The 26-year rebuilding period established in Amendment 1 is consistent with the Magnuson-Stevens Act, the National Standard Guidelines at 50 CFR part 600, subpart D, and the HMS FMP.

Comment 2: If prohibiting fishing for 10 years does not quite give a 70-percent chance of rebuilding the LCS complex to MSY, then prohibit fishing for 20 years.

Response: As discussed above, the HMS FMP establishes a 70-percent probability as a guide for shark management measures. Eliminating fishing would not achieve a 70-percent probability of rebuilding within 10 years; therefore, NMFS has established a rebuilding period of 11 years (no fishing period) plus one mean generation time. Prohibiting shark fishing for 20 years would give an 86-percent chance of rebuilding the LCS complex to maximum sustainable yield (MSY). However, prohibiting shark fishing for 20 years is not required by the Magnuson-Stevens Act, which allows NMFS to consider a number of factors when determining the rebuilding time frame, including impacts on fishing communities. If NMFS were to prohibit fishing for 20 years, a number of businesses including fishermen, processors, and suppliers, could be forced out of business and a number of communities, including recreational fishing communities, would be adversely affected. Additionally, prohibiting fishing for 20 years would eliminate the fishery-dependent data that is needed to accurately assess the status of the stocks. Given these impacts, the objectives of the HMS FMP and Amendment 1, the requirements of the Magnuson-Stevens Act and other domestic law, and the results of the 2002 large and small coastal shark stock assessments, NMFS does not believe that shark fishing should be prohibited for 20 years.

Comment 3: Our confidence in the 70-percent chance to rebuild figure is low given the number of uncertainties and deficiencies in the plan particularly the fact that the quota is not reduced by 50 percent, the time/area closures to protect juveniles will not be implemented immediately, there is no size limit in place, and NMFS has not accounted for all sources of mortality such as state landings.

Response: While some uncertainty is inherent in developing any rebuilding plan, based on the best available scientific information, NMFS is confident that the combination of management measures in Amendment 1 should have a 70-percent chance of rebuilding the LCS complex. The 2002 LCS stock assessment found that reducing the catches by 50 percent would have, on average, a 67-percent chance of rebuilding LCS in 30 years. While the rebuilding time frame in the amendment is shorter than 30 years and the commercial quota is reduced by 45 percent, not 50 percent, NMFS is implementing a number of other management measures that should reduce fishing mortality and increase the reproductive potential of several stocks in the LCS complex. For example, the time/area closure will protect juvenile sharks as recommended by the 2002 LCS stock assessment. Numerous studies have shown that protecting this life stage provides the greatest benefit to increasing the population size. Thus, the time/area closure will be more effective at protecting juvenile sharks and rebuilding the population than a commercial minimum size because a minimum size would force commercial fishermen to discard undersized sharks, which would not be counted against the commercial trip limit. This could result in more sharks being caught and potentially discarded. In the long-term, if dead discards were to increase as a result of a minimum size, then the commercial and recreational portions of the optimum yield would decrease and both the commercial quota level and recreational retention limit could be reduced. A minimum size in the recreational fishery does not raise the same concerns because the recreational fishery is believed to have low post-release mortality rates and has already been limited to one shark per trip, not including the exception for Atlantic sharpnose and bonnethead sharks.

NMFS is also implementing other management measures, such as the requirement for commercial fishermen to carry and use line cutters and dehooking devices, that should minimize the mortality of sharks that are caught and released. Together, these management measures, along with accounting for all sources of fishing mortality (including both Federal and State commercial landings, dead discards, and recreational catches), increasing and improving education and outreach, and increasing compliance with the recreational regulations, should give the LCS complex a 70-percent chance of rebuilding within the rebuilding time frame.

An additional significant aspect of the HMS FMP is the requirement that NMFS conduct periodic stock assessments for species or species-groups. If new information indicates that the LCS complex is not likely to be rebuilt within the required time frame, NMFS can adjust management measures, as necessary, to ensure the

70-percent probability of rebuilding the stock over the course of the 26-year rebuilding period. Additionally, as more species-specific information becomes available, NMFS will attempt to conduct species-specific assessments and evaluate possible management measures that could focus on those species that are the most vulnerable or that need the most protection.

Comment 4: In considering the management options and probability of rebuilding sharks, having an additional set of alternatives with a higher probability of success would have been useful for comparison purposes. As it stands, the most conservative alternatives are the ones chosen as the preferred alternatives and they may be insufficient to meet the management goals. As such, the preferred alternatives in the amendment should be considered the absolute minimum necessary to manage sharks consistent with the advice of the 2002 stock assessments.

Response: As required under NEPA, NMFS considered a wide range of alternatives designed to rebuild LCS. The range of alternatives included those that could be considered risk-prone (*e.g.*, removing the retention and/or size limits in the recreational fishery) to risk-averse (*e.g.*, allowing no retention in the recreational fishery). From all the alternatives considered, NMFS selected a group of alternatives that, consistent with the Magnuson-Stevens Act, is likely to rebuild the LCS complex within the revised rebuilding time frame while allowing for a viable shark fishery. If warranted based on the results of future stock assessments, NMFS can adjust the commercial quota or other management measures to ensure the 70-percent probability of rebuilding the stock over the course of the 26-year rebuilding period.

Comment 5: The proposed rebuilding time frame is the maximum allowed under the National Standard guidelines and is set using the entire complex rather than considering the biology of each individual species. We encourage NMFS to consider stratifying the time frame by considering the biology for individual species.

Response: NMFS would like to move toward more species-specific management in the future and will do so if fishermen can demonstrate a better ability to target and/or avoid certain species of sharks, species-identification among commercial and recreational fishermen and commercial dealers improves, and enough scientific data are collected that allows for more species-specific stock assessments. Thus, NMFS will consider revising the basis for calculating the commercial quota and the classification scheme to consider a more species-specific approach to management when sufficient data are available to do so effectively.

Comment 6: The rebuilding time frame should be calculated from the time the fishery was declared overfished, in this case 1999. Restarting the clock based on new assessment information is not required by the Magnuson-Stevens Act.

Response: NMFS had originally finalized a rebuilding plan in the 1999 HMS FMP that was designed to rebuild ridgeback LCS in 39 years and non-ridgeback LCS in 30 years. This rebuilding plan was based on the projections from the 1998 LCS stock assessment. Based on a peer review of that stock assessment, NMFS determined that the projections from that stock assessment should not be used as the basis for management decisions. For this reason and as a result of the change in status of the two primary LCS species in the fishery, NMFS determined it was necessary to revise the rebuilding plan. Under National Standard 1, a rebuilding plan begins when the first measures to rebuild the stock are implemented. NMFS notes that under this revised rebuilding plan, the LCS complex will be rebuilt by 2030, which coincides with the time period projected for rebuilding non-ridgeback LCS sharks under the 1999 HMS FMP (2029) and is less than the 1999 HMS FMP rebuilding time period projected for ridgeback LCS sharks (2038).

Comment 7: Applying a 70-percent probability to the setting of a time frame does nothing to enhance conservation and increases risk to the sharks. Choosing the 27-year time frame over a 10-year time frame is, at best, conservation neutral because the management measures, at least for 2004, are the same regardless of the rebuilding end date. At worst, choosing the longer time frame is riskier because it allows shark stocks to linger longer at lower biomass levels and could allow for inappropriate increases in fishing effort in future years before the complex is rebuilt.

Response: The 70-percent probability of achieving the rebuilding target will enhance conservation, reduce risk, and facilitate rebuilding of LCS. NMFS disagrees that a 10-year time frame would be consistent with the same management measures applied under the revised 26-year time frame. In the HMS FMP, NMFS decided to use a higher probability standard for sharks because the biology of sharks is different than other HMS and fish in that they take a number of years to mature, have few pups per brood, and generally only reproduce every other or every three years. This, combined with the fact that they are migratory and that some of their prey species are overfished, has led to the determination that a higher level of certainty is required when setting management actions for sharks. Under a 10-year rebuilding time frame, even with a closure of the fishery, NMFS still would not reach a 70-percent probability of rebuilding the LCS complex.

Comment 8: Probabilities of success should be applied only once a rebuilding time frame is set. The HMS FMP, other FMPs, and courts have all noted that management measures must have at least a 50-percent chance of success. The 2002 LCS stock assessment found that a 50-percent reduction in catch has a 50-percent chance of rebuilding the LCS complex within 10 years. Thus, the plan meets the minimum probability of success. Ironically, NMFS does not apply the 70-percent guide to the selected time frame, noting instead that 64 percent is close enough.

Response: By applying probabilities of success only once a rebuilding time frame is set, NMFS would have no basis for determining whether or not a stock could likely rebuild in less than 10 years or more than 10 years. This could result in unrealistic rebuilding time frames that could be so short as to leave no option other than closing the fishery or that could be so long as to never result in rebuilding the stock. Instead, NMFS uses the probability of success both in setting the rebuilding time frame and in selecting all the alternatives to ensure that, taken together, the suite of alternatives will meet the probability standard. Thus, in Amendment 1, while reducing the overall catch by 45 percent does not give a 70-percent probability of success, the combination of catch reductions with other management actions that will likely reduce mortality of released catch or protect juvenile sharks does have a 70-percent probability of success.

2. Commercial Management Measures

A. LCS Classification

Comment 1: NMFS received a range of comments regarding the proposed classification. Comments received included: It is easier to comply with one closure date; violators can take advantage of two closure dates. We support the preferred alternative because it will simplify the regulations and reduce regulatory discards. We agree that species-specific quotas are not reasonable now and therefore support

the re-aggregating the LCS complex; however, NMFS should not abandon the goal of species-specific management. Because fishermen can actively target sandbar and blacktip sharks, we prefer the alternative that allows for species-specific shark groupings or, alternatively, the ridgeback/non-ridgeback species groupings. The stock assessment recommended that every effort be made to manage the LCS fishery on a species by species basis; thus, we support LCS groupings with different closure dates possible.

Response: NMFS considered five different LCS classifications in developing the proposed and final rule. The aggregate LCS classification with one closure date is preferred because, in combination with the other preferred alternatives, it is (1) expected to maintain historic fishing practices (since 1993) and food availability in the market place, (2) expected to reduce burden on fishermen for sorting, (3) expected to decrease, or at least not increase, the number of protected resource interactions; and (4) not expected to increase regulatory discards. During this rulemaking process NMFS heard that many fishery participants cannot accurately identify or effectively target individual shark species. As such, NMFS does not believe that a species-based classification is warranted at this time, but will reconsider this issue when the ability to identify and target shark species improves.

Comment 2: The preferred alternative is the same classification that was in place from 1993 through 2002 but is not consistent with the rebuilt status of sandbar and blacktip shark or the economic needs of shark fishermen.

Response: The final action for LCS classification (*i.e.*, aggregate LCS, one closure date) seeks to minimize bycatch (*i.e.*, regulatory discards) of both rebuilt and overfished species of LCS, which would otherwise occur under separate closure dates or partial closures of a mixed fishery. While sandbar and blacktip sharks are no longer overfished and, in the case of blacktip sharks, may be able to withstand an increase in harvest, NMFS also needs to rebuild overfished LCS. As noted above, species-specific management is not feasible at this time. This final action allows fishermen the opportunity to catch the entire quota without decreasing efficiency (*i.e.*, increased time to sort catch, increased time at sea to make up for lost catch resulting from regulatory discards, etc.), thus, maximizing economic benefits as compared with the other classification alternatives considered.

Comment 3: NMFS should increase research, survey, and monitoring efforts to acquire the critical information on individual life histories, ecological requirements, and stock conditions to enable more species-specific management. NMFS should develop a plan of action for moving towards species-specific management in the future.

Response: NMFS is supportive of increasing scientific research, surveys, and monitoring efforts of shark populations, provided that funding is available to do so. Currently, NMFS funds a number of shark focused research programs including, but not limited to: (1) Cooperative shark research (*i.e.*, between Southeast Fisheries Science Center and Mote Marine Laboratory), (2) reducing blue shark bycatch in pelagic longline fisheries, (3) delineation of winter nursery grounds, migratory patterns, and critical habitat of juvenile sandbar sharks in the western Atlantic Ocean, and (4) various observer programs in the shark fishery. NMFS will review species-specific information and incorporate such information into stock assessments, as appropriate, as it becomes available and intends to pursue workshops to improve species identification by fishermen and dealers in the future. As such, NMFS may consider implementation of species-based LCS classifications when the ability to accurately identify and effectively target shark species improves.

Comment 4: National Standard 1 requires NMFS to adopt alternatives that result in the lowest quotas for vulnerable and overfished species and minimize bycatch to the greatest extent possible. Therefore, NMFS should adopt the alternative that aggregates LCS and closes the fishery when the quota for the most vulnerable species is meet.

Response: Of the LCS classification alternatives considered, the LCS classification final action best complies with National Standard 1 because it, in combination with the final action for the quota basis, prevents overfishing and facilitates rebuilding of LCS while achieving optimum yield on a continuous basis from the fishery. Additionally, the selected alternative is expected to decrease, or at least not increase, the number of protected resource interactions and not expected to increase regulatory discards, which is consistent with National Standard 9. Closing the fishery when the quota for the most vulnerable species is met is not a viable alternative at this time because to date there is limited data available on individual LCS species beyond that of sandbar and blacktip. Without species-specific assessments, it is difficult to say which LCS species have highest vulnerability or even what the quota should be for any individual species. NMFS may consider this alternative as more information becomes available in the future.

B. Shark Quota Administration

Comment 1: NMFS received a range of comments regarding the combination of regional quotas and trimester seasons (*i.e.*, three four-month periods). Comments included: We support the proposed administration of regional and trimester seasons. We cannot support the proposed administration of regional and trimester seasons. Regional and trimester seasons will provide for more flexible management and improve quotas as a management tool. The regional quotas and trimester seasons will force vessels down to Florida for the January opening and will force them to fish for a shorter amount of time.

Response: NMFS considered three separate alternatives regarding seasons and two alternatives pertaining to regional quotas. NMFS is implementing trimester seasons with regional quotas because this combination will (1) aggregate the majority of shark pupping into one fishing season (*i.e.*, second trimester) as opposed to divide it into two or more seasons, which is possible with either the semi-annual or quarterly season approaches, (2) provide managers with flexibility to adjust regional quotas, where necessary, to prevent mortality on juveniles and reproductive female sharks, (3) provide a higher degree of resolution on which to manage seasonal fisheries, (4) minimize the social and economic costs associated with switching gear more often (*i.e.*, only three times as opposed to four per year), (5) give a higher percentage of the quota to each open season than would occur under a quarterly season approach, and (6) will increase the number of open seasons (*i.e.*, three as opposed to two) and spread them across the calendar year, thereby promoting greater economic stability of fishery participants.

Comment 2: NMFS received a range of comments regarding the proposed trimester approach. Comments included: The entire season, from January through November, should be closed to protect fish. The second semi-annual season closes too early. The trimester seasons will spread out the landings and avoid current price drops. The trimester approach will allow fishermen to catch sharks when grouper prices are lower and helps sharks be available year-round. Trimester seasons

appear to have the greatest potential to accommodate shark pupping activities. The second trimester season should be closed to all shark fishing to reduce the catch of juveniles.

Response: NMFS considered three different seasons for the shark fishery in the development of the proposed and final rule. Trimester seasons (*i.e.*, three four-month fishing seasons) are preferred because they will allow managers the flexibility to open and close seasons to match species requirements such as aggregating shark pupping seasons into one fishing season, as opposed to spreading pupping time-frames over multiple open seasons. Trimesters will also avoid undesirable dates (*i.e.*, July 1st) for market openings. Additionally, trimester seasons will give fishermen a greater chance to build new markets for sharks, given that there will be more open seasons (*i.e.*, three as opposed to two) spread across the calendar year. Increasing the number of open seasons and effectively spreading open seasons out more evenly over the calendar year will, in the long-term, result in greater economic stability for fishermen and associated communities.

Comment 3: NMFS should keep the semi-annual seasons and open the second season on July 15th each year.

Response: Maintaining semi-annual seasons could have negative ecological, social, and/or economic impacts should semi-annual seasons continue to extend into pupping seasons. Given that LCS are overfished and overfishing is occurring, continued mortality levels on juvenile and reproductive females could cause the complex to decline further over time. Further declines in LCS stock status could result in additional reductions in available quota and/or other management measures, which could impact fishermen and fishing communities both economically and socially. Trimester seasons will aggregate the majority of shark pupping into one fishing season (*i.e.*, second trimester) and simultaneously avoid market problems associated with a July 1st opening by providing for openings on January 1, May 1, and September 1 of each year.

Comment 4: NMFS should start each season at the same time to help disperse fishing effort and promote equitable distribution of the allowable quota.

Response: While opening shark seasons at the same time for all regions may help to disperse fishing effort and promote equitable distribution of the allowable quota, allowing managers flexibility to determine alternative season opening dates (*i.e.*, by region) will promote further consideration of safety at sea and give greater fishing opportunities based upon fish availability in each region.

Comment 5: August and September are not good times for shark fishing. Most of the effort should be in October through December. Therefore, the quota should be reapportioned from the first two trimesters to the last trimester.

Response: NMFS recognizes that there are temporal differences in catch-per-unit-effort as well as catch composition in the shark fishery. As such, annual quotas need not be split equally between trimester seasons. Instead, trimester seasons will allow managers to establish quotas for each open season based on markets, pupping season, effort concerns, and other relevant factors. Initially, NMFS will split the available quota equally between trimesters for the first year or two and will re-evaluate this approach via rulemaking, if necessary, based upon observed catch rates and other factors, such as stock status.

Comment 6: NMFS received a range of comments specific to the proposed percentages for regional quotas. The comments included: The historical percentage of small coastal sharks in the Gulf of Mexico is incorrect due to improper identification and reporting. The regional quota proposed for the North Atlantic is below the actual take and would be filled quickly between the vessels fishing in the region. The North Atlantic proposed portion of the LCS quota is too large and should be reduced; the percentage was probably inflated due to misidentification of sandbar sharks. The South Atlantic proposed portion for SCS is too large due to misinformation and misidentification; there are just as many LCS reported in that region as SCS. We can only support regional quotas if one region does not prevent another region from having a fair shot at the fishery.

Response: NMFS combined information from two separate databases containing regional landings information as reported by dealers and states to NMFS over several years. These landings data represent the best available information pertaining to regional data. Given that the regional quotas seek to maintain historical landings, as opposed to reducing landings, NMFS does not expect this alternative to change previous fishing practices or result in any significant economic impact. Fishery participants will be allowed to fish in any region, provided that the season for the region in question is open and that the quota for that region has not been taken. Over time, this alternative may allow NMFS the flexibility to manage quotas to each region's maximum economic advantage. Additionally, if reporting indicates that participation in one region increases or decreases, NMFS may, through another rulemaking, modify the percentages available to each region to ensure that fishermen in all regions have a reasonable opportunity to fish for sharks. NMFS recognizes the need for more accurate species identification and as such, the agency will pursue mandatory workshops through a future rulemaking that will focus on improving species identification by fishery participants and possibly dealers and enforcement agents.

Comment 7: How will NMFS enforce the regional quota approach? Will there be three separate permits for vessels fishing within the regions or can a vessel fish in an open region and land catch in a closed region? We are only supportive of the regional quota approach if permitted vessels can fish in any region.

Response: Federal fishery participants will be allowed to fish in any region, provided that the season for the region in question is open and that the quota for that region has not been taken. As such, NMFS will not be issuing regional permits to vessels authorizing them to fish in a given region. Rather, each regional quota will be enforced by monitoring illegal fishing activity in each region, as is done in the Atlantic bluefin tuna fishery. As is current practice, the closure date for each region will be announced before the start of the season. Additionally, state agencies may have different permit and closure requirements. As such, fishery participants are encouraged to check with state agencies, where state permit and/or closure requirements are in question.

Comment 8: NMFS should not use data from 1999 to 2001 to establish the regional quotas. Instead, NMFS should use data from the 1980s (*i.e.*, before management) in order to get an idea of where the fishery historically operated. If this is done, the North Atlantic will account for over half the landings.

Response: Calendar years 1999–2001 were used as the basis for establishing regional quotas because they (1) represent the period of time following the last major change in management of the shark fishery, (2) fall after implementation of limited access permits, and (3) represent the time-frame for which the best regional data are available. Using a longer timeframe or only data from the past may not provide an accurate representation of the current fishery. Over time, NMFS may, if warranted, decide to adjust the

regional quotas via rulemaking to ensure each region has an opportunity to fish.

Comment 9: NMFS should pay particular attention to regional differences in shark pupping activity and use its discretion in allocating quotas and setting seasons so as to best prevent mortality of congregating pregnant females, pups, and juveniles.

Response: Spatial differences in fishery practices and catches warrant further consideration, and regional quotas provide a means of preventing mortality of congregating reproductive females, pups, and juvenile sharks. Shark pupping data indicate that spatial differences exist between species utilization of various shark pupping grounds. For example, species within the SCS complex utilize pupping grounds between South Carolina and the Gulf of Mexico, whereas some species within the LCS complex utilize only the Atlantic coast for pupping grounds. NMFS will periodically assess regional differences in shark pupping activity and should changes be required, quota adjustments will be carried out via framework action.

C. Shark Quota Basis

Comment 1: We support the preferred alternative of an MSY basis. In the future, NMFS should estimate MSY on a species-specific basis for all LCS. NMFS should establish a similar approach for pelagic sharks when a validated assessment is available.

Response: Amendment 1 uses MSY as a basis for establishing commercial quotas. NMFS must determine MSY as well as optimum yield (OY) and specify status determination criteria to determine the status of the stock. As such, the 1999 HMS FMP defined fishing mortality and biomass levels necessary to produce MSY and OY on a continuing basis. Given that these definitions are not subject to change in this final rule, MSY-based quotas provide a direct means for determining appropriate fishery management action. MSY and OY estimates are readily available from stock assessment outputs and can be updated annually if necessary. NMFS is currently limited in its ability to estimate MSY for all shark species within each of the management units. However, as new information becomes available, NMFS will strive to integrate more species-specific information into stock assessments, where MSY could be calculated. Once the international stock assessment for pelagic sharks is complete, NMFS will re-evaluate the appropriateness of existing pelagic shark quotas and the basis for calculating commercial quotas for these species.

Comment 2: NMFS received several comments regarding the reduction in LCS quota by 40 percent instead of the recommended 50 percent. Comments included: Because the proposed alternative reduces MSY by only 40 percent instead of the recommended 50 percent, NMFS should adopt other conservation methods such as gear restrictions and time/area closures whose effects can be quantified to show that they achieve the mortality goal of rebuilding with a 70-percent probability. The 40-percent reduction is not reasonable; there is no reliable basis to stray from the scientific advice. The assessment recommendation is based on a 50-percent probability of successful rebuilding; if NMFS were to apply the 70-percent guide, the proposed reduction would be larger not smaller than 50 percent. Therefore, NMFS should reduce the quota by a minimum of 50 percent.

Response: The preferred quota alternatives will implement an LCS aggregate quota based upon a 45-percent reduction of average maximum sustainable catch (MSC) for LCS, multiplied by the percentage of commercial catch attributable to the LCS complex. NMFS reduced the 50 percent recommended reduction by five percent after considering the following factors: (1) While the stock assessment did say that the LCS complex should be reduced by 50 percent, it also said that the reductions should be on species other than sandbar and blacktip; (2) observer data indicates that sandbar and blacktip sharks comprise approximately 67 percent of the LCS catch, indicating that a quota reduction would mostly apply to those species; (3) peer reviews of the 2002 LCS stock assessment indicated that the complex assessment may not be as accurate as individual species because of biological differences between species; (4) catch per unit effort (CPUE) data for silky, tiger, and scalloped hammerhead do not indicate a decline; and (5) the other preferred measures such as the time/area closure will reduce mortality and/or dead discards. Furthermore, the percent reduction has been revised upward from the 40-percent reduction originally proposed in the draft Amendment based upon public comment received during public hearings. The Southeast Fisheries Science Center has indicated that the combination of the preferred alternatives, namely the 45-percent quota reduction and time/area closure, would increase compliance in the fishery and allow for the LCS complex to rebuild within the specified time-frame. As such, further reductions in the LCS commercial quota are not necessary at this time. However, NMFS will adjust the quota over time based upon future stock assessments to ensure that the LCS complex rebuilds within the 26-year rebuilding time frame.

Comment 3: NMFS must also account for state fisheries mortality estimates when setting quotas.

Response: State landings are included as part of the commercial landings percentage used to calculate the commercial quotas. Thus, the commercial quota is established to include landings by Federal and state fishermen. Any overharvests or underharvests will be accounted for in the same season of the following year.

Comment 4: We support the preferred alternative but the draft amendment is unclear on how information from future stock assessments will be used in setting quotas. Would the same percent of MSY always be used regardless of the population level?

Response: The LCS aggregate quota is based upon a 45-percent reduction of average MSC for LCS, multiplied by the percentage of commercial catch attributable to the LCS complex. As such, this percent reduction may not be used when setting future quotas. Instead, NMFS will assess the appropriateness of percent reductions and/or increases as new information becomes available in future stock assessments in order to ensure that the LCS complex rebuilds within the rebuilding timeframe.

Comment 5: We support the proposed MSY basis as long as that calculation continues to incorporate a target fishing mortality rate at 75 percent of the fishing mortality at MSY (F_{MSY}). We would also support expanding this precautionary buffer by lowering the percent of F but not increasing the rate toward F_{MSY}.

Response: The 1999 HMS FMP defined fishing mortality and biomass levels necessary to produce MSY and OY on a continuing basis. In summary, a species is considered overfished when the current biomass (B) is less than the minimum stock size threshold. The minimum stock size threshold is determined based on the natural mortality of the stock and the biomass at Maximum Sustainable Yield (B_{MSY}). The MSY is the maximum long-term average yield that can be produced by a stock on a continuing basis. Overfishing is occurring on a species if the current fishing mortality (F) is greater than F_{MSY}. When one or both of these measures occur, a species is declared overfished and action to rebuild the stock and/or prevent overfishing is needed within one year.

A species is considered rebuilt when B is greater than B_{MSY} and F is less than F_{MSY}. A species is considered healthy when B is greater than or equal to the biomass at optimum yield (B_{OY}) and F is less than or equal to the fishing mortality at optimum yield (F_{OY}). NMFS is not changing these definitions in this rule, thus the target control rule for managing healthy stocks continues to be 75 percent of F_{MSY}. This definition is consistent with the National Standard guidelines.

D. Minimum Size Restrictions

Comment 1: NMFS received a range of comments regarding what the commercial minimum size should be. Comments included: We support the no commercial minimum size alternative. The minimum size in the HMS FMP was based on sandbar sharks but does not fit for all ridgeback LCS species. We support the proposed no minimum size because the minimum size was established for sandbar sharks which is no longer overfished and because it will help reduce regulatory discards. We support a minimum size for sharks. The minimum size of any shark should be 15 feet. If recreational fishermen have a minimum size to protect juveniles, commercial fishermen should have a minimum size as well. We could support no commercial minimum size if juveniles of all species were protected by time/area closures; the proposed time/area closure does not do this.

Response: NMFS considered six different minimum size alternatives in the commercial fishery. Not implementing a commercial minimum size is preferred because, in combination with the other preferred alternatives, it will minimize regulatory discards and economic and social impacts to commercial fishermen, while providing adequate protection for juvenile and neonate sharks through the time/area closure off of North Carolina. Furthermore, commercial gear, unlike recreational gear, can have high post-release mortality rates. Therefore commercial management measures, which are aimed at reducing (*i.e.*, quota reductions) or preventing (*i.e.*, via time/area closures) catch are better for protecting juvenile and neonate sharks.

Comment 2: NMFS made a strong case in the HMS FMP for a minimum size based on protecting the age classes with the highest reproductive potential, demographic information, and the proportion of sharks brought to the boat dead. Now that NMFS is backing away from a ridgeback LCS quota, this measure is needed to protect the most sensitive life stages of ridgeback LCS (sandbar and dusky sharks in particular). NMFS should maintain the minimum size, show quantitative analyses that indicate a minimum size is not needed, or replace it with more effective species-specific measures to protect juvenile dusky and sandbar sharks.

Response: Maintaining the commercial minimum size is not warranted at this time. This rule finalizes several commercial management measures including, but not limited to, trimester seasons, regional quotas, reductions in the LCS quota, bycatch reduction measures, and a time/area closure to protect juvenile dusky and sandbar sharks, which will facilitate rebuilding of LCS.

Comment 3: If NMFS does not adopt a minimum size, it must adopt a time/area closure to reduce bycatch of juvenile and neonate sharks to levels at least as great as would be achieved with minimum sizes.

Response: Implementation of a time/area closure would reduce bycatch of juvenile and neonate sharks, but alone, it would not be sufficient to meet the rebuilding target for the LCS complex. As such, NMFS is implementing multiple management measures including, but not limited to reductions in the LCS quota, bycatch reduction measures, and the time/area closure, which are intended reduce bycatch of juvenile and neonate sharks.

Comment 4: NMFS should establish sub-group or species-specific minimum sizes within the LCS, SCS, and/or pelagic shark species groups as justified by new or updated research.

Response: Minimum sizes for sub-groups or individual species within each management unit are not necessarily the most effective management measures. While a commercial minimum size would seek to protect and reduce fishing mortality on juvenile sharks, any conservation benefits gained may be offset by increases in regulatory discards and associated post-release mortality if commercial fishermen are unable to avoid mixed-size aggregations of some shark species. For instance, while sandbar sharks tend to segregate by size, blacktip sharks and other species do not. Regulatory discards may also result in effort increases by fishermen in order to make up for lost catches, which could also result in increased interactions with protected (*i.e.,* sea turtles and marine mammals) and non-targeted (*i.e.* prohibited sharks and other finfish) species. Additionally, regulatory discards of LCS are not counted against the 4,000 pound trip limit. Thus, if a fisherman should catch a set full of undersized sharks, those sharks would be discarded and the fisherman could set the gear again, possibly in another school of small sharks. If the ability of fishermen to target certain species of sharks improves, then NMFS may reconsider minimum sizes in the commercial fishery.

Comment 5: Commercial fishermen have long claimed that most sharks come in alive. Therefore, there does not seem to be any rationale for a recreational minimum size while similar commercial measures are eliminated. A commercial minimum size for mako sharks is overdue. Longliners are willing to compromise for a minimum size on mako sharks.

Response: Commercial fishery observer data indicate that a number of LCS exhibit low survivability following longline capture. These species include spinner (63 percent dead when brought to the vessel), dusky (81 percent), scalloped hammerhead (87 percent), blacktip (88 percent), silky (90 percent), and great hammerhead (95 percent). As such, NMFS believes that implementation of a minimum size in the commercial fishery would result in significant increases in regulatory dead discards of LCS. However, sharks caught on recreational gear are thought to have low post-release mortality rates and, as such, a minimum size in the recreational fishery would contribute to LCS rebuilding by protecting juvenile and subadult sharks.

E. Commercial Shark Quota: General

Comment 1: NMFS received a range of comments regarding what the commercial quota level should be, including: Commercial quota levels should be reduced or even eliminated until the complex recovers. Quotas should be reduced by 700 percent. We support the quota alternatives (classification, administration, and basis) insofar as that together they result in the lowest overall quotas to ensure sustainable levels for all species and protect juveniles.

Response: NMFS did not propose a specific quota level. Instead, NMFS considered a wide range of quotas that resulted from the combination of classification and quota basis alternatives, specifically seven different commercial quotas for LCS and three different commercial quotas for SCS. Each quota alternative carefully considered the results of the 2002 stock assessments for LCS and SCS. The preferred quota alternatives will implement commercial quota levels of 1,017 mt dw for the LCS aggregate and 454 mt dw for the SCS aggregate. These quota levels are expected to rebuild the LCS complex within the necessary time

frame and prevent overfishing of SCS. If future stock assessments indicate adjustments are necessary to meet these goals, then the preferred quota basis alternative will allow NMFS the flexibility to address such adjustments.

Comment 2: The most recent stock assessment called for a 50-percent reduction in catches for the LCS complex but the preferred alternatives combined result in a 34-percent reduction in commercial catch from recent years (1,692.7 mt dw to 1,109 mt dw). While the additional measures may result in further reductions in mortality, the other proposed measures could increase the quotas and undermine management.

Response: The combination of preferred alternatives including, but not limited to, a commercial quota with a 45-percent reduction in catches and a time/area closure aimed at protecting juvenile and neonate sharks will rebuild the LCS complex. Analyses by the Southeast Fisheries Science Center indicate that the combination of the preferred alternatives in the draft Amendment would allow for the LCS complex to rebuild within the rebuilding time frame. Furthermore, the other final actions (*i.e.,* trimester seasons and regional quotas) will not result in an increase in quotas, but will allow for more flexibility in management to better refine management measures to protect juvenile sharks and rebuild overfished LCS.

Comment 3: NMFS received several comments regarding the apparent increase in quota from the total of 816 mt dw in the HMS FMP to the proposed 1,109 mt dw. Comments included: Even though LCS are overfished and overfishing is occurring, NMFS is proposing to increase the LCS quota by 35 percent; this is hard to understand. NMFS should move forward with the MSY quota basis but maintain the 816 mt dw quota level until a new, validated stock assessment can be carried out.

Response: The no action alternative would implement commercial quota levels for LCS (*i.e.,* 620 mt dw for ridgeback LCS and 196 mt dw for non-ridgeback LCS) totaling 816 mt dw, which were approved in the 1999 HMS FMP based on projection models in the 1998 LCS stock assessment. These quota levels were never implemented due to litigation. Taking into consideration the court-approved settlement agreement, the results of the 1998 stock assessment peer reviews, and other information, NMFS maintained the 1997 commercial quotas for LCS (*i.e.,* 1,285 mt dw) as an interim measure pending completion of Amendment 1. As such, except for 2003, commercial fishermen have been fishing under the LCS quota of 1,285 mt dw, since 1997. The preferred alternatives, which would implement a LCS quota of 1,017, represent a 21-percent reduction in available quota compared to the 1,285 mt dw baseline.

Comment 4: The LCS quota component of the species-specific quota alternatives is too low and should be doubled in order to reduce the potential for regulatory discards.

Response: The species-specific quota alternatives (*i.e.,* MSY and average landings) incorporated an appropriate percent reduction for each species or species group, as recommended in the 2002 LCS stock assessment. Additionally, the 2002 stock assessment clearly indicated that LCS reductions should focus on species other than sandbar and blacktip. Because regulatory discards will occur as a result of implementing species-specific quotas in the LCS fishery, NMFS selected alternatives, which in combination with one another will aggregate LCS species and establish one commercial quota for the complex.

Comment 5: Fishing pressure on all LCS species except sandbar and blacktip has been abated since the HMS FMP. Any need to reduce the potential for bycatch of the other species via the use of an aggregate quota at a low quota level is inconsistent with the status and biomass levels of the principal commercial species and subject to the practicability standard of National Standard 9. It is not practicable to reduce the commercial fishery now that the primary commercial species are rebuilt.

Response: Amendment 1 seeks to rebuild the LCS complex, which is overfished. Consistent with National Standard 9, the preferred alternatives, which would aggregate LCS species and establish one commercial quota for the complex, will , to the extent practicable, minimize bycatch (*i.e.,* regulatory discards of shark) resulting from partial closures (*i.e.,* multiple closure dates by LCS grouping or individual species as a result of quotas being taken) of a mixed fishery and allow fishermen the opportunity to catch the entire quota. Additionally, the number of protected resource interactions may decrease, or at least not increase, because fishermen would not have to increase effort in order to make up for lost catch during partial closures and the LCS quota will be lower as a result of the preferred alternatives.

Comment 6: Mexican fishermen catch huge amounts of sharks. Why are U.S. fishermen limited? These limitations on U.S. fishermen has kept prices down.

Response: NMFS has regulatory jurisdiction over the exclusive economic zone (*i.e.,* from generally 3 nautical miles seaward to the 200 nautical mile limit) in U.S. waters but cannot regulate the fishing activities of other countries. However, consistent with the National Plan of Action and the Shark Finning Prohibition Act, NMFS is continuing cooperative research efforts with other countries (*e.g.,* Canada and Mexico) and engaging in deeper dialogues with international fishery management organizations such as the International Commission for the Conservation of Atlantic Tunas (ICCAT), the United Nations General Assembly, Food and Agriculture Organization (FAO), and others as appropriate for shark management.

Comment 7: We need an adequate incidental quota to reduce/eliminate regulatory discards and cover the inevitable secondary catches in many fisheries.

Response: An incidental quota or similar alternatives could be a viable alternatives for reducing regulatory discards. NMFS will investigate this issue in a future rulemaking.

3. Recreational Management Measures

A. Retention Limit

Comment 1: NMFS received a range of comments regarding the appropriate recreational retention limit, including: We support the preferred alternative and suggest that anglers also be allowed one additional blacktip shark because the stock is rebuilt. Only one shark of any species per vessel per trip should be allowed because most recreational anglers cannot identify individual shark species. The proposed alternative is appropriate and precautionary because the recreational sector has been fishing under regulations based on a stock assessment that was overturned and, therefore, contributed more to rebuilding. We do not oppose the proposed addition of bonnethead, but urge NMFS to monitor this species to prevent overexploitation; South Carolina has already taken the proposed action based on the same stock assessment results. Any additional catch reductions that may be required to meet management goals should come from the commercial sector before considering further cuts to the recreational sector. Recreational fishermen kill sharks for no reason and cause numerous dead discards to wash up on the beach. Recreational take levels should be reduced.

Response: One shark per vessel per trip plus one Atlantic sharpnose and one bonnethead shark per person per

trip is appropriate for the recreational shark fishery. This alternative could reduce recreational harvest levels by the 80–85 percent required under the rebuilding plan in Amendment 1 if angler compliance increases. NMFS analyzed other alternatives in Amendment 1 that would have allowed the retention of additional LCS, SCS, and pelagic sharks. However, because the 2002 LCS stock assessment indicates that the LCS complex needs a reduction in fishing mortality and many recreational anglers cannot correctly identify sharks, those alternatives would not achieve the level of reduction needed to rebuild LCS. With regard to discards and mortality in the recreational fishery, NMFS urges anglers to comply with size and retention limits and release sharks in a manner that maximizes their survival. NMFS may adjust size and retention limits in the future based on the results of future stock assessments.

Comment 2: NMFS received several comments regarding methods of increasing compliance within the recreational fishery, including: Any non-compliance by the recreational sector is due to confusion with the current regulations and, to a lesser extent, the proper identification of different shark species. NMFS can solve these problems by increasing angler education and outreach. Compliance and enforcement is not strong in Federal waters. NMFS should increase outreach by using the internet, linking the HMS regulations to the NOAA weather page, and printing flyers for marinas, Sea Grant, port agents, and states.

Response: Compliance in the recreational fishery, outreach, and the availability of educational materials needs to be increased. NMFS will distribute a revised Atlantic shark recreational fishery brochure after the final rule for Amendment 1 is published. It will contain information regarding HMS Angling category permits, HMS Charter/Headboat permits, bag limits and minimum sizes, release information, landing restrictions, the no sale provision, HMS tournament registration, tagging information, as well as species that may be retained, and species that must be released. Additional brochures on other HMS fisheries are available. NMFS is also currently producing an identification guide for sharks, tunas, and billfishes of the Atlantic and Gulf of Mexico that should be available shortly. Further, NMFS received public comment in favor of mandatory educational workshops for anglers and commercial fishermen discussing species identification, release techniques, and regulations. NMFS intends to move forward with requiring participation in mandatory workshops in a future rulemaking and will attempt to make voluntary workshops available to the public in the interim.

Comment 3: The one-shark per boat limit is not a problem except in tournaments where anglers may be forced to decide between keeping an eligible shark or taking a chance on catching a larger one. The difference between allowing one or two recreationally caught sharks would be minuscule on an annual basis, in comparison with what a longliner could kill during the same time period.

Response: Allowing recreational anglers an additional shark each would not have minor impacts compared to the commercial fleet. Currently, recreational fishermen take more sharks than commercial fishermen (142,000 LCS in 2001 versus 99,200 LCS in the commercial fishery). Additionally, recreational fishermen catch smaller sharks than commercial fishermen (average size of approximately 10 pounds versus 36 pounds in the commercial fishery). This information, combined with the facts that most anglers cannot correctly identify sharks and the LCS stock assessment recommended protecting juvenile LCS, provides support for the one shark limit. Further, the vast numbers of recreational anglers could lead to large numbers of LCS being taken. NMFS analyzed an alternative that would have allowed vessels with HMS Angling category permits participating in registered tournaments, or HMS CHB permit holders on for hire trips, to retain one shark per person, up to two sharks per vessel, per trip, as well as one Atlantic sharpnose and one bonnethead per person per trip. This alternative would have resulted in mortality levels greater than those expected from some of the other alternatives considered and is not consistent with the 2002 LCS stock assessment which indicates that the LCS complex needs a reduction in fishing mortality. Additionally, without more information regarding the status of pelagic sharks, this alternative could have been detrimental to pelagic sharks. However, this alternative could be combined with other fishing controls (*e.g.*, increased minimum sizes) so that overall mortality is not increased. NMFS may consider this approach in the future.

Comment 4: Many tournaments have restricted eligible species only to makos and threshers in order to avoid the waste of sharks not normally taken for food.

Response: NMFS appreciates and encourages conservation efforts by anglers and tournament organizers.

B. Minimum Size Restrictions

Comment 1: NMFS received a range of comments regarding the recreational minimum size, including: We support the proposed alternative because a minimum size helps to promote the live release of young sharks. The number of recreational fishermen who fish for sharks from Maine to Texas could number in the millions, which could significantly affect the mortality of juvenile sharks especially if there is no minimum size. South Carolina has already taken this proposed measure; most recreational anglers support a minimum size larger than is being proposed. Because many fish are killed before they are measured, particularly if they are dangerous, we cannot support a recreational minimum size. An exception to the minimum size for blacknose sharks should be added, because they are not overfished and do not reach the proposed minimum size.

Response: A 4.5 feet fork length for all sharks and no size limit for Atlantic sharpnose and bonnethead sharks is appropriate for the recreational shark fishery. Sharks caught in recreational fisheries are thought to have low post-release mortality rates and the preferred 4.5 foot fork length minimum size limit should minimize fishing mortality on the stages that contribute the most to population growth by maintaining catch-and-release fishing on juvenile and subadult sharks. The allowances for the retention of Atlantic sharpnose and bonnethead sharks without a minimum size were preferred because these species are easily identified, not overfished or experiencing overfishing, do not commonly reach the current 4.5 foot fork length minimum size limit, and are important recreational catches in some regions. Exceptions for other SCS species were not analyzed in Amendment 1 because of difficulties with identification (*e.g.*, blacknose sharks) or because they are currently experiencing overfishing (*e.g.*, finetooth sharks).

Concerning the safety of anglers who are required to measure live sharks in order to retain them, NMFS recommends that anglers mark areas on the outside of fishing vessel hulls (*e.g.*, at the waterline or boot stripe) with the minimum size. If a shark is smaller than this measurement or if it is a prohibited species, it should be released.

Comment 2: Information on proper release techniques and equipment should be made available to the recreational sector.

Response: Workshops demonstrating proper handling and release techniques for finfish, sharks, and protected resources, and discussing regulations and species identification could reduce bycatch mortality, improve compliance with current regulations, and improve accuracy of reported data. NMFS intends to move forward with requiring participation in mandatory workshops in a future rulemaking and will attempt to make voluntary workshops available to the public in the interim.

C. Authorized Gears

Comment 1: NMFS received a range of comments regarding authorized gears, including: We support the preferred alternative. Recreational fishing techniques should be limited to rod and reel and handlines. Spearfishing gear should also be added to the list of allowable recreational fishing gears. Bandit gear is not appropriate for the recreational fishery. Bandit gear should be an allowable gear. Harpoon gear should be added to the list because many fishermen feel it is easier and safer to use harpoons than gaffs.

Response: Rod and reel and handline gear are appropriate gears for the recreational shark fishery, because they have lower bycatch and bycatch mortality of sharks, finfish, and protected species, and are being used in other recreational HMS fisheries. Bandit gear was not selected because it has traditionally been considered a commercial fishing gear and because the vast majority of recreational fishermen use rod and reel or handline gear. Spearfishing gear has not been an allowable gear in the recreational shark fishery and therefore was not included. However, implements used to secure rod and reel or handline catches alongside a vessel (*e.g.*, gaffs and harpoons) are being allowed.

Comment 2: Limiting the recreational fishery to handline and rod and reel would prohibit landings by recreational gillnet fishermen.

Response: This is correct. All sharks caught recreationally with gears other than rod and reel and handline in Federal waters must be released. NMFS does not believe that this measure will increase discards substantially, because the vast majority of recreational fishermen already use rod and reel or handline gear and recreational fishermen, including those using gillnets, have been limited to one shark per vessel per trip since 1999.

Comment 3: NMFS should provide a provision that would allow disabled anglers who cannot hold the gear to fish.

Response: NMFS will continue to allow fishermen who are unable to operate rod and reel or handline gear to apply for an EFP that would allow them to fish for sharks recreationally with alternative gear.

4. Bycatch Reduction Management Measures

A. Gear Restrictions

i. Authorized gear.

Comment 1: NMFS received a range of comments regarding the proposed regulation to ban drift gillnet fishing and allow strikenet fishing only, including: Strikenetting and drift gillnetting should be stopped. No observations of these gear types is accurate. Because of bycatch problems, many states have passed regulations banning drift gillnets; therefore, NMFS should as well. Gillnets should not be allowed because, in addition to unacceptable levels of bycatch of sea turtles, marine mammals, red drum, tarpon, and other game fish, the small shark gillnet fishery in Federal waters off Georgia drains limited law enforcement resources that are needed elsewhere. We support the preferred alternative allowing strikenets only if observer coverage is maintained to document a reduction in bycatch. If there is no reduction, this gear type should be removed from the list of authorized gear types. There is no reason to close the shark gillnet fishery because bycatch of protected resources is within the allowance for those species. NMFS should not eliminate a viable fishery that has reliable observer science behind it. There are only five vessels remaining in the fishery, which is down from the historic twelve vessels that used to participate.

Response: The intent of the proposed bycatch alternatives were to minimize bycatch and bycatch mortality to the extent practicable. The strikenet only alternative minimizes interactions with protected resources and reduces the bycatch of non-target species, while allowing the commercial shark gillnet fishery to operate. However, NMFS received public comment that allowing the use of strikenets only would not accomplish this objective because strikenet gear cannot target SCS. Therefore, the final regulations permit the use of drift gillnets with possible gear modifications or other measures being implemented through a future rulemaking, based upon further study.

Comment 2: The State of Georgia has requested a ban on gillnets since 1992 and continues to request this ban. Because Georgia has banned gillnets, the presence of a gillnet fishery in adjacent Federal waters compromises State management and regulatory statutes and does not meet the standards for consistency required under Georgia's Coastal Zone Management Act (CZMA) program. Using Global Positioning System (GPS) technology, it may be possible for NMFS to close the Exclusive Economic Zone (EEZ) to gillnets adjacent to Georgia to alleviate ongoing consistency and enforcement problems.

Response: The CZMA (1972, reauthorized 1996) requires that Federal actions be consistent with the enforceable policies of all state coastal zone management programs. NMFS has determined that the final actions in Amendment 1 and this rule, which seek to rebuild the LCS complex, prevent overfishing of the LCS complex, and prevent overfishing of other species of sharks, will be implemented in a manner consistent to the maximum extent practicable with the enforceable policies of the coastal states in the Atlantic, Gulf of Mexico, and Caribbean that have federally approved coastal zone management programs.

The State of Georgia objects to the consistency determination due to the continuing operation of the shark gillnet fishery in Federal waters. NMFS has analyzed several bycatch alternatives in Amendment 1, including elimination of the shark gillnet fishery. However, data currently available indicate relatively low rates of bycatch and bycatch mortality of protected species and other finfish in this fishery. In the Biological Opinion (BiOp) conducted for this rulemaking, NMFS determined that the continued operation of the shark gillnet fishery would not jeopardize any endangered or threatened resources and issued a new incidental take statement for the fishery. Therefore, NMFS is not prohibiting the use of this gear at this time, consistent with National Standard 2 which requires that management measures be based on the best scientific information available. NMFS is finalizing a measure that will require all shark gillnet vessels to install and activate a VMS during right whale calving season, and will examine gear modifications or other alternatives to reduce bycatch and bycatch mortality in future rulemakings. NMFS will also work with existing take reduction teams and relevant Fishery Management Councils to examine methods of reducing bycatch. Thus, NMFS finds that the final regulations implemented in Amendment 1 are consistent with Georgia's Coastal Zone Management Program to the maximum extent practicable.

Comment 3: If only strikenetting is allowed, the State of Georgia would continue to ask for 100 percent observer

coverage because the reduction of bycatch using strikenet gear in or near Georgia waters has not been adequately investigated. Unlike the waters off Florida, the waters off Georgia are highly turbid. Without adequate observer data, allowing strikenetting for sharks is not a risk-averse strategy to reduce bycatch.

Response: This rule does not remove gillnet gear from the list of authorized gears in the commercial shark fishery. The Agency understands the concerns about the need for adequate observer data documenting gillnet operations and catch near Georgia waters and will continue to monitor catch and bycatch, protected species interactions, and fishery characteristics through continued observer coverage.

Comment 4: Many states ban both longling and gillnetting without adequate data. If longlines are allowed in Federal waters, then gillnets should similarly be allowed.

Response: NMFS has banned gear types (*e.g.*, gillnets in the swordfish fishery) and restricted the use of other gear types (*e.g.*, area closures in the pelagic longline fishery) for a variety of reasons including reducing bycatch and bycatch mortality. In this case, NMFS is not removing gillnet gear from the list of authorized gears at this time.

Comment 5: Blacktip and Atlantic sharpnose sharks make up the majority of our drift gillnet landings and are not overfished or experiencing overfishing according to the latest stock assessments. Our biggest discard species in the LCS fishery are rays. In the small coastal shark fishery, our biggest discard species is king mackerel and we have petitioned the South Atlantic Fishery Management Council to allow us to retain more of this catch per trip.

Response: The latest LCS and SCS stock assessments indicate that Atlantic sharpnose and blacktip sharks are not overfished and overfishing is not occurring. In regard to the reduction of bycatch and discards, NMFS supports the reduction of bycatch, including regulatory discards, in HMS fisheries. According to 2002 shark gillnet fishery observer data, king mackerel was observed to be the species most commonly discarded from drift gillnet sets, with approximately 248 fish discarded; however, great barracuda (approximately 4 fish) and cownose rays (one fish) were observed to be the most commonly discarded species from strikenet sets. Little tunny, king mackerel, and great barracuda were the three non-target species most commonly observed caught in the shark gillnet fishery in 2002. In a future rulemaking, NMFS will consider additional alternatives such as gear modifications to reduce bycatch of all species in the gillnet fishery.

Comment 6: The preferred alternative allowing only strikenet gear appears as if the Agency is trying to supercede the actions of both the Atlantic Large Whale Take Reduction Plan and the Bottlenose Dolphin Take Reduction Plan. Negotiated actions with members working on these plans are about to become final. If NMFS eliminates the use of gillnet gear, it would be wrong and set a dangerous precedent. Instead, NMFS should start a buyout program for these vessels and regularly attend take reduction plan meetings. There is no support from either take reduction team to ban drift gillnetting.

Response: As part of this rulemaking, NMFS analyzed the impacts of various bycatch alternatives on bycatch species and protected resources in an attempt to minimize bycatch and bycatch mortality in HMS fisheries to the extent practicable. In this final action, NMFS is not implementing measures to limit or remove gillnet gear from the list of authorized gears. A buyout program is beyond the scope of this rulemaking, but could be considered in the future should funding become available.

Comment 7: The only way to fish for small sharpnose sharks is with a drift gillnet in deep water. Strikenet gear will not work because it only catches large coastal sharks.

Response: NMFS has reviewed available shark gillnet fishery observer data and agrees that strikenet gear does not appear to be effective at catching Atlantic sharpnose sharks. For this reason, and reasons discussed above, drift gillnet gear will not be banned in this rulemaking.

Comment 8: Enforcement efforts in the EEZ could be complicated due to similarities between drift gillnet and strikenet gear.

Response: NMFS agrees that enforcement efforts could be complicated due to similarities between drift gillnet and stikenet gear. For this reason, and reasons discussed above, drift gillnet gear will not be banned in this rulemaking.

Comment 9: The five vessels actively using drift gillnet should be given gillnet endorsements on their directed shark permits to limit entry into the fishery. NMFS should consider allowing the five fishing vessels currently in the fishery to continue and prevent any new vessels from entering the fishery.

Response: NMFS did not consider specific permit endorsements in this rulemaking, but may consider options to limit vessel participation in the shark gillnet fishery in the future.

Comment 10: NMFS received several comments regarding the modification of shark gillnet gear to reduce protected resources interactions. The comments include: Instead of banning the gear, NMFS should reduce the allowable length of the gear. NMFS should consider gear modifications to reduce bycatch. My vessel accounted for a large number of interactions between marine mammals and sea turtles until I replaced a large section of my gear; while I still have some interactions with them, they swim away unharmed and are observed to be healthy. I used new gear this past summer with tighter mesh and this increased my sharpnose catch and decreased my interactions with protected species. Fishermen who use shark drift gillnet gear have adapted their gear using corks to keep the gear high in the water and allow any entangled turtles to get to the surface and survive. Fishermen who do not usually fish in the fishery or who use stab nets are the fishermen who catch dead turtles. Instead of banning drift gillnets, NMFS should consider the use of pingers to reduce interactions with protected species.

Response: Gear modifications have been shown to be effective in other fisheries; however, some modification measures can be difficult to enforce or can be circumvented by altering fishing patterns, resulting in no bycatch reduction. NMFS continues to support research projects regarding effectiveness of gear modifications, to the extent that funding allows, and will consider the possibility gear modifications in a future rulemaking.

Comment 11: NMFS received several comments regarding sea turtle interactions in the shark gillnet fishery. The comments include: In terms of actual numbers, relatively few sea turtles have been captured in the shark gillnet fisheries. While this fishery is supposed to have high levels of observer coverage, this is not always the case. As noted in the June 2001 BiOp, this fishery can have a large impact on leatherback sea turtles at a time when reproductive females are in the area. I have been fishing 18 years and carried an observer for 10 years; in those 10 years, I have only caught one sea turtle.

Response: The best available information indicates that relatively few sea turtles have been captured in the shark gillnet fishery. The October 2003 BiOp estimated that over a five-year period the expected take of sea turtles in the shark gillnet fishery would be 10 total loggerhead sea turtle captures with one mortality, and 22 total leatherback sea turtles captures with three mortalities. The BiOp concluded that

the continued operation of the shark fisheries, including the shark gillnet fishery, are not likely to jeopardize the continued existence of the endangered Kemp's Ridley, green, hawksbill, and leatherback sea turtles, and the threatened loggerhead sea turtle. Although there were multiple interactions with leatherback turtles during 2001, NMFS believes this was an anomalous event, possibly associated with changes in environmental conditions. NMFS believes that events such as this can be mitigated through observer coverage, gear modifications, and enforcement.

Comment 12: I can strike at sharks without ''striking'' as you define it. I do not use the second vessel.

Response: NMFS is aware that some vessels have experimented with setting strikenet without using a second vessel. To the extent that these methods are more economical for fishermen, NMFS supports these methods. However, the use of shark strikenet gear in a method inconsistent with the current definitions inside the restricted area could constitute a violation. Requirements for strikenet vessels operating in the restricted area are described in the Atlantic Large Whale Take Reduction Plan regulations.

Comment 13: NMFS says that only six vessels are in the drift gillnet fishery. There are actually about a dozen that would be affected.

Response: The best available information indicates that there are five vessels that actively target sharks in the shark gillnet fishery. NMFS believes that there are a number of fishermen who land sharks incidental to their target species in other gillnet fisheries (*e.g,* bluefish, croaker, mackerel). All of these fishermen are affected by the general management measures such as changes in the commercial quota and the establishment of regional quotas. However, only those fishermen who actively targeted sharks would have been affected by the proposed measure to prohibit drift gillnet gear. NMFS is not finalizing that prohibition in this rule.

Comment 14: The bycatch of red drum in the shark gillnet fishery is of serious concern, given interstate effort to reduce bycatch of this species. Red drum is an overfished species whose harvest is strictly regulated with slot limits to promote its recovery.

Response: Red drum is caught incidentally in the shark gillnet fishery. However, the limited amounts of observed bycatch of this species in the shark gillnet fishery is not expected to impede recovery of the stock. Observer data indicate that the shark gillnet fishery does not catch large numbers of red drum. In 2002, 28 red drum were observed caught, of which, 50 percent were released alive.

Comment 15: Finetooth sharks are rare in trawl catches off Georgia. However, significant numbers are taken by the shark drift gillnet fishery. Elimination of the shark drift gillnet fishery would contribute towards reducing the overfishing of finetooth sharks.

Response: The shark gillnet fishery has been observed to target Atlantic sharpnose and blacktip sharks. Elimination of the shark drift gillnet fishery would not be expected to reduce significantly overfishing of finetooth sharks, because they are not a target species. In 2002, 21,978 sharks were observed caught in the shark gillnet fishery. Of those sharks observed caught, 1,615 (7.3 percent) were finetooth sharks.

Comment 16: The Atlantic sharpnose I catch have stomachs full of juvenile sea turtles. NMFS should calculate how many sea turtles are saved by allowing the drift gillnet fishery to continue.

Response: NMFS is concerned with all sources of mortality for protected resources and realizes that the ecosystem as a whole needs to be considered when rebuilding species. However, NMFS' can only influence and mitigate anthropogenic sources of mortality, specifically, those due to interactions with fishing gear within NMFS' jurisdiction.

ii. VMS.

Comment 1: The use of VMS on bottom longline and gillnet vessels, combined with time/area closures to protect juveniles, may help reduce mortality of vulnerable shark stocks beyond what the quota cuts will achieve.

Response: The preferred time/area closure is designed to reduce bycatch and mortality of neonate and juvenile dusky and sandbar sharks in a known pupping and nursery area. The preferred time/area closure could reduce fishing mortality on the stages that contribute the most to population growth. The use of VMS on shark bottom longline and gillnet vessels will contribute to the enforcement of time/area closures and may enhance the rebuilding of LCS to maximum sustainable yield.

Comment 2: As a gillnet fisherman, I prefer observers over VMS.

Response: While NMFS understands that individual fishermen may prefer using observers over VMS, the VMS alternative is preferred as an aid in enforcing time/area closures. Fishery observers are used to monitor catch and bycatch, protected species interactions, and fishery characteristics, and not used specifically for enforcement purposes.

Comment 3: One commenter was concerned with the utilization of VMS to monitor activities when vessels are engaged in normal fishing operations and not operating illegally.

Response: Currently, VMS is used in many fisheries managed by NMFS. VMS is the best technology at this time for monitoring vessel locations. It can be used by NMFS to reduce observer program costs, improve the enforcement of time/area closures, to deter illegal fishing, and to increase the efficiency of surveillance patrols. With respect to the shark gillnet and bottom longline time/area closures in particular, the size of the closed areas significantly diminishes the likelihood of detection through conventional means. Traditional methods of surveillance in these areas would be cost prohibitive. Other possible benefits of the VMS include increased safety at sea and dependable and confidential communications.

Comment 4: If VMS is implemented, NMFS should hold operators, not vessel owners, responsible for violations because the owner has little control over what the operator does with the vessel once it leaves the dock.

Response: NMFS is aware of vessel owners' concerns, however, for enforcement purposes, both vessel owners and operators will continue to be subject to liability for violations. Vessel owners can employ or terminate operators based on their compliance with fishery regulations.

Comment 5: VMS should be phased in to reduce negative economic impacts and blended with a communication adaptation that the U.S. Coast Guard uses as a homeland security technique.

Response: The VMS requirement will only be required for five shark gillnet vessels and any shark bottom longline vessels operating near the time/area closure (approximately 14 vessels). Because this measure will be required for only a select few vessels, it can be implemented with minimal economic impacts and will not affect the vast majority of the shark fishing fleet. To minimize impacts and to give time to NMFS to issue a type approval notice, NMFS is delaying the effective date of VMS in the shark fishery. In regards to communications adaptions and uses of VMS for homeland security, NMFS supports these uses.

Comment 6: NMFS received several comments regarding the number of vessels required to install and activate a VMS unit. The comments include: VMS is required for all pelagic longline vessels, why would it only be required for a portion of the bottom longline

fleet? VMS should be expanded to all vessels all-year round.

Response: VMS is required for all pelagic longline vessels to aid in the enforcement of multiple large scale closed areas in a highly mobile fishery. In addition to approximately five shark gillnet vessels, the VMS requirement analyzed in this rule would require vessels located near the time/area closure (approximately 14 vessels) to install and activate a VMS unit. Analyses indicate that while vessels in the pelagic longline fleet are highly mobile, vessels in the bottom longline fleet rarely fish far from their reported homeport. Thus, NMFS believes that requiring VMS for only that sub-population of the shark fishing fleet that fishes in the vicinity of the time/area closures is appropriate because the intent of the measure is to monitor vessel activity to ensure that time/area closures are effective.

Comment 7: If gillnet gear remains authorized for use in the shark fishery, VMS must be mandatory to ensure compliance during right whale calving season and to facilitate cooperative state/Federal enforcement efforts to monitor this fishery.

Response: The final action requires shark gillnet vessels to install and activate VMS units during the right whale calving season (November 15–March 31). This measure is expected to facilitate enforcement efforts.

iii. Other Gear Restrictions.

Comment 1: We support all of the alternatives being considered including limited soak times, reducing the length of the gear, and, especially requiring circle hooks. Reducing soak time and requiring the use of circle hooks could be an effective means of protecting juvenile sharks. These measures could reduce discard mortality of dusky sharks, which remains a candidate for listing under ESA, and other bycatch species.

Response: NMFS considered multiple gear restriction alternatives in Amendment 1. The preferred alternatives that require VMS on a sub population of commercial shark fishing vessels as well as require shark bottom longline vessels to use corrodible hooks, possess release equipment, and move one nautical mile after an interaction with a protected species.

Comment 2: It is unclear from the analyses presented in the draft amendment whether the most effective measure to reduce mortality of small sharks would be a series of time/area closures, a minimum size combined with measures to reduce bycatch, or some other plan. Therefore, we express support for measures that seem likely to reduce juvenile shark mortality, especially area closures. However, we encourage NMFS to do a more thorough analysis of the effectiveness of each bycatch reduction measure and to develop a comprehensive bycatch reduction plan.

Response: NMFS believes that a combination of measures will be most effective in reducing bycatch and bycatch mortality of protected species and small sharks in the shark fishery. Thus, NMFS is implementing a time/area closure, a requirement to possess and use release equipment, and a minimum size in the recreational fishery. NMFS has also issued an implementation plan to enhance current bycatch reduction efforts in HMS fisheries under the guidance of the 1998 NMFS Report, Managing the Nation's Bycatch. This report, which is posted on the NMFS website, contains the Agency's national bycatch goal, which is ''to implement conservation and management measures for living marine resources that will minimize, the extent practicable, bycatch and the mortality of bycatch that cannot be avoided.'' The NMFS National Bycatch Strategy and the HMS Bycatch Implementation Plan are discussed in Amendment 1.

Comment 3: The requirement of non-stainless steel corrodible hooks should be readily accepted by the industry and, because most vessels already use these hooks, there will be little or no economic hardships or changes in fishing practices. These hooks corrode in a much shorter period of time and would decrease impairment of feeding and wounding of sea turtles and thus, increase post-release survival.

Response: NMFS agrees and is implementing a requirement for their use on shark bottom longline vessels.

Comment 4: NMFS received several comments regarding the requirement for shark bottom longline vessels to move one nautical mile after an interaction with a marine mammal or sea turtle. The comments include: Requiring vessels to move one nautical mile after an interaction with a sea turtle or marine mammal should not significantly affect normal fishing operations because most vessels already move more than one mile after hauling their gear particularly if the set caught sea turtles or a lot of juvenile sharks. Some vessels travel substantially further to dump carcasses from dressed fish in order to prevent contamination of the fishing grounds. Requiring a vessel to move after an interaction with a protected species can be difficult to enforce unless enforcement personnel are on the scene when the gear is retrieved. If sea turtles are caught in gear, the vessel should move 20 nautical miles away, not one.

Response: NMFS believes that the requirement for shark bottom longline vessels to move one nautical mile after an interaction with a protected species is appropriate for the shark bottom longline fishery. This requirement would reduce the probability of another interaction with a protected species because marine mammals, sawfish, and sea turtles often aggregate in clusters. By requiring vessels to move after an interaction, the vessel would increase the likelihood of avoiding additional animals in a cluster when setting subsequent gear. This requirement could increase fuel costs due to increased the time transiting to another fishing area and increase time needed to fish if alternate fishing grounds are not as productive for target species. However, because few marine mammals, sawfish, or sea turtles have been observed caught, NMFS does not believe that this requirement would affect more than a few trips for all vessels combined, each year. Moreover, NMFS expects that vessels will comply with the requirement because, during normal fishing practices, vessels may already move more than one mile after hauling their gear. Moving more than one mile increases the chance of a vessel encountering another cluster of protected species.

Comment 5: NMFS received several comments regarding the possession of release equipment on shark bottom longline vessels. The comments include: The safe removal of hooks and line before release can dramatically increase the chances of survival of the released bycatch and has been endorsed by the U.S. pelagic longline fleet, ICCAT, Inter-American Tropical Tuna Commission (IATTC), and various non-governmental organizations (NGOs). The Southeast Fisheries Science Center has developed a line cutter that is safe and effective in removing line from entangled marine mammals and sea turtles in the pelagic longline fishery. Vessels that can boat smaller sea turtles should boat them in order to better control their gear removal procedures. Dehooking devices, line cutters, and dip nets are relatively simple to use and techniques can easily be transferred from fishery to fishery and nation to nation.

Response: NMFS agrees that there are benefits of using release equipment and is implementing an alternative that will require the possession of release equipment on shark bottom longline vessels.

Comment 6: Requiring workshops to certify that a permit holder has passed a training course on the proper use of

release equipment would aid enforcement and be more cost effective as a whole. These workshops could also serve as an educational forum for fishermen to learn the latest research and regulations, share concepts for their fishery that could be transferred to other fisheries (*e.g.*, recreational to commercial), gain a feeling of stewardship of the environment and their fishery, learn release techniques in a controlled environment, and develop and promote educational video tapes or literature. The workshops would also give fishermen a chance to talk to, and receive answers from, people in NMFS about regulations they do not understand. This could lead to a better working relationship over time.

Response: NMFS intends to move forward with this measure in a future rulemaking that will evaluate alternatives and implementation issues. In the interim, NMFS will attempt to make voluntary workshops available to the public.

Comment 7: We remain deeply concerned that NMFS has failed to offer options for increasing compliance in the recreational fishery after repeatedly acknowledging that anglers do not adhere to the shark regulations and that this non-compliance may be inhibiting stock rebuilding. We urge NMFS to develop programs for angler education in species identification and other efforts to improve compliance. Angler training should be a pre-requisite for obtaining an HMS Angling category permit.

Response: NMFS agrees that angler education could significantly improve compliance in the recreational shark fishery. In Amendment 1, NMFS analyzed an alternative that would require commercial and recreational fishermen to attend mandatory workshops discussing shark (and possibly other) species identification, marine mammal, sawfish, and sea turtle release techniques, and current regulations. NMFS received public comment in favor of mandatory workshops, and while it appears that mandatory workshops would be beneficial, outstanding implementation and operational issues remain that need to be addressed. Based on these issues, NMFS intends to move forward with this measure in a future rulemaking, and will attempt to make voluntary workshops, informational pamphlets, and an identification guide available in the interim.

Comment 8: At this time, we cannot support mandatory workshops. Rather, increased fiscal and other agency resources need to be expanded to significantly increase the distribution and availability of educational materials such as improved printed materials, electronic media, and more. Specific instructional/training workshops should be developed to focus on commercial fishing fleets/organizations, charter fishermen, tournament organizers, Marine Recreational Fisheries Statistics Survey (MRFSS)/other survey clerks, state/federal enforcement agencies, and more. Partnerships with other federal and state agencies to distribute this material should be explored.

Response: NMFS is working to increase outreach and available educational materials. Currently, NMFS is distributing Atlantic shark recreational fishery brochures containing information regarding HMS Angling category permits, HMS Charter/Headboat permits, bag limits and minimum sizes, release information, landing restrictions, the no sale provision, HMS tournament registration, tagging information, as well as species that may be retained, and species that must be released. NMFS is also currently producing an identification guide for sharks, tunas, and billfishes of the Atlantic and Gulf of Mexico. As discussed above, NMFS will explore mandatory workshops in a future rulemaking.

Comment 9: While the United States is trying to protect sea turtles, fishermen in Florida watch fishermen just outside the U.S. EEZ in Cuba and the Bahamas kill them. I recently watched one vessel in the Bahamas kill 39 sea turtles.

Response: Sea turtles are classified as endangered or threatened species in the United States and NMFS has implemented many measures to conserve these species. NMFS does not have the authority to determine how neighboring countries manage their resources, but will continue to pursue improvements in international sea turtle conservation measures.

Comment 10: Amendment 1 does not adequately address the incidental capture of threatened and endangered sea turtles in shark fisheries, especially shark bottom longlines. Reducing the rate of bycatch and reducing the mortality of sea turtles needs to be a primary priority. The impact of shark fisheries on sea turtles appears to be purposefully masked by key omissions in Amendment 1 about the level of sea turtle take and associated past-hooking mortality. The June 2001 BiOp estimates that 207 to 517 loggerheads are caught in the shark bottom longline fishery annually. Many of these animals probably die after release. Significantly more observer coverage is needed to improve confidence intervals. Amendment 1 fails to estimate and discuss the implications of post-hooking mortality of sea turtles. The June 2001 BiOp provides estimates of post-hooking mortality on pelagic longlines. This mortality rate in bottom longlines is expected to be higher because the turtles are trapped on the bottom unable to breathe. Because effort in shark fisheries has increased since 2001, many hundreds of sea turtles are being killed annually in shark longline fisheries.

Response: NMFS Protected Resources Division has prepared a new BiOp for this rulemaking that analyzes the incidental capture of protected resources in the shark fisheries. An estimated 222 loggerhead sea turtles were incidentally caught in the shark bottom longline fishery from 1994 through 2002. Based on observer data and the reported effort in the shark bottom longline fishery, it is estimated that 51 loggerhead turtles will be killed as a result of an interaction with a bottom longline. The highest estimate of post release mortality for sea turtles interacting with pelagic longlines is 42 percent for turtles ingesting hooks. Assuming all loggerhead turtles that ingest a hook are subject to this mortality rate, results in another 72 loggerhead turtles will be killed. This gives a total of 123 loggerhead turtles killed per year as a result of an interaction with a bottom longline. An estimate of 30 leatherback sea turtles were incidentally caught from 1994 through 2002 in the shark bottom longline fishery. Using the same methodology for leatherback sea turtle interactions results in an estimate of 17 leatherback turtles killed each year in this fishery. The leatherback mortality is very conservative because it is known that leatherback turtles rarely ingest or bite hooks, most are usually foul hooked on their flippers or carapaces, reducing the likelihood of post-hooking release mortality. However, leatherback-specific data for this fishery are not available and therefore the most conservative estimate was used. NMFS agrees that the precision of the estimates is likely to improve with greater observer coverage. One of the conditions of the BiOp is that NMFS must continue to implement an observer program at current or higher levels to monitor incidental takes of protected resources in Atlantic (including Gulf of Mexico) shark fisheries. NMFS disagrees that effort in shark fisheries has increased since 2001. Based on reported effort in the logbook data and the observer programs, the total number of hooks set in the shark bottom longline fishery in 2000–2002, ranged from 2.5 to 2.7 million hooks per year. This level of

effort is approximately 62 percent less than the reported effort in 1996. In addition, based on current and historical participation, implementation of limited access in the shark fisheries reduced the number of shark permit holders from over 2,200 before limited access to 584 in October of 2003.

Comment 11: Only one alternative addresses sea turtle bycatch by recommending that fishing vessels move one nautical mile after an interaction with a sea turtle. Dip nets and line cutters should also be required.

Response: To reduce sea turtle mortality, NMFS is implementing an alternative that will require vessels with shark bottom longline gear to use corrodible hooks, possess release equipment (line cutters, dip nets, and when approved, dehooking devices), as well as move one nautical mile after an interaction with a marine mammal or sea turtle.

Comment 12: NMFS needs to conduct experiments to determine if circle hooks are effective in reducing the number of turtles caught and the position of the hooks in captured animals.

Response: The June 14, 2001, BiOp included a recommendation that NMFS conduct a three-year experimental fishery in the northeast distant statistical reporting area (NED) to attempt to reduce the interactions between pelagic longline gear and sea turtles. In the summer and fall of 2002, tested the use of circle hooks, mackerel bait, and shortened daylight soak time to examine their usefulness in reducing the capture of sea turtles. Although NMFS did not specifically investigate the use of circle hooks to reduce interactions with sea turtles in the shark bottom longline fishery, information from the NED experiments could be transferable to or provide helpful information for other fisheries.

Comment 13: We support the preferred alternatives of line cutters, dip nets, and dehooking devices and feel they would reduce mortality by recreational fishermen as well.

Response: Release gear may be beneficial in recreational fisheries; however, requiring this equipment for anglers who generally do not use heavy monofilament line and rarely encounter protected species is not practical at this time. NMFS does support the voluntary use of release gear in recreational shark fisheries.

Comment 14: NMFS should consider a variation of the no discard alternative (retention of all sharks with no discards allowed) in order to encourage reducing regulatory discards. This is possible but not practicable in today's marketplace and would be tough to enforce. Other portions of the regulations, such as no filleting at sea or the current trip limit, would need to be changed.

Response: NMFS analyzed the no-discard alternative and determined that it could virtually eliminate the bycatch of sharks in the commercial shark fishery and reduce fishing effort needed to reach trip limits and fill quotas, thereby reducing potential interactions with prohibited species. However, this alternative could also increase the mortality of juvenile sharks, prohibited species, and other sharks not normally retained. Fishermen may also illegally high-grade and discard less marketable species to avoid reaching the trip limit, increasing waste. If no discards were allowed, trip limits and quotas could be reached more quickly, resulting in derby fishing conditions. Derby conditions may result in depressed ex-vessel prices, reduced revenues, market gluts, and concerns for the safety of fishermen at sea. Due to ecological, social, and economic concerns, NMFS does not believe this alternative is appropriate for the commercial shark fishery at this time. NMFS may consider a variation of this alternative in a future rulemaking.

Comment 15: NMFS received several comments regarding bycatch of sharks and non-target species. The comments include: Amendment 1 does not contain a comprehensive strategy to avoid and reduce shark bycatch, as mandated by law. For years NMFS has highlighted the shrimp trawl and menhaden purse seine fisheries as problem fisheries for shark bycatch, yet NMFS has not offered any suggestion on how to address these bycatch sources. NMFS must take action to address these continual problems. The non-targeted species and sub-legal bycatch that are routinely discarded as a result of indiscriminate gillnets and longlines is disturbing and a waste of our marine resources.

Response: Bycatch of sharks in trawl, set-net, and hook and line fisheries is discussed in Amendment 1. In this rule, NMFS specifically addresses shark bycatch in HMS fisheries by implementing several measures designed to reduce bycatch and bycatch mortality including: a time/area closure, VMS requirements for shark bottom longline and gillnet vessels, requiring the use of corrodible hooks, and requiring the possession of release equipment (line cutters, dipnets, and, when approved, dehooking devices). As described above, NMFS has also issued a bycatch implementation plan.

Comment 16: NMFS needs to examine the bycatch of sharks in monk fishing gear.

Response: NMFS will investigate the bycatch of sharks in a number of fisheries to determine if measures are needed to minimize shark bycatch and bycatch mortality.

B. Time/Area Closure

Comment 1: NMFS received several comments regarding the use of time/area closures in general. These included: NMFS should establish sanctuaries for all fish species. The entire fishery should be closed from January through July to protect pupping females and pups. NMFS should implement seasonal closures to longlines and gillnets in coastal nursery grounds to protect all shark species.

Response: The time/area closure is based on specific information from the shark bottom longline observer program that indicates a high proportion of prohibited dusky shark and juvenile sandbar sharks being caught off North Carolina from January through July. Closing the entire shark fishery from January through July is not warranted. The closure will afford some protection to all species that are caught on bottom longline gear during that time of year.

Comment 2: One commenter noted that NMFS should implement the time/area closure alternative that would close all shark nursing and pupping grounds based on EFH for neonate and juvenile sharks, in order to protect juvenile sharks from indiscriminate commercial gears. Alternatively, another commenter noted that they cannot support the blanket alternative for closing all pupping and nursery grounds because each proposal needs to be fully evaluated and based on acceptable understanding of stock status, life histories, and defined EFH for each species.

Response: NMFS considered an alternative that would close all pupping and nursery grounds, *i.e.*, nearly all coastal waters off the U.S. Atlantic coast and the Gulf of Mexico, but this final rule would implement a targeted time/area closure for a specific time period. Currently, there are insufficient data to support a closure of all EFH pupping and nursery areas. Moreover, a closure of all coastal waters would have had a severe economic impact on fishing communities.

Comment 3: Any delay in implementation of closures may undermine management objectives.

Response: Delayed effectiveness of time/area closures has been used in the past, and is a reasonable approach to allow fishermen to adjust to the regulations that affect fishing areas and to the potential economic changes incurred by a time/area closure.

Comment 4: NMFS should consider time/area closures to protect adult dusky sharks as well as juveniles.

Response: The time/area closure is based on information relating to all life stages of dusky sharks, including adults. The time/area closure is expected to reduce the catch of all dusky sharks by approximately 79 percent and adult dusky sharks by 65 percent.

Comment 5: Any closure that is considered should be imposed on all commercial and recreational shark gear.

Response: Recreational gears have the capability to release sharks alive, whereas many sharks, and dusky sharks in particular, have low survival rates when caught with commercial gear. This is due in part to the longer soak times required in the commercial fishery. Dusky sharks, for example, have an at-vessel mortality rate of 82 percent. If data in the future indicate adverse impacts from other gears, NMFS will consider closures for other gear types, including recreational.

Comment 6: The Environmental Protection Agency (EPA) recommends marine protected areas (MPAs) for overfished stocks; marine protected areas for sharks that exhibit territorial behavior in breeding would likely benefit.

Response: NMFS has selected an alternative that implements a targeted time/area closure to protect prohibited dusky sharks and juvenile sandbar sharks which are currently experiencing overfishing. This time/area closure is a type of MPA and is also an effective means to reduce fishing mortality and help rebuild stocks. Based on the best available scientific data, NMFS has taken steps to identify and protect EFH and Habitat Areas of Particular Concern (HAPCs) for both dusky and sandbar sharks. The time/area closure will prevent the catch of both pregnant females and neonates during the critical pupping stage.

Comment 7: Any regulations imposing a closure should have a clear scientific exit strategy to reduce and/or eliminate the closure when scientifically justified.

Response: NMFS agrees that closed areas should be re-opened when scientifically justified and will thus be reviewing the status of both dusky and sandbar sharks, the two species most affected by the time/area closure, in the near future. Based on the status of those stock assessments and other information regarding the effectiveness of the closure, NMFS may consider revising the size and scope of the closure, the duration of the closure, and potentially elimination of the closure.

Comment 8: NMFS received several comments specific to the proposed time/area closure. These comments included: Closing nursery areas has always been seen as one of the most beneficial management measures possible for sharks and has been recommended by nearly every shark stock assessment group assembled; thus we support the proposed time/area closure and NMFS efforts to work with the two Fishery Management Councils to protect important state nursery waters. NMFS should close the proposed mid-Atlantic region to bottom longline fishing from January through July to protect nursery and pupping areas.

Response: Time/area closures are an important tool in reducing mortality of prohibited species and juvenile life stages of sharks, and the current time/area closure will help to protect dusky sharks and rebuild sandbars sharks.

Comment 9: NMFS should look at the fish being sold; this will show that the fishermen are not selling small sharks. NMFS should look at the average carcass weight, not length.

Response: One of the principal reasons for the time/area closure was to protect prohibited dusky sharks, which are illegal to sell. Additionally, because dusky sharks do not mature until approximately 10 ft (3 m) fork length (FL), even large dusky sharks are considered juveniles. For years, the shark observer program and many other researchers have been collecting length data for sharks because many sharks are released without being landed and weights would be difficult if not impossible to collect. The length-to-weight relationship is used by scientists to determine the life stage and sexual maturity of most fish species, including sharks. Shark bottom longline observer data show high rates of neonate and juvenile sandbar sharks less than 137 cm FL being caught and landed in the winter fishery off of North Carolina. The 137 cm FL corresponds to the recreational minimum size limit for sharks which is 4.5 feet FL. It also corresponds to the female smallest size at maturity. For instance, one data series for the winter fishery off North Carolina in 2001 shows approximately 83 percent of 1,188 sandbar sharks observed caught were less than 137 cm FL, with an average length of approximately 120 cm FL. Sandbar shark pups are born from March to early August and measure about 60 cm FL at birth.

Comment 10: The information used to support the time/area closure is flawed because shark observers are mis-identifying dusky sharks.

Response: The commercial shark bottom longline fishery observers are trained to identify all species of sharks, including dusky sharks. NMFS acknowledges that some misidentification of sharks may occur, however, the preponderance of the data, including fishery independent data collected by researchers and trained biologists who participate in tagging efforts indicates that the area off North Carolina is a pupping and nursery area for dusky as well as sandbar sharks. NMFS did not rely solely on information from the shark observer program to make its determination for a time/area closure, but relies on many other data sources as well.

Comment 11: Dusky shark catches before 1999 should not be considered because we could not land them then; since 1999, our catch of dusky sharks has decreased.

Response: Since dusky sharks were prohibited in June 2000, the data from that point forward has been analyzed separately from earlier data in the final Amendment. However, it is also important to examine data prior to 2000 because it helps to establish the high rate of historical bycatch and the importance of the area as a pupping and nursery ground for both dusky and sandbar sharks. In analyzing the shorter time period, NMFS found that the number of dusky sharks being caught off North Carolina and elsewhere has declined since June 2000, but that a much higher percentage of dusky shark are observed caught in the time/area closure than in other areas, particularly when the relatively small size of the time/area closure is compared to all other open areas of the Atlantic and Gulf of Mexico.

Comment 12: We do not support the time/area closure at this time because of the significant economic and social impacts that would result in the affected fishing communities and the fact that the document does not sufficiently analyze the closure or enforcement of the closure. If done properly, a time/area closure can benefit all concerned; however, the proposed time/area closure is not reasonable. The decision to close the area seems to be driving the science.

Response: The original time/area closure proposed in the draft Amendment would have closed a large area (31,487 square nautical miles) and may have had severe economic and social impacts. Based on public comments, NMFS re-analyzed the data and proposed a revised time/area closure of 4,490 square nautical miles in part to mitigate social and economic impacts on fishing communities in

North Carolina. The revised time/area closure will still be effective at reducing dusky catch by 79 percent, and neonate and juvenile sandbar catch by 55 percent.

Comment 13: It is not clear if other measures are sufficient to rebuild sandbar and dusky sharks without the addition of time/area closures.

Response: Rebuilding of dusky and sandbar sharks is based on the combination of management measures including the reduction in quota, the time/area closure, gear restrictions that should reduce post-release mortality, and a minimum size on recreationally caught sharks. Without the time/area closure, NMFS would need to implement other reductions or restrictions in order to ensure that LCS are rebuilt within the necessary time frame.

Comment 14: NMFS received a number of comments regarding the depth of the closures. Comments included: most nursery grounds are in nearshore areas; closing areas 20 fathoms in depth to the shore should be suitable to protect neonates and juveniles. NMFS does not need to close areas out to the 200 mile limit unless the desire is to fiercely impact these shark fishing entities. Regions outside of 20 fathoms should remain open. We question any justification for closing anything other than state waters during pupping seasons. We cannot support closures inside of 10, 20, or any other fathom mark at this time.

Response: NMFS examined catches based on depth and found that both dusky sharks and juvenile sandbar sharks are caught at depths of up to 50 fathoms. Since large numbers of sharks appear to be caught in a line along the 50 fathom contour, a buffer of approximately two miles was included to extend the seaward boundary of the time/area closure to approximately 60 to 80 fathoms. The time/area closure is one of the few known areas where shark pupping and nursery grounds extend into Federal waters. It is also one of the only areas designated as a HAPC (for sandbar sharks) in Federal waters.

Comment 15: NMFS received several comments regarding the proposed time/area closure and the burden being placed on North Carolina fishermen. Comments included: Juvenile sharks are caught all along the coast and North Carolina fishermen are being targeted unfairly. If closures are needed to rebuild sharks, then fishermen in all states need to share the task, not just North Carolina fishermen. The time/area closure is payback for previous lawsuits by the commercial industry.

Response: Juvenile sharks are caught along much of the U.S. Atlantic and Gulf of Mexico coasts; however, the proportion of juvenile and neonate dusky and sandbar sharks being caught off North Carolina is substantially higher than in other areas. This is because the waters off North Carolina are pupping and nursery areas for these two species, and pregnant females, pups and juveniles aggregate in the area. EFH areas for both sandbar and dusky sharks, and HAPC areas for sandbar sharks have been designated off North Carolina. Data indicate that from 1994–2002, 1,099 or 79 percent of all dusky sharks were caught in the time/area closure from January through July. Of these, 1,016 or 92 percent were neonates or juveniles. Of the 12,445 sandbar sharks observed caught in the Atlantic from 1994–2002, 6,755 or 54 percent were caught in the time/area closure between January and July, of which 61 percent were juveniles and neonates. While there may be other nursery and pupping areas in coastal waters, this is one of the only areas where such a high proportion of neonate and juvenile sharks have been documented being caught in Federal waters.

Comment 16: The proposed time/area closure is absurd; the period should be April 1 through June 30 or maybe July 15. NMFS should not close the area for the entire time from January through July because most fishermen do not see any pregnant females in the area after mid-July.

Response: Data from the commercial shark observer program indicates that there are substantial numbers of juvenile and neonate sharks being caught in all months from January through July, not just from April through July. This is because in addition to being a primary pupping area from May to August, the area is also a secondary nursery and overwintering ground for young-of-the-year and juvenile sharks.

Comment 17: The five vessels with a history of landing most of the juvenile sandbar sharks should be given some options on how to catch bigger sharks.

Response: NMFS has not analyzed specific information regarding which vessels are catching small or large sharks, but has relied instead upon analysis of all data gathered in the time/area closure over various time periods to form the basis for the closure. Even if information were available to indicate that certain vessels were responsible for the majority of juvenile landings, options to remedy the problem would have to be made available to the entire fleet, not just selected vessels. Commercial shark fishery participants who fish in the area are encouraged to share information on fishing gears, methods, and locations that might reduce the catch of juvenile sharks. The intent of the closure is to reduce all interactions between commercial fishing operations and pupping and nursery grounds and hence reduce both the catch and mortality of dusky and juvenile sandbar sharks.

Comment 18: Shrimp nets catch more small sharks than the directed shark fishery in North Carolina.

Response: NMFS agrees that the shrimp fishery is responsible for large catches of SCS. The bycatch of SCS in the shrimp trawl fishery in the Gulf of Mexico has been documented and was taken into account during the latest 2002 SCS stock assessment which indicates that SCS are not overfished and overfishing is not occurring. While there may be benefits to the SCS stock as a result of the closure, the intent of the closure was to reduce the catch of juvenile sandbar sharks and prohibited dusky sharks.

Comment 19: If an area is closed, landings should not be allowed in states adjacent to the area no matter where the fish are harvested.

Response: NMFS does not agree that adjacent states should be closed as well, or that landings should not be allowed in adjacent states. The time/area closure is based on specific information about catches off North Carolina in a known pupping and nursery area. Although there are pupping and nursery areas in state waters, most notably Chesapeake Bay, Maryland, and Delaware Bay, Delaware, fishing effort there has historically been low. Additionally, most other areas adjacent to the closure off North Carolina are not known pupping and nursery areas and have a much higher proportion of adult sandbar sharks, and far fewer dusky sharks. NMFS is implementing VMS to aid in enforcement of the time/area closure. VMS will benefit fishermen by allowing them to traverse the closed area to offload.

Comment 20: The time/area closure will push more vessels into other areas such as the Florida East Coast. This combined with the regional quotas and trimester seasons will mean that all the vessels will be working for one sixth of the normal January opening quota. There is only a small area off of Florida where you can shark fish. If more vessels go to that area, there will not be enough room to set gear.

Response: The original time/area closure proposed in the draft Amendment would have closed all waters off North Carolina, and portions of Virginia and South Carolina to

commercial bottom longline fishing. Based on public comments that the catch of dusky sharks has declined in recent years, and that the time/area closure would have severe economic impacts on commercial fishing entities in those states, NMFS re-examined the data for the time/area closure, specifically by looking at a shorter time period of catches from 2001–2002. Based on an analysis of the data, NMFS revised the time/area closure to close the portion of the original time/area closure which had the highest catch rate of dusky and juvenile sandbar sharks. NMFS believes that the revised time/area closure will reduce the catch of dusky and juvenile sandbar sharks, while also mitigating the economic impact of the closure by allowing vessels to continue fishing in waters north and south of the time/area closure off North Carolina from January through July. This should prevent vessels from having to fish in Florida, and will allow the quota to be harvested over a larger area.

Comment 21: NMFS received several comments regarding how the proposed boundaries were established. Comments included: NMFS needs to improve the transparency in how the time/area boundaries were established and include maps of all observed trips and research cruises, not just observed takes of sandbar and dusky sharks.

Response: The final Amendment provides a more thorough explanation and justification for the boundaries established for the revised time/area closure. The seaward boundary of the revised area follows the 60 to 80 fathom contour, and was selected to include all observed catches of dusky sharks and sandbar sharks. No dusky or sandbar sharks were observed caught east of approximately 50 fathoms. Since large numbers of sharks appear to be caught in a line along the 50 fathom contour, a buffer of approximately two miles was included thus extending the boundary to 60 to 80 fathoms. The northern boundary was selected to include the HAPC for sandbar sharks off Cape Hatteras, and because areas north of Cape Hatteras have historically had low catches of both dusky and sandbar sharks. The southern boundary was selected based on low numbers of dusky sharks that have been observed caught there in recent years, and because the proportion of juvenile and neonate sandbar sharks is much lower there than in the time/area closure. In summary, the revised time/area closure will reduce the catch of dusky sharks by 79 percent versus 85 percent under the original proposal, and will reduce the catch of sandbar sharks by 51 percent versus 66 percent under the original proposal. Detailed maps of the revised time/area closure, all observed trips, and research cruises are provided in the final Amendment.

Comment 22: Why is Virginia closed? The marginal benefit of extending the closed area into Virginia does not appear as great as it would be off of Cape Canaveral, Florida. There appears to be another area of high sandbar and dusky abundance off central Atlantic Florida; NMFS should have proposed a similar closed area in that region.

Response: Based on public comments received, NMFS re-examined the data and concluded that the waters off Virginia did not warrant being closed at this time. The time/area closure boundary has been revised to include only waters south of the HAPC off Cape Hatteras. For the area near Cape Canaveral, Florida, NMFS found that the area accounted for only 8 percent of the observed dusky shark catch from 1994–2002, and less than 14 percent of sandbar sharks, of which a very high proportion were adults. Given the low percentage of catch of prohibited dusky sharks from this area, and the high proportion of adult sandbar sharks, NMFS did not feel it was appropriate to close the area at this time.

Comment 23: NMFS must adopt the alternative that would establish a time/area closure for smalltooth sawfish critical habitat. The smalltooth sawfish is the first marine fish to be listed under ESA, and although critical habitat has not yet been designated, NMFS should act immediately.

Response: NMFS does not have the basis for implementing a time/area closure for smalltooth sawfish at this time. Without information about smalltooth sawfish critical habitat, NMFS does not have sufficient information to identify an appropriate time/area closure. Once a recovery plan is developed and critical habitat identified, NMFS will reconsider a closure to protect smalltooth sawfish.

Comment 24: The depths on the maps depicting the time/area closure are incorrect.

Response: NMFS has provided updated maps showing the correct bathymetry in the final Amendment.

Comment 25: NMFS needs to compare the number of dusky shark takes in the commercial and recreational fisheries. MRFSS data are not credible.

Response: NMFS has provided estimates of the number of dusky sharks caught in the commercial and recreational fisheries in the final Amendment. The estimates show that the number of dusky sharks caught in the commercial fishery was considerably higher (18,867) than in the recreational fishery (5,570) in 1999, but that the recreational fishery may have caught more dusky sharks in 2000–2001 (8,100 vs. 6,063). MRFSS data are not the only data used in calculating recreational catch estimates. Other data are obtained from the NMFS Headboat Survey (HBOAT) and the Texas Parks and Wildlife Recreational Fishing Survey (TXPWD).

Comment 26: The proposed time/area closure splits South Carolina. How will enforcement enforce the regulation?

Response: The revised time area closure is located entirely off the coast of North Carolina and enforcement should no longer be an issue off South Carolina. Other time/area closures have been implemented that did not fully encompass a state's waters, and NMFS utilized VMS to ensure the effectiveness and enforcement of the closures. NMFS intends to implement VMS for the current time/area closure as well. VMS will have the added benefit of allowing vessels to transit the closed area.

5. Other Management Measures

A. Deepwater and Other Sharks

Comment 1: NMFS received a range of comments regarding the alternatives for the deepwater and other species group. The comments include: Deepwater sharks should be protected. Because there is little practical effect of leaving or removing them from the management unit, deepwater and other sharks should be left in the management unit. Leaving the deepwater and other sharks in the management unit could decrease the time needed to act, if necessary. Deepwater and other sharks should remain in the management unit because if any fishery should develop, it could take years to create an FMP following section 305(a) of the Magnuson-Stevens Act in terms of gear evaluation and notification of entry. We support the preferred alternative. NMFS should continue to collect data on these species until such a time that they can be assessed or until a potential fishery develops. If needed, NMFS should move to put them back in the management unit to protect them.

Response: Maintaining data collection only on the deepwater and other sharks is sufficient because there are not significant landings of the species in this group and no known fishermen target these species. If directed fisheries were to start, NMFS would evaluate data available at that time to see if an FMP amendment or other regulatory measures would be warranted.

Comment 2: Fishing for deepwater and other sharks should be prohibited

because they are more likely to be overfished than coastal sharks.

Response: At this time, there are no known fishermen targeting deepwater and other sharks. Prohibiting these species would be precautionary, but it may not significantly reduce mortality because these species are only caught rarely in non-HMS fisheries. Further, prohibiting landings of these species in HMS fisheries could reduce the availability of important data on them.

Comment 3: To the extent that deepwater sharks are a target of fisheries in the Caribbean, the complex should be assessed and managed.

Response: NMFS will assess this species group when more biological and fishery information becomes available.

Comment 4: Deepwater and other sharks were added to the management unit not only to ban their finning, but also to preclude possession of species that may be vulnerable to overfishing and to help prevent development of directed fisheries or markets for uncommon or seriously depleted species.

Response: The species added to the prohibited species group in the HMS FMP were added because they were known to be vulnerable to overfishing, uncommon, or seriously depleted. The deepwater and other group was included in the management unit only to prohibit finning of these species. No other regulations were placed on this group (*e.g.*, no permitting or reporting requirements). Presently, the only protection afforded under the HMS FMP, a ban on finning, is now afforded nationally under the Shark Finning Prohibition Act (February 11, 2002, 67 FR 6194). Given the national protection, maintaining data collection only on these species is sufficient at this time.

B. Prohibited Species

Comment 1: Fishermen should be fined $10,000 for every prohibited species they capture.

Response: Currently, the possession and landing of prohibited species is illegal. Penalties and fines vary with the severity of the infraction. At this time, NMFS does not believe a $10,000 fine for capturing a prohibited species would be appropriate under all circumstances.

Comment 2: NMFS received a range of comments stating that dusky sharks should be removed from the prohibited species list in order to determine where and how many are caught. Alternatively, some commenters stated that NMFS should not remove dusky sharks because they have suffered a severe population decline and all measures to reduce mortality should be imposed.

Response: Dusky shark catch rate data indicate large population declines since the early 1970s. Dusky sharks have a high bycatch mortality, approximately 80 percent, and are usually dead when gear is retrieved. Although commercial shark fishery observer data shows that dusky sharks comprise approximately one percent of total catch in recent years, removing dusky sharks from the prohibited species list could result in increased mortality of this overfished species by allowing the retention of individuals that may otherwise be released alive. NMFS determined that removing dusky sharks from the current prohibited species group would likely have significant ecological impacts.

Comment 3: NMFS received several comments regarding the addition of the deepwater and other species to the prohibited species group. The comments include: Because they are slow growing and because new fisheries can spring up and deplete populations before action can be taken, deepwater and other sharks should be added to the prohibited species list. Removing deepwater and other sharks reduces the chances for conserving slow growing deepwater sharks. NMFS continues to assert the lack of a fishery for deepwater sharks and yet has failed to reconcile their previous finding in the National Plan of Action for Reducing Fishing Capacity that deepwater sharks are overcapitalized.

Response: NMFS determined that adding the deepwater and other species to the prohibited species group would likely have only minor positive ecological impacts. Prohibiting these species takes a precautionary approach, but may not significantly reduce mortality because these species are only caught rarely in non-HMS fisheries. Further, prohibiting the landing of these species in HMS fisheries may limit the availability of data pertaining to them. If directed fisheries started, NMFS would evaluate data available at that time to see if an FMP amendment or other regulatory measures would be warranted. The draft National Plan of Action for Reducing Fishing Capacity stated that deepwater sharks are overcapitalized. NMFS believes the deepwater and other species were given this designation because the management group was included along with other shark management groups which are overcapitalized. The Highly Migratory Species Management Division has recommended that this finding for the deepwater and other species be amended because there are no known fishermen who target these species.

Comment 4: We support adding finetooth sharks to the prohibited species list. Possession should be prohibited until effective management measures to stop overfishing are implemented.

Response: NMFS analyzed an alternative that would add the finetooth sharks to the prohibited species group, but determined that this alternative would likely have limited positive ecological impacts as finetooth sharks are common bycatch in non-HMS fisheries and prohibiting them in HMS fisheries will not prevent their capture. Additionally, finetooth sharks are not overfished and are commonly caught in HMS fisheries. As such, finetooth sharks do not appear to meet the criteria established in the selected alternative. As described in Amendment 1, NMFS will take a long-term approach of identifying where finetooth sharks are caught and work with the appropriate Fishery Management Council to reduce fishing effort, as appropriate.

Comment 5: NMFS received several comments regarding the preferred alternative for prohibited species. The comments include: We support the proposed alternative for prohibited species. We support the proposed alternative but recommend removing the criterion of rarity in LCS catch. If a species is commonly caught in the LCS fishery, but is depleted and warrants protection according to the biological criteria, then the species should be prohibited. We support the proposed mechanism but note that the criteria and procedures in the draft Amendment 1 require further investigation and clarification regarding appropriateness before finalization. We support the proposed mechanism but suggest that the criterion for adding and removing species be separated because the action may be contrary.

Response: NMFS believes the mechanism for adding and removing species to and from the prohibited species list and the associated criteria are appropriate for addressing the biological needs of individual shark species. In regard to concern over the second criterion, a species may be rarely caught in HMS fisheries but stock assessments show few signs of depletion (*e.g,* HMS gear types are not efficient at catching the shark species or the species is caught in areas not fished by HMS fishermen). Before any species is added or removed from the list, NMFS would issue a proposed and final rule that fully describes how and if the species meets the criteria. If adjustments to the criteria are found to be needed in the future, NMFS can modify the criteria in a future rulemaking.

Comment 6: NMFS should return to the original five prohibited species. All

LCS should be assessed. If they remain on the prohibited species list, NMFS will not have the data they need to assess them. Similarly, we support the proposed mechanism but NMFS should also remove any species that are logically not likely to be overfished (*e.g.*, rarely caught species).

Response: The 1997 prohibition on the possession of whale, basking, sand tiger, bigeye sand tiger, and white sharks within Federal waters was a precautionary measure developed to ensure that directed fisheries did not develop for these species. These five species were identified as highly susceptible to over exploitation. In 1999, the HMS FMP prohibited the retention of the remainder of the prohibited species because they were known to be vulnerable to overfishing, uncommon, or seriously depleted. Although the preferred alternative includes a mechanism and lays out criteria for the inclusion and removal of species from the prohibited species group, NMFS does not believe any changes to this group are warranted at this time. Each species will be considered on a case by case basis in future rulemakings. In the 2002 LCS stock assessment, there was sufficient information to assess the LCS complex as a whole, and sandbar and blacktip sharks individually. NMFS will assess individual species as more biological and fishery information become available.

Comment 7: If the proposed mechanism is finalized, what type of request would we be required for NMFS to start rulemaking to remove species?

Response: NMFS would require a petition for rulemaking to alter the prohibited species list. A petition for rulemaking should contain sufficient information for NMFS to consider the substance of the petition. For a petition regarding changes to the prohibited species list, the petition should, at a minimum: (1) Indicate what species are requested to be added to or removed from the list; (2) identify how the criteria warrant the addition or removal of the species; (3) provide data and other information relevant to those identified criteria; (4) state if additional research may be necessary to develop the requested change; (5) explain the interest of the petitioner or other stakeholders regarding the requested change; and (6) explain the importance of the action requested to promoting established NMFS' priorities and policies.

Comment 8: If the proposed mechanism is finalized, will NMFS conduct an annual assessment regarding which species will be placed on the prohibited species list?

Response: NMFS will assess individual species as additional data becomes available and not necessarily on an annual basis.

C. EFPs

Comment 1: We support the preferred alternative as long as NMFS maintains some accountability on how the sharks are used, particularly the prohibited species. Any demographic information for age, growth, and offspring that evolves from aquarium use should be provided to NMFS annually for use as a comparative database for life history analyses versus wild stocks.

Response: NMFS maintains an EFP database which accounts for each highly migratory species requested, authorized, taken/collected, and/or tagged under an approved EFP. As for data reporting, each permitted individual is required to submit interim reports throughout the calendar as well as submit an annual report documenting the amount, composition, and disposition of the catch as well as information pertaining to fishing activities. Additionally, NMFS has finalized a rule that amends HMS reporting requirements under EFPs (68 FR 63738, November 10, 2003). Additional issues regarding EFPs and Display permits may be addressed in a future rulemaking.

Comment 2: We support a separate display permitting system, apart from research or EFPs. NMFS should overhaul the EFP system and establish separate classifications of permits for each specific use (*e.g.*, public display, research, and other exempted activities).

Response: NMFS agrees and is establishing display permits in this rule. Other purpose classifications of exempted fishing permits may be addressed in future rulemakings.

Comment 3: NMFS received several comments regarding the issuance of permits. Comments included: NMFS should not issue any more permits for scientific research. Background checks should be made of all permit holders; anyone with previous violations of any kind should be denied a permit. Requests for EFPs and SRPs need to be fully evaluated, taking into consideration past performance and other background, particularly for species that are already critically overfished.

Response: Valuable information is gathered from activities under scientific research permits (SRPs) that would otherwise be prohibited. For example, SRPs have facilitated the collection of life history, migration, and age and growth information from prohibited shark species. As noted above, NMFS recently amended the reporting regulations for EFPs and SRPs and will be investigating additional improvements in the permitting processes.

Comment 4: Fishermen catching sharks for display purposes should be required to have a purchase order from an aquarium in hand before going out. Annual follow-up investigations to the aquarium should be made to ensure that the shark is cared for properly. If someone is caught without a purchase order, the fine should be $10,000 per shark.

Response: NMFS will be investigating these issues further in a future rulemaking.

Comment 5: Several changes are needed to the EFP process including incorporating more public comment into the EFP allocation process and letting the public know what the final decision is and what the environmental impacts are of its decision.

Response: NMFS will be investigating alternatives to improve the process in a future rulemaking and notes that information on the types of and number of permits issued are presented in the annual Stock Assessment and Fishery Evaluation (SAFE) reports.

Comment 6: Efforts should continue with the Atlantic States Marine Fisheries Commission (ASMFC) regarding coordination between state and federal permits. There often appears to be too many permits and too little oversight.

Response: NMFS supports continuing dialogues with the ASMFC regarding coordination between state and federal permits and has been working on improving its own database and collection methods, in part, to improve communication between NMFS and state agencies.

Comment 7: While criteria for each EFP may vary, there should be uniform standards of performance, reporting, and accountability that are equally applicable to fishermen, aquariums, researchers, and educational institutions. Implementation of measures to ascertain the educational need justifying the harvest of these animals and improving reporting should be investigated.

Response: NMFS will be investigating these issues further in a future rulemaking.

6. Essential Fish Habitat Update

Comment 1: EPA recommends including a discussion on whether shark EFH is being affected by other fishery practices. For example, if shark EFH is protected by limiting clamming or

trawling in coastal bays, then the fishery may support higher quotas.

Response: Because sharks use both estuarine and coastal inshore habitats, their EFH may be negatively impacted by fisheries that target species other than sharks. These fisheries may be either state or Federally managed. In particular, shark pupping and nursery habitats may be subjected to fishing impacts from gears of other fisheries, *e.g.*, shrimp trawling, but the degree of overlap between the various trawl fisheries and shark EFH, the extent to which habitat is altered by these gears, and the resulting impact on EFH are currently not known. Further research would be required to determine habitat-related production rates for sharks (the highest, most refined level of information available with which to identify EFH, and which is currently not available for sharks) and the potential impact of other fisheries on these production rates. Even if clamming or trawling were limited in some way to reduce impacts on shark EFH, the decision to raise quotas would only be made after appropriate stock assessments were conducted to determine whether the status of the stock had improved as a result of the conservation and enhancement actions.

Comment 2: NMFS should identify EFH based on the entire geographic range of the species.

Response: The EFH final rule recommends distinguishing EFH from all habitats potentially used by a species (50 CFR 600.815(a)(1)(iv)(A)). NMFS considered identifying EFH based on the entire geographic range of the species, but because specific information from scientists, observers, and tagging programs was available, decided to identify EFH more precisely based on observed distributions and knowledge about habitat requirements of individual species. The final action identifies EFH based on an initial analysis of 100 percent of the observed distribution, which may then either be expanded or reduced based on the status of the stock. If new information is not available, the existing EFH identifications would be maintained. The basis for this alternative is to provide flexibility to increase or decrease the extent of EFH based on the status of the stock. Since overfished resources are considered to be at greater risk, the percentage of habitat identified as EFH for overfished species would be greater than that of fully fished or not overfished species. Identifying the entire range could potentially have resulted in inclusion of the entire EEZ for certain species, which would include more than the range of areas necessary for spawning, feeding, breeding and growth to maturity as defined in the EFH regulations. Areas currently identified as EFH in Amendment 1 are based upon the best available science and represent the most accurate identification of EFH.

Comment 3: We support the use of the preferred alternatives to identify EFH as specifically as possible and the use of data to increase or decrease the identifications for each species.

Response: The final action provides an objective way of identifying EFH, and allows for the expansion or contraction of EFH based on the status of a particular species or life stage. For example, for overfished species, 90 percent of the range of distribution could hypothetically be identified as EFH, and for a species that is not overfished, 75 percent of the range of distribution might be identified as EFH.

Comment 4: Sandbar shark EFH should include areas in the northern Gulf of Mexico.

Response: Current sandbar shark EFH for all life stages includes areas in the northeastern Gulf of Mexico from Key West, Florida, as far west as Cape San Blas, Florida, on the Florida Gulf coast at 80° 15′ North, including Apalachicola Bay, Florida. NMFS did not have sufficient information to include areas farther west at this time.

Comment 5: NMFS should work with Mexico and Cuba to include their waters as EFH. Twenty percent of all dusky shark tags are returned from Mexico after having been tagged in the mid-Atlantic region. Expanding EFH would help present all information possible about EFH throughout the immediate range.

Response: Habitats that satisfy the criteria in the Magnuson-Stevens Act and the EFH regulations have been identified and described as EFH; some additional habitats may lie outside the U.S. EEZ, and therefore cannot be identified as EFH under the Magnuson-Stevens Act. Instead, these areas may be highlighted as particularly important habitats and actions that may adversely affect the habitat may be addressed through international agreements as recommended in the EFH regulations (50 CFR 600.805(b)(2)). The U.S. has engaged in discussions with Mexico regarding fisheries issues in the past, and met again October 22–24, 2003, for U.S. Mexico Bilateral Consultations in Mazatlan, Mexico. Currently the U.S. does not have diplomatic relations with Cuba, and working cooperatively to determine shark habitat in Cuban waters would be difficult.

Comment 6: The Amendment discusses changes to EFH based on human impacts but does not discuss natural impacts such as red tide or rising temperatures.

Response: Both red tide and rising temperatures may influence EFH. Red tides may have a short term impact by altering distribution of organisms, and temperature rise may have a long term influence by changing the distribution and abundance of predators and prey, benthic and water column habitat characteristics, and a host of other related issues. Red tides and rising temperatures have been linked to human activities, and as such, the final Amendment includes conservation measures that could reduce the runoff of coastal pollution which may influence or exacerbate red tides, and discusses many other influencing factors that are land-based and may have an impact on coastal waters and EFH.

7. The Stock Assessments and the Status of the Sharks

Comment 1: NMFS received a range of comments regarding the current abundance of sharks. One commenter noted that a research scientist told him that there are plenty of sharks and that the scientist has seen more in his research this year than in other years. Another commenter noted that he no longer sees as many large coastal sharks as he used to and that shark harvesting should be stopped.

Response: Because of a number of factors including, but not limited to, environmental changes, the gear used, the random sampling scheme used, and past experience of the fisherman, the number of sharks seen by one person or in one year of a time series compared to other years or other people can vary. The models used in the 2002 large and small coastal shark stock assessments take this variation into account when examining the data provided by fishermen and scientists and are considered to be the best available science and an appropriate basis for management action.

Comment 2: How could blacktip sharks be overfished in 1998 and now be rebuilt?

Response: As a result of a settlement agreement with commercial fishermen, NMFS had the 1998 LCS stock assessment peer reviewed. Those reviews found that the scientific conclusions and recommendations in the 1998 stock assessment were not based on scientifically reasonable uses of appropriate stock assessment techniques. As a result of these peer reviews, NMFS went back to the 1998 stock assessment and conducted a number of sensitivity analyses on the data and the models used at that time.

These analyses found that the data and models used for blacktip sharks were particularly sensitive to a number of factors and that changing some of the factors could lead to results that indicated the stock was either rebuilt or was well below sustainable levels. The sensitivity of the results (to computational issues) was largely attributed to the CPUE series within the analyses, which showed contradictory trends. As a result of these sensitivity analyses, before the actual 2002 stock assessment was conducted, scientists and other stakeholders examined each time series and model available and determined which ones were the most appropriate for use. Given these decisions on data inputs and modeling approaches, the condition of blacktip sharks was determined to be rebuilt. The peer review of the 2002 LCS stock assessment found that the models and data used were appropriate.

Comment 3: Given the short period of shark management and the long time required for sandbars to attain maturity, the assertion that sandbar sharks are restored is something of a scientific miracle. Sandbar sharks used to be so common in the mid-Atlantic that they could be counted upon to save almost every summer shark trip. After a few years of intense commercial shark fishing, that species was practically wiped out. We still do not see them.

Response: The latest LCS stock assessment constitutes the best scientific information available. It was conducted by some of the most respected shark and stock assessment scientists in the United States and, as is attested by the results of the peer review, used state-of-the-art models. Additionally, the data and models used in the stock assessment were examined and debated by scientists, environmentalists, and fishermen in a stock evaluation workshop before the stock assessment itself. The assessment found that sandbar sharks are no longer overfished but are experiencing overfishing. It is important to note that a change in status from overfished to rebuilt does not mean that the population is restored to levels of an unexploited or lightly exploited population. In general, a fish population that is capable of producing MSY on a continuous level (*i.e.*, a population that is not overfished) is roughly half that of an unexploited population. Thus, NMFS would not expect sandbar shark catch rates to return to the catch rates that occurred at the start-up phases of either the recreational or commercial fisheries.

Comment 4: How can a species have overfishing occurring but not be overfished?

Response: Overfishing relates to the rate of fishing mortality and indicates that the standing stock is being reduced because removals exceed the capacity of the stock to replace itself. Fishing pressure or fishing mortality needs to be reduced on a species that is experiencing overfishing or the species will become overfished. A species is overfished if the biomass or the number of fish in the population is too low to produce the desired level of harvest on a continuing basis. In the case of an overfished species, fishing mortality must be reduced in order to keep more individuals in the population and contributing to reproduction. An overfished population cannot rebuild unless overfishing is stopped.

Comment 5: NMFS received several comments regarding the accuracy of species identification and its impact on data quality and the accuracy of stock assessments. Comments included: NMFS needs to improve species identification and reporting by shark dealers. The data you are using is wrong because fishermen have normally listed everything as a ''sandbar shark.'' NMFS should work within the Atlantic Coastal Cooperative Statistics Program (ACCSP) to better standardize fishery-dependent survey data collection and address the tendency of dealers to simply categorize shark landings as ''sharks.''

Response: Since 1993, species-specific reporting has been required. However, some fishermen and dealers still report sharks as ''shark'' or as ''large coastal.'' Both the small and large coastal shark stock assessments use a variety of data including fishery-dependent (*e.g.*, self-reported data such as logbooks) and fishery-independent data (*e.g.*, research cruises with a set sampling scheme). While some fishermen or dealers may report the incorrect species on logbooks, other fishermen and dealers do report the correct species, as is required by the regulations, and observers or scientists trained in species-identification report the correct species level data. Both stock assessments conducted numerous sensitivity analyses to examine what happens to the results of the models if only relative abundance data reported by fishermen or only data reported by scientists are used. The overall results of the stock assessments consider these sensitivity analyses and constitute the best scientific information available at this time. Recognizing that the accuracy of stock assessments and management can be improved with correct species-identification, NMFS will be releasing a species-identification guide shortly and will be examining, in a future rulemaking, methods of requiring mandatory workshops for both commercial and recreational fishermen in order to improve, among other things, species-identification. NMFS continues to work within the ACCSP and other relevant forums to improve the reporting process of shark data.

Comment 6: How independent were the peer reviews?

Response: For the 1998 and 2002 LCS stock assessments, Natural Resources Consultants, Inc. (NRC) hired several non-NMFS scientists to conduct the peer review. These non-NMFS scientists provided information to show they had no conflict of interest. NMFS provided NRC with all the supporting documentation the scientists required such as copies of the stock assessment and the related documents. However, pursuant to a court-approved settlement agreement, NRC did not disclose the identities of the peer reviewers to fisheries management staff at NMFS until after the reviews were complete.

Comment 7: All shark fishing should be stopped. The PEW Report and other reports by independent, unbiased scientists indicate that overfishing is occurring. NMFS is not accurate when it says ''sandbar sharks are no longer overfished.''

Response: As explained above, the current LCS stock assessment underwent an independent peer review and is the best available science on the status of the stocks.

Comment 8: NMFS received a range of comments regarding the menhaden fishery and shark bycatch. These comments included: The menhaden fishery catches a lot of sharks. Does NMFS incorporate bycatch information from the menhaden fishery in the stock assessment? NMFS should monitor and control the bycatch in the menhaden fishery.

Response: The Gulf of Mexico menhaden purse seine fishery does have some bycatch of sharks. It is estimated that approximately 75 percent of the sharks encountered in the fishery die, and 97 percent of the sharks encountered are LCS while 3 percent are SCS. The 2002 LCS stock assessment included these discard estimates for LCS, blacktip, and sandbar in the Gulf of Mexico menhaden purse seine fishery from 1981 to 2001. Additionally, different sensitivity analyses were conducted to determine how much the results would change if data extended back to 1964. Results from those sensitivity analyses indicated that extending the series of menhaden discard estimates back in time had almost no effect. NMFS will continue to work with the Gulf States Marine Fisheries Commission and the Gulf of

Mexico Fishery Management Council to monitor the situation and, as needed, examine methods of reducing bycatch of sharks in this fishery.

Comment 9: The two species that have been assessed outside the LCS complex have been shown to be not overfished; NMFS needs to assess the other 20 LCS species to find out what their status is. All LCS, except sandbar and blacktip sharks, are considered overfished. Some of these species are rare event animals in the ecosystem; they have never, nor will ever be, overfished because they cannot be targeted in U.S. waters. These species should not be considered overfished. Despite 10 years of management, NMFS has failed to conduct species-specific assessments for all LCS. Similarly, some of the prohibited LCS, such as bigeye sand tiger and narrowtooth sharks, are listed as overfished but should not be. These animals are rarely caught or found in U.S. waters.

Response: NMFS continues to collect species-specific data in support of species-specific stock assessments. To date, NMFS has conducted individual stock assessments for sandbar, blacktip, Atlantic sharpnose, finetooth, blacknose, and bonnethead sharks. As additional biological and fishery-related data become available, NMFS will conduct other species-specific stock assessments. As noted in the 2002 LCS stock assessment, NMFS plans to conduct a dusky shark stock assessment in the near future. Until that time, NMFS must use the best available data to conduct stock assessments. For many species of sharks, this means conducting group stock assessments of the entire complex. These results indicate that some species in the LCS complex are in apparent decline while other species are not. Until stock assessments can be conducted on individual shark species, NMFS is implementing a mechanism that uses a number of criteria to determine if the species should be on the prohibited species list. If a species, such as narrowtooth sharks, is rarely caught but does not meet the other criteria, such as sufficient biological data to indicate a decline, then the species can be removed. However, if the species is rarely caught because its stock is depleted, the species would be added to, or maintained on, the prohibited species list.

Comment 10: NMFS' dusky data is incorrect and is not a true indicator of what is being caught. Juvenile dusky sharks are not caught off the east coast of Florida. Only giant dusky sharks were reported in logbooks in the past.

Response: The data collected on dusky sharks is from a variety of sources including fishermen, dealers, observers, and scientists. While there may be some problems with species identification on the part of those individuals not trained, observers and scientists who have been trained to identify sharks do provide species level data. These data indicate that juvenile dusky sharks (dusky sharks do not mature until they are approximately 10 ft (3 m) FL) are caught off the east coast of Florida.

Comment 11: NMFS received several comments regarding the assessment results for finetooth sharks. Comments include: The data on finetooth sharks is flawed; I only land a few and there is only a small area where they are caught. Assessments for finetooth sharks can be improved with better landings and bycatch information. NMFS states that overfishing is occurring for finetooth sharks because of excessive bycatch, yet according to the SCS stock assessment, no bycatch numbers were used in the model; NMFS should improve the data on finetooth sharks.

Response: Results for finetooth sharks are uncertain, possibly due to limited catch and CPUE series, lack of bycatch estimates, and no catches reported in some years. NMFS is also examining which fisheries are actually landing the majority of the finetooth sharks. The majority of finetooth shark landings come from gillnets in the South Atlantic fishery; however, observer data indicate that the gillnet vessels that are known to be targeting small coastal sharks, including finetooth sharks, do not land as many finetooth sharks as are reported. Given the uncertainty of the results of the models and the need to collect information on these non-HMS fisheries that are landing finetooth sharks, NMFS intends to prevent overfishing of finetooth sharks by improving species-identification, particularly by recreational fishermen, and working with the Fishery Management Councils to identify and improve monitoring of fisheries that land finetooth sharks.

Comment 12: NMFS received several comments regarding future assessments. Comments included: NMFS should use an assessment protocol similar to the South Atlantic Fishery Management Council's Southeast Data and Assessment Review (SEDAR) process for future stock assessments. Species level assessments for several of the primary LCS species need to be developed as soon as possible. NMFS needs to schedule LCS and SCS stock assessments for 2004 to prepare plans for future shark issues of importance. An assessment for the pelagic shark group needs to be completed as soon as possible.

Response: The process for conducting shark stock assessments continues to evolve and improve over time. As new data and techniques become available, NMFS makes every effort to examine the possibility of using those data and techniques for assessing the status of sharks. Additionally, NMFS considers and will continue to consider the process of other fisheries stock assessments and the needs of the fishing communities to improve the overall stock assessment process. Under the HMS FMP, NMFS committed to hold stock assessments for each complex every two to three years. At this time, NMFS has not yet decided when the next SCS or LCS stock assessments will be conducted. However, NMFS will make every effort to ensure interested parties can attend the shark evaluation workshop. As for pelagic sharks, because of their migratory nature, NMFS is working with ICCAT to collect data and conduct an international stock assessment of several species of pelagic sharks. That stock assessment should occur in 2004.

Comment 13: NMFS should make efforts to document fully landings in Mexican waters and to work with that country in coordinating shark management.

Response: NMFS agrees and is working through international means and with Mexican scientists to improve communication and facilitate the exchange of data.

8. Economic Impacts

Comment 1: NMFS received several comments regarding the range of economic impacts that should be analyzed. Comments included: NMFS should focus on the probability of extinction of sharks instead of the economic impacts on commercial fishermen. NMFS should not focus on the economic impacts on commercial fishermen but on U.S. citizens as a whole.

Response: In this rulemaking, NMFS considered the status and biology of the stock, the ecological impacts of management measures, and social and economic impacts, as required under the National Environmental Policy Act, 1969 (42 U.S.C. 4321 *et seq.*), Regulatory Flexibility Act, 1980 (5 U.S.C. 601 *et seq.*), Small Business Regulatory Enforcement Fairness Act, 1996 (5 U.S.C. 801 *et seq.*), Regulatory Planning and Review, 1993 (Executive Order 12866), and Proper Consideration of Small Entities in Agency Rulemaking, 2002 (Executive Order 13272). NMFS conducted economic and ecological analyses in an EIS, Initial Regulatory Flexibility Analysis (IRFA), Final

Regulatory Flexibility Analysis (FRFA), and a Regulatory Impact Review (RIR), which document economic impacts on the affected fishery, small entities, and the nation as a whole.

Comment 2: The revised quotas will put fishermen out of business. The current quotas are good and the overall fishery is improving.

Response: According to the 2002 LCS stock assessment, the LCS complex is overfished and overfishing is occurring (Cortes, 2002). As such, the 2002 stock assessment recommends that adjustments to quotas be made in the form of percent reductions in catch. Economic analyses indicate that the LCS quota was worth $2,895,521 in 2001 under the baseline for comparison (*i.e.*, 1,285 mt dw). Implementation of the preferred alternatives will result in a 21-percent reduction in total gross revenues for both the fishery as a whole as well as small entities. If NMFS did not act, the quotas from the 1999 HMS FMP, which are 20-percent lower than the LCS quotas finalized in this rule, would go automatically into place and result in a 24-percent reduction in total gross revenues for both the fishery as a whole and small entities.

Comment 3: The combination of the classification for LCS and quota basis would stabilize some of the economic impacts that have unfolded upon the directed shark participants since 1997 due to regulations and inadequate science.

Response: While the combination of the final actions would increase total gross revenues by 33 percent to both the fishery as a whole as well as small entities, this economic benefit may be short-lived if the fishery continues to decline as a result of substantial increases of regulatory discards that are anticipated with multiple closures in a mixed LCS fishery. Fishermen would likely need to increase effort in order to make up for lost catches during partial closures, which may result in increased protected resource interactions and mortality on non-targeted species. Moreover, longer sorting times per set are likely to increase opportunity costs to fishery participants. Additionally, lengthening of trips may occur in order for fishermen to compensate for lost catches during a partial closure. Increased time at sea reduces the profits fishermen gain due to increased costs for fuel, bait and ice, and could raise safety at sea concerns if fishermen fish longer or harder to counteract for lost revenues.

Comment 4: The regional quotas and estimates of catches by region are flawed and will put North Atlantic fishermen out of business. This regional quota and a trimester approach will give the North Atlantic 1.3 percent of the quota or 14.4 mt dw for each season. This is not sufficient to maintain a crew.

Response: NMFS combined information from two separate databases containing regional landings information as reported by dealers and states to NMFS. The landings information represent the best available information pertaining to regional data. Given that regional quotas seek to maintain historical landings, as opposed to reducing landings, NMFS does not expect that regional quotas would change previous fishing practices or result in any significant economic impact. To the extent that the LCS quota itself is being reduced, fishermen in all regions will likely have reduced landings. However, NMFS believes that having more open seasons (*i.e.*, three as opposed to two) and spreading the open seasons out more evenly, will result in greater economic stability for fishery participants, including crew members. Additionally, over time, regional quotas may allow NMFS the flexibility to manage quotas to each region's maximum economic advantage.

Comment 5: NMFS received a range of comments regarding the economic impact of a trimester approach. Comments include: We cannot support the trimester season approach because it would hurt the market and because it could have economic costs for fishermen who would need to switch their gear types three times a year instead of two times. Grocers need at least a month to develop their advertising and know their potential supply and price; a trimester approach would not give enough time for grocers to advertise. I like the trimester approach because it would allow for more advertising and therefore a higher price. I do not need to switch my gear because I use the same gear for grouper, sharks, and tuna. NMFS, as part of the Department of Commerce, should be more sensitive to seafood markets and should know that changing the seasons from biannual to trimesters will cause extreme harm to the established market routine for sharks.

Response: NMFS recognizes that trimesters may take time for fishermen and associated communities (*e.g.*, dealers, processors, retail agents) to adapt to, given that new markets will need to be established at different times of the year. Fishery participants will need time (*i.e.*, between two weeks and a month) to work with grocers to advertise shark products and under trimester seasons the time available for such advertisements may be further limited, as compared with the no action alternative. Additionally, since fishermen may be able to land sharks at the same time as other fish, there could be fluctuations in markets for other fisheries. Spreading open seasons out more evenly over the calendar year could, in the long-term, result in greater economic stability for fishermen and associated communities because the amount of time between open and closed seasons would be reduced and sharks would be available in the market more frequently throughout the year. In order to reduce the economic impacts associated with trimesters, NMFS will implement a delay in effectiveness to give fishery participants an opportunity to work with dealers and grocers to enhance markets and advertising solutions in advance of season openings. NMFS also recognizes that variation in open seasons could result in short-term social and economic burdens, given that fishermen will need to adjust fishing practices, including but not limited to, re-rigging gear more often to fish for shark, as opposed to other species, during what would otherwise be a closed season. Social and economic costs associated with switching gear more often may be minimized, if shark fishery participants use the same gear in other fisheries (*e.g.* similar gear is used to fish for shark, grouper, and tuna). Trimester seasons are preferred to quarterly seasons because trimesters will minimize the costs of switching gear (*i.e.*, only three times as opposed to four per year) and give a higher percentage of the quota to each open season than would occur under a quarterly season approach.

Comment 6: I want a buyout if you are going to set the regional quotas and trimester seasons. My vessel is worth more than $200,000 to me.

Response: NMFS has the authority to reduce capacity under the Magnuson-Stevens Act (Section 312(b)–(e)) and may investigate options to reduce capacity during a future rulemaking.

Comment 7: If NMFS bans drift gillnet, all shark gillnet fishermen, including those already using strikenet gear, will go out of business because you can only use strikenet from January through April when the LCS are schooling and the season is open. You cannot use strikenet to target SCS which is what shark gillnet fishermen rely on when the LCS season is closed. You also cannot use strikenet gear in the summer because the sharks in this area are not schooling. Shark gillnet fishermen cannot fish for Mackerel due to the Florida net ban; therefore, most of their money comes from shark fishing. Strikenet fishing requires two large vessels to retrieve the gear, two small

vessels to deploy the gear, and an airplane. Buying new gear itself costs at least $70 K. That is a large amount of capital investment and because it captures a large amount of blacktip sharks at a time, the gear can only support two vessels.

Response: As explained above, NMFS no longer prefers the alternative that would allow only strikenet method in the shark gillnet fishery. Based on public comment, NMFS re-examined available data. These data indicate that allowing the use of strikenets only would not accomplish the objective of allowing the gillnet fishery to continue while minimizing interactions with protected resources as well as reducing bycatch of non-target species because strikenet fishermen do not target SCS. Therefore, the final regulations will permit the use of drift gillnets with possible gear modifications or other measures designed to reduce interactions and mortality of bycatch being implemented through a future rulemaking, based upon further study.

Comment 8: The complete prohibition of a gear in a fishery is not unusual in fisheries management, especially in regards to entanglement gear. Gillnets have been disallowed in other fisheries that are considerably larger and with more socioeconomic impact than the six to eight gillnet vessels in this fishery. Beside protected species, gillnets kill gamefish species such as tarpon and large red drum that support recreational and charter fisheries that contribute over $500 million to Georgia's economy. The kill of these premier gamefish in this gear presents a clear threat to Georgia's growing recreational and charter fishing fleets, with distinct economic implications to the State.

Response: While it may be true that prohibitions of gear types exist in other fisheries and that those actions may have resulted in economic impact to the concerned fishery as well as small entities, it is likely that the decision-making associated with why those prohibitions were originally considered and ultimately approved differs. In this instance, NMFS proposed the strikenet method only to minimize interactions with protected resources and reduce bycatch of non-target species to the extent practicable while allowing the commercial shark gillnet fishery to continue. Through public comment it has been brought to the attention of NMFS that allowing the use of strikenets only would not accomplish this objective. Therefore, the final regulations will permit the use of drift gillnets with possible gear modifications or other measures being implemented through a future rulemaking.

Comment 9: I use small mesh monofilament stab nets to fish for whiting, bluefish, Spanish mackerel, and croakers. I normally land more than the incidental limit of sharks. If you allow only strikenets, I will go out of business.

Response: NMFS originally proposed allowing the strikenet method only in the shark gillnet fishery in order to reduce bycatch of protected species. This alternative would have allowed incidental shark landings from vessels participating in other gillnet fisheries, such as those mentioned in the comment above. However, as explained above, NMFS is not implementing this alternative at this time.

Comment 10: The time/area closure off of North Carolina will put many fishermen out of business.

Response: NMFS acknowledges that some fishermen may go out of business as a result of the time/area closure. Original economic analyses in the draft Amendment indicated that the time/area closure offshore of South Carolina, North Carolina, and Virginia could have a direct economic impact on a total of 34 vessels (out of 251 total directed permits issued in 2002 ~ 14 percent) with directed shark permits. In response to comments, NMFS revised the time/area closure. Economic analyses, based on revisions to the time/area closure, indicate that 23 vessels (out of 256 total directed permits issued in 2003 ~ 9 percent) with directed shark permits may experience direct economic impacts. Additionally, original analyses pointed toward a total of 13 vessels with home ports located in South Carolina, North Carolina, and Virginia as having reported shark landings during 2001. These vessels reported gross revenues totaling $351,600 during that year. Revised economic analyses indicate that only 8 vessels with home ports located in North Carolina reported shark landings during 2001. This revised analysis indicates that the time/area closure off of North Carolina will result in a 15-percent reduction in total gross revenues for the fishery as a whole and in a three-percent reduction of revenues for the small entities directly affected by the proposed closure. As such, the revised time/area closure mitigates the economic impacts by $17,956 in total gross revenues for the small entities directly affected by the closure as compared with the original preferred alternative as outlined in the draft Amendment.

Comment 11: NMFS received several comments regarding VMS. Comments included statements that the proposed VMS is not as expensive as the program run out of the Northeast; therefore, we encourage your program. VMS is expensive and a violation of privacy. A VMS requirement would put bottom longline fishermen out of business.

Response: Economic analyses of the impacts associated with the VMS requirements indicate that only five percent of the fleet would be affected and that this will result in a eight-percent reduction in total gross revenues for the fishery as a whole and a 26-percent reduction in total gross revenues for the 12 vessels directly affected by this proposed requirement during the first year of implementation. For every year thereafter, economic analyses indicate that annual costs will result in a seven-percent reduction in total gross revenues for the fishery as a whole and a seven-percent reduction in total gross revenues for the 12 vessels directly affected by this proposed requirement.

Comment 12: Will the agency pay for VMS for this fishery?

Response: Implementation of the VMS requirement in this final rule will result in five gillnet vessel owners and seven bottom long-line vessel owners having to pay for VMS units and all associated costs. Specifically, the costs associated with implementing a VMS program in the Atlantic shark gillnet fishery include an initial average cost per vessel of approximately $2,275 (not including postage costs for returning certification statement), an average annual maintenance cost of approximately $500/year, and approximately $197.28/year for communications during the right whale calving season. Costs associated with implementing a VMS program in the directed shark bottom longline fishery include an initial average cost per vessel of approximately $2,275 (not including postage costs for returning certification statement), an average annual maintenance cost of approximately $500/year, and approximately $305.28/year for communications during the 212 day shark bottom longline time/area closure.

Comment 13: The fuel that it takes to move one nautical mile after an interaction with a protected species is not significant and should not have a large economic impact.

Response: NMFS believes that most fishing vessels will move at least one nautical mile during the course of normal operations. As such, fuel costs associated with a requirement to move one nautical mile after an interaction with a protected species are insignificant and would have minimal, if any, economic impacts.

Comment 14: The retrieval of fishing gear (*i.e.*, hooks, leaders, and crimps) saves the fisherman money replacing

the lost gear and time and effort. Dehooking and disentanglement techniques would speed up, in most cases, their fishing operation and reduce CPUE. Additionally, line cutters and dehooking devices are relatively inexpensive and are a one-time cost that could be paid back with the savings from retrieved hooks from one or two trips.

Response: NMFS agrees that costs associated with purchasing release equipment are minimal and that retrieval of fishing gear will reduce some of the costs associated with replacement of lost gear.

Comment 15: If HMS fishermen properly use release equipment, they would have the ability to call their target species ''sea turtle friendly'' at the marketplace. This would allow for a market edge for US-caught fish over imports.

Response: NMFS agrees that economic costs associated with purchase of release equipment could be minimized if consumers perceive the shark fishery as conservation minded and correspondingly begin to support the sale of shark products in the marketplace. Examples of eco-labeling programs, such as those supported by the Marine Stewardship Council, illustrate this effect.

Comment 16: Private sector gear technologists, NGOs, educational grants, and other interested parties may be willing to help pay for educational workshops. Trainers could donate their time. Fishermen and anglers could absorb the costs of travel and time and contribute assistance in funding if necessary.

Response: NMFS will pursue the requirement of mandatory workshops during a future rulemaking and intends to investigate these funding options at that time.

Comment 17: NMFS is proposing a number of measures that may change the allocation methodology of potential future quotas and cause expensive and unnecessary negative impacts to the current commercial shark fleet. NMFS should be patient with the shark fishing community and minimize the potential for socioeconomic impacts until further efforts to stabilize the fleet through better analysis, sufficient quotas, buyback program, *etc.,* become more progressed. NMFS should not be in a hurry to put fishermen out of business.

Response: The 2002 stock assessment for LCS documents that the complex is overfished and that overfishing is occurring. Under the Magnuson-Stevens Act, NMFS must take action to prevent overfishing and rebuild overfished stocks. However, to the extent practicable, NMFS is delaying implementation of certain measures such as VMS and the time/area closure to give fishermen time to adjust and will implement relief restrictions such as the quota and commercial minimum size immediately. This delay in implementation is aimed at minimizing some of the economic impacts associated with VMS and the time/area closure.

Comment 18: NMFS should consider some type of individual quota evolved from the current directed shark limited access permit holders. These quotas could reduce derby effects and seasonal market gluts.

Response: Individual transferable quotas (ITQs) may be a viable alternative and NMFS may investigate this and other alternatives in a future rulemaking.

Comment 19: NMFS should consider restricting imports of shark products to help boost the domestic market.

Response: The Magnuson-Stevens Act authorizes use of import prohibitions under certain circumstances, most notably where another country is not complying with an applicable international fishery agreement. To date, no such agreement has been reached with regard to Atlantic sharks. As such, NMFS cannot impose importation restrictions on other countries. However, NMFS is supportive of continuing dialogues with international fishery management organizations such as ICCAT, FAO, and others as appropriate for developing international fishery agreements aimed at shark management.

Comment 20: NMFS shark management has been both an ecological disaster and a knife in the backs of recreational shark fishermen. While NMFS spends millions of taxpayer's money to buy out commercial fishermen who destroyed the stocks with overfishing, there is no offer to compensate those in the recreational fishing business who have been bankrupted by NMFS policies.

Response: There are a variety of Federal programs, which provide economic relief to fishermen and other businesses affected by fishery management measures. A summary of these programs can be found in Chapter 8 of the FEIS. As such, NMFS believes that equal opportunities are given to all members of the affected environment, where fishing regulations and economic relief are concerned.

Comment 21: Amendment 1 claims that shark fishermen are paid $0.91 per pound for LCS. This is quite an achievement given that dealers are selling meat for $0.70 to $1.20 per pound to seafood chains.

Response: The average price used in this rulemaking comes from the data submitted to NMFS on weigh-out slips submitted by dealers. The average ex-vessel price changes based on which gear was used and which area the fish was sold in. For example, LCS caught on pelagic longline and sold in the states bordering the Gulf of Mexico had an average ex-vessel price of $0.45 per pound while pelagic longline-caught LCS sold in the South Atlantic had an average ex-vessel price of $1.69 per pound. The average of the average prices by gear and region equals the $0.91 used in this rulemaking to estimate the gross revenues of Federally-permitted fishermen. NMFS does not collect information regarding wholesale prices; however, some information from the Fulton Fish Market indicates that the average wholesale price also varies depending on the species, the state sold, and the month sold.

In 2003, NMFS began collecting mandatory cost-earnings trip level information from 20 percent of all Federal shark permit holders. The information collected via this mandatory system should allow NMFS to more accurately estimate gross and net revenues of shark fishermen. Additionally, the information collected in that system will allow NMFS to verify the weigh-out data submitted by dealers.

Comment 22: In the 2003 SAFE Report produced by the Highly Migratory Species Management Division, NMFS reported that over 3 million pounds dw of LCS had been landed in 2001. In the economic analyses of Amendment 1, NMFS reports that only 1.5 million pounds dw of LCS had been landed in 2001. These numbers should match.

Response: The numbers in the SAFE Report include all sharks that were reported landed from all available data including landings by state fishermen. The SAFE Report numbers are the actual tally of sharks landed and are the numbers used in the stock assessment and throughout most of Amendment 1. The numbers in the economic analyses in Amendment 1 are limited in scope and include only those sharks reported landed in 2001 by fishermen who hold a current Federal shark permit. Thus, the numbers in the SAFE Report and the economic analyses of Amendment 1 should not match.

Some fishermen who held a permit in 2001 and reported landings, may not currently hold a permit, may have let their permit lapse during the time NMFS queried the permit database, or

may have transferred their permit onto another vessel. Thus, their landings would not be included in the economic analyses of Amendment 1. Similarly, some fishermen fish for sharks only in state waters and do not hold a Federal permit. Those landings were not included in the economic analyses for Amendment 1. In terms of the economic analyses for Amendment 1, this approach is appropriate because any management action will have a direct impact on those fishermen who currently have Federal permits.

9. General

Comment 1: The EPA stated that in some cases it is unclear how the No Action alternative is assessed for impacts and recommended including further information. As an example, EPA refers back to the statement on page 4–10 of the draft environmental impact statement that semi-annual seasons would not have any ecological impacts because the fishery had been managed that way since 1993.

Response: In the final environmental impact statement, NMFS has clarified the No Action alternatives, particularly the explanation of any impacts of continuing a particular course of action. In the specific example cited by EPA, NMFS does not agree that semi-annual seasons have caused adverse ecological impacts. Semi-annual seasons can have some ecological impacts if they extend into pupping seasons; however, it is unlikely that providing fishermen two fishing seasons caused the decline of the stock. Rather, it is likely that the overall level of fishing mortality, combined with environmental factors, led to the decline of the stock.

Comment 2: The EPA states that it would be useful for a baseline comparison if NMFS could explain why a No Fishing alternative would be reasonable or unreasonable.

Response: In the case of Atlantic sharks, NMFS does not believe that a No Fishing alternative is reasonable nor would such an alternative be consistent with the Magnuson-Stevens Act. The latest stock assessments indicate that the SCS complex is not overfished and overfishing is not occurring and that while the LCS complex is overfished, the two primary LCS species are not. Given the status of the SCS complex, there is no reason why NMFS would consider a No Fishing alternative. For the LCS complex, alternatives are available that would allow fishing to continue while still allowing the stock to rebuild. As described in the Amendment, NMFS feels a No Fishing alternative is not consistent with the Magnuson-Stevens Act in that it would not minimize social and economic impacts, to the extent practicable, nor would it be based on the best available science.

Comment 3: EPA notes that summary tables that provide clear and relevant background information and recommends including a glossary of terms, a list of acronyms, and other visual diagrams such as pie charts.

Response: In the final environmental impact statement, NMFS has included a list of acronyms and several more diagrams and figures. Many of the tables presented in Amendment 1 come straight from the stock assessments or other supporting documents, and NMFS feels it would be best to rely on the information as it was first presented rather than to convert it to an unfamiliar format. Throughout the FEIS, NMFS provided definitions for fishing-related terms, such as MSY, in the text.

Comment 4: EPA comments that NMFS should clarify the effects of other fisheries on the stocks of sharks and clearly connect relevant information throughout the document. As an example, EPA refers to a quote regarding the amount of commercial landings of SCS compared to bycatch (page 3–13 of the draft Amendment) and compares this quote to other quotes regarding the amount of LCS bycatch in the menhaden fishery (page 3–75 of the draft Amendment). EPA also mentioned the need to clarify and expand upon the discussion of collection of sharks for public display.

Response: NMFS has tried to clarify and connect relevant information throughout the final Amendment in order to provide a context for any related analyses. Regarding the specific example given by EPA, NMFS notes that the SCS and LCS fisheries are two different fisheries with different species of sharks and that bycatch of SCS is not necessarily related to bycatch of LCS. For example, while the menhaden fishery catches both SCS and LCS, 97 percent of the catch of sharks are LCS and only 3 percent are SCS. Regarding the example of public display, NMFS has added details regarding the number of sharks taken for public display each year and the impact on the stocks.

Comment 5: EPA comments that NMFS should clarify the impact of other fishery practices on sharks. If sharks are being significantly diminished by other fishery practices, the FEIS should contain a short discussion of what other FMPs are doing to minimize impacts on sharks and provide a webpage link to that other FMP.

Response: NMFS agrees that knowledge regarding the relationship between shark catches in other fisheries and their impact on shark stocks needs to be examined and improved. For several years, NMFS has been working on including this type of information in the stock assessments. For example, the 1998 LCS stock assessment included Mexican catches for the first time and the 2002 LCS stock assessment expanded upon the Mexican catches and included information regarding shark bycatch in the menhaden fishery. However, while the total number of sharks taken as bycatch in other fisheries might be large, most fishery managers consider the bycatch in individual fisheries under their purview to be a low priority, particularly compared to the target catch and bycatch of other managed or protected species. Thus, many FMPs do not analyze in detail the impacts of the specific target fisheries on sharks. Additionally, as described above, NMFS recently released National Bycatch Implementation Plans for different fisheries. Several of the implementation plans for other fisheries outline recommendations for improving monitoring of bycatch in these fisheries. As information on shark bycatch in these fisheries becomes available, it will be incorporated in future stock assessments.

Comment 6: Draft Amendment 1 was too large. The document needs to be condensed to be easily understood.

Response: Legal requirements dictate the content of fishery management plans and plan amendments, the analyses that are required, and the need to respond to public comments. However, to enhance the public's ability to understand the final Amendment, NMFS has provided an executive summary in the final Amendment, an updated one-page chart that outlines the regulations and highlights major changes from the draft Amendment, and summary and explanatory tables and figures throughout the document. As required by the Regulatory Flexibility Act, NMFS will also be providing a small entity compliance guide for the final rule. Additionally, NMFS will be updating and revising the current recreational and commercial brochures based on the changes to the regulations.

Comment 7: NMFS should accept comments via e-mail.

Response: NMFS is working towards a system that would allow the public to submit comments electronically over the web. In 2001, NMFS issued the first ''e-comment'' pilot program for a proposed rule regarding issues in HMS charter/headboat fisheries. Based on the results from this pilot, NMFS made a number of improvements and continues to test the program on other rules in

order to ensure that the final e-comment program is user-friendly and provides an adequate method of providing comments. A link to regulations that are accepting comments via the web can be found off the main NMFS Web page at: *http://www.nmfs.noaa.gov.* NMFS is also working on a system that would allow commenters to submit comments via e-mail. This system may be available for use in 2004.

Comment 8: NMFS received a range of comments on the rule and Amendment as a whole. Comments included: NMFS should be commended for adhering to the scientific recommendations from recent stock assessments and proposing conservation measures that have a reasonable chance to protect all shark species. This proposed rule is an encouraging step forward in the long process of rebuilding; management is on the correct path to rebuilding and sustaining this fishery. The continued communication and cooperation between various stakeholders and the inclusion of interested parties and user groups from the inception of the process has helped to ensure the success of these management measures. NMFS has proposed a rule that walks down the middle to allow for a viable commercial fishery while protecting the most vulnerable species; all the alternatives are linked to account for the 50-percent reduction that is needed. The proposed measures will not be enough catalyst to regain a healthy population across the whole spectrum of the shark species; the ''collective impact of humanity'' on the total population has to be addressed as well as the simplistic concept of the population being overfished.

Response: Management measures in this document are a step forward towards rebuilding and are a result of the participation and cooperation of various stakeholders and user groups. Consistent with the Magnuson-Stevens Act, the measures in the final Amendment and this rule are based on the best available science, will rebuild the LCS complex, prevent overfishing of Atlantic sharks, provide for commercial and recreational fisheries, and will clarify other shark-related management measures. Without these management measures, some management measures that are not based on the best available science, such as the 1999 commercial quotas, will go in place, contrary to the Magnuson-Stevens Act. NMFS will continue to work with stakeholders on issues not addressed in this rulemaking during a future rulemaking process.

Comment 9: NMFS received a range of comments regarding who is influencing agency decisions. One commenter noted that NMFS settled with the commercial fishing industry but is fighting the environmental groups tooth and nail in order to protect commercial fish profits. Another commenter was concerned that NMFS is being overly influenced by environmentalists.

Response: Environmental groups, recreational fishermen, and commercial fishermen all had the chance to participate in the process and submit comments on the scoping documents and the Draft Amendment 1 and proposed rule. While NMFS considers these comments in selecting the alternatives, the Agency follows the mandates of the Magnuson-Stevens Act and other domestic law when finalizing actions, not the influence of particular stakeholders.

Comment 10: While state waters are outside of NMFS' jurisdiction, ensuring rebuilding of overfished sharks is not. NMFS must develop a strategy for working with states and state commissions to implement cooperative shark management in nearshore waters.

Response: NMFS will continue to work with states and the Fishery Management Councils with a goal of consistent management in mind. At the time of finalization of the HMS FMP, several states indicated their intent to develop more consistent regulations but decided to postpone their efforts due to the unstable legal environment for Federal shark management. Upon completion of this rule and during the scoping processes for future rulemakings, NMFS hopes to work with those and other states, possibly through the implementation of Memorandum of Understandings, to ensure that, at the minimum, NMFS can have access to all state shark landings and catches from all fisheries for use in future stock assessments.

Comment 11: NMFS must reduce bycatch and mortality of sharks in both directed and non-directed fisheries; establish a standardized bycatch reporting methodology; account for all sources of mortality when determining shark quotas and closures; and allocate levels of observer coverage that are adequate to provide statistically significant estimates of catch and bycatch.

Response: As described above, NMFS recently issued National Bycatch Implementation Plans for various fisheries, including HMS fisheries. Sources of shark mortality other than the directed fishery landings are included as part of the stock assessments from which the quotas were developed. Levels of observer coverage are generally set at five percent of the total effort in each fishery unless there is a concern that more coverage would be beneficial, as is the case for the shark gillnet fishery where 100 percent observer coverage is required during the right whale calving season.

Comment 12: NMFS should identify and quantify the potential impacts of any HMS fisheries on seabirds so that appropriate protocols can be developed to alleviate potential chronic mortalities associated with the fishery or gear. This will be especially important in future actions associated with pelagic sharks and other components with the HMS FMP.

Response: Potential impacts to seabird populations should continue to be monitored and where appropriate, protocols developed to alleviate bycatch problems. Relatively few seabird interactions have been identified in the Atlantic shark fisheries. If a potential problem is identified with the pelagic longline fishery this can be addressed in a future rulemaking.

Comment 13: Draft documents need to ensure that detailed effort data is incorporated into the text and tables, especially regarding the bycatch of sea turtles, marine mammals, and sea birds. For example, draft Amendment 1 does not properly quantify the level of observer effort involved in documenting seabird bycatch in the Atlantic pelagic longline fishery (Table 3.38). Therefore, the conclusion that seabird interactions are relatively low holds little merit.

Response: The Final Amendment 1 provides an overview of the types of seabird interactions in the shark fishery. The conclusion regarding the level of seabird interactions in Amendment 1 is based on the take of a single seabird in nine years of observer data from the shark bottom longline fishery.

Comment 14: NMFS should increase boat and catch monitoring efforts.

Response: NMFS already requires 100 percent observer coverage for shark gillnet vessels operating during the right whale calving season and approximately 50 percent outside of the calving season. Observer coverage in the shark bottom longline fishery is targeted as five percent while pelagic longline vessels operating in the NED experimental area are required to carry an observer at all times. A target of five percent observer coverage for pelagic longline vessels fishing outside of the NED is in place. Additional resources would need to be identified in order to increase observer coverage.

Comment 15: I need time to prepare for other fisheries and hire crew between notice of the final rule and implementation.

Response: For a number of regulations, such as implementation of the time/area closure and VMS

requirement, NMFS is providing time for fishermen to adjust to and prepare for the changes. The commercial quotas, elimination of the commercial minimum size, and certain other measures will be effective at the start of the 2004 fishing year to ensure that more restrictive measures do not go into effect. NMFS provided the approximate dates of effectiveness for the requirements in the Executive Summary of Amendment 1 and before the Response to Comments section of this rule.

Comment 16: Are you leaving the 4,000 lb LCS trip limit alone? NMFS should consider some type of trip limit tolerance because the trip limit is not working well now that sandbar and blacktip sharks are not overfished.

Response: This rule will not change the 4,000 lb LCS directed trip limit. In the Issues and Options paper released during the public scoping phase of Amendment 1, NMFS indicated that changing the 4,000 lb LCS directed trip limit could be one of the management measures addressed in Amendment 1. However, given the possible changes as a result of Amendment 1, NMFS felt some of the items in the Issues and Options paper, including the 4,000 lb LCS trip limit were beyond the scope of this rulemaking. NMFS may consider those issues in a future rule.

Comment 17: NMFS should allow fishermen to fish until the quota is caught instead of scheduling closure dates. I am afraid that if we have a couple of years where we do not catch the quota because of weather, that the quota will be taken away from us. NMFS should monitor landings and allow the season to remain open until the quota is filled.

Response: Before the HMS FMP, NMFS monitored the landings and gave five days notice before closing the fishery. This technique led to the quota being exceeded, derby fishing, and unreliable markets because no one knew when the fishery would be closing. Additionally, some dealers and fishermen delayed sending in their reports in an effort to keep the fishery open longer. To address these concerns, in the HMS FMP, NMFS decided to announce, based on previous catch rates, the closing date of the fishery before the fishery opened. Additionally, any over-or underharvest would come off of or be added to the same season's quota of the following year (*e.g.,* first semi-annual season to first semi-annual season). This technique appears to be working (*e.g.,* fewer seasonal quotas have been exceeded and fishing seasons have lengthened) and during scoping few fishermen wanted to change the current system. With the transition to trimester and regional quotas, there may be some adjustment needed in terms of calculating catch rates and estimating the length of the seasons in each region; however, NMFS does not intend to ''take quota away'' because of underharvests. In the future, NMFS might adjust the percent of quota available in each fishing season (*e.g.,* if one season is always exceeded while another season always has quota left, some of the quota may be moved to the first season from the second) or might adjust the percent of quota available to each region (*e.g.,* if one region always exceeds its quota while another region does not land its full portion, some of the quota from the second region might be transferred to the first region). However, any such adjustment would require a rulemaking and would not change the overall total quota available.

Comment 18: NMFS should be relying on an observer report from 1994 through 2002, not a report from recent years.

Response: NMFS is using the best available science which includes several observer reports that cover only one or two years each.

Comment 19: NMFS should re-examine the five percent fin ratio rule. The legal percentage does not work accurately unless the sandbar shark catch is blended down by other LCS with smaller fins.

Response: NMFS first implemented the five percent fin ratio in the 1993 Shark FMP. This ratio was based on research that indicated that the average ratio of fin weight (including first dorsal, pectorals, and lower caudal fins) to dressed weight of the carcass was 3.6 percent and the sandbar fin ratio was 5.1 percent. Observer data indicate that, except for a couple of years, the fin ratio for all observed sharks has been under five percent. In December 2000, the Shark Finning Prohibition Act was signed. This Act, which implements the five percent finning ratio for all shark fisheries in the United States, was fully implemented through a final rule released in February 2002. Thus, any changes to the five percent fin ratio would have to be the result of Congress modifying the Act.

Comment 20: Because porbeagle sharks are often caught while pursuing cod, mackerel, and other New England finfish, northeast groundfish commercial fishermen should be allowed to keep one porbeagle shark per day per trip without a commercial shark fishing permit.

Response: Since 1993, fishermen who have caught and sold sharks in Federal waters have been required to have a Federal shark permit. In 1999, NMFS implemented a limited access program for the Atlantic shark fisheries. Under this program, any fisherman who had a Federal shark permit and reported landing a limited number of sharks could qualify for either a directed or incidental Federal shark limited access permit. This program was implemented to reduce latent effort in the shark fishery and reduce overcapitalization in order to rebuild the LCS complex and prevent overfishing on other shark species. From past experience, NMFS knows that porbeagle sharks are highly susceptible to overfishing. Until a stock assessment on porbeagle sharks indicates that the porbeagle shark is not overfished and is not experiencing overfishing, NMFS does not want to re-open that sector of the shark fishery. However, those fishermen wishing to land porbeagle sharks can either obtain a commercial permit from someone leaving the fishery or obtain a recreational permit. Any porbeagle sharks that are landed would have to be caught with an authorized gear type.

Comment 21: NMFS has not done one iota to protect mako sharks except limit recreational fishermen. While the proposed rule does have some positive proposals that limit commercial fishing, conservation of the most important recreational sharks left, pelagic sharks, continues to be ignored.

Response: NMFS is working with ICCAT to collect data in order to conduct an international stock assessment of pelagic sharks. Because pelagic sharks traverse the Atlantic Ocean, NMFS is not able to conduct an accurate stock assessment without data from other countries. The international stock assessment is expected to occur in 2004. Once the international stock assessment is complete, NMFS will consider the results and will modify the management measures for pelagic sharks, as appropriate.

Comment 22: NMFS should consider converting directed shark permits that have been inactive since July 1999 to incidental permits. This could help reduce latent effort from becoming active during the rebuilding period.

Response: NMFS is considering several options to could lead to changes in the current limited access program in a future rule. NMFS will consider comments such as this one at that time.

Comment 23: The number of shark permits should be reduced to 10.

Response: In 1999, NMFS implemented a limited access program in the commercial shark fishery to reduce latent effort and capitalization in the fishery. This program established two types of commercial shark permits: directed and incidental. The directed

permits allow fishermen to target sharks while the incidental permits were designed to allow fishermen who target other species to land a limited number of sharks, thus reducing regulatory discards. At this time, NMFS recently approved a Saltonstall-Kennedy Grant to researchers who are examining the feasibility of a buyout program for commercial shark fishermen. Additionally, NMFS will consider other options, such as conversion of directed to incidental permits or individual transferable quotas, to revise and refine the current limited access program in a future rule.

Comment 24: Enforcement personnel should be hired and trained to catch fishermen who illegally take and kill any fish species. The budget for enforcement is too small and should be increased by 800 percent.

Response: Enforcement personnel are trained to catch fishermen who illegally take and kill any fish species. With a budget increase, more enforcement personnel could be hired and additional resources could be obtained to enhance enforcement efforts throughout the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea.

Comment 25: The more information NMFS has, the more money fishermen lose.

Response: Improved information ensures that NMFS can better address economic, social, and ecological impacts of proposed management measures. For example, in the 1999 HMS FMP, NMFS finalized commercial shark quotas that are lower than those quotas selected in Amendment 1. However, based on new information and analyses, the latest stock assessment indicates that two species of LCS are no longer overfished. Thus, NMFS is able to select the higher quotas in Amendment 1 than those finalized in 1999. Ideally, as the status of LCS improves, the commercial quota should be able to increase. However, without data from the fishermen, NMFS will not know if the status is improving and therefore would not be able to increase the quota. Indeed, with less data, NMFS may decide that the best, most risk-averse, course of action would be to lower the quotas.

Comment 26: NMFS should integrate the Large Pelagic Survey (LPS) within the MRFSS in order to expand and improve the acquisition of recreational landings data for sharks and other HMS.

Response: NMFS continues to explore improvements to the design of the LPS and has implemented some of these for the 2003 fishing year. The biggest change was integrating the charterboat and headboat sectors of the LPS and MRFSS into a single For-Hire Survey for the Atlantic Coast. A separate For-Hire Survey was implemented in 2001 for the Gulf of Mexico. Both of these efforts should provide improved estimates of recreational catch and landings of HMS as well as non-HMS. Evaluation of other modifications already implemented for the LPS are ongoing and may lead to additional changes to survey design and estimation procedures.

Comment 27: NMFS received several comments regarding where public hearings should have been held because there are a lot of fishermen who could be affected by the proposed regulations. These areas included New Jersey, Virginia, and Fort Pierce, Florida. NMFS also heard that Montauk, New York should not have had a public hearing because there are no fishermen in the area and it is too far to drive.

Response: NMFS tries to schedule a number of public hearings along the Atlantic and Gulf of Mexico coasts in areas where there are a number of fishermen but understands that some areas with many fishermen will likely be unintentionally missed. For Amendment 1, NMFS tried to coordinate public hearings with Fishery Management Council meetings in order to reduce travel for stakeholders who were interested in attending both meetings. In other cases, NMFS scheduled hearings at areas where attendance at previous hearings has been large. People who are unable to attend a public hearing are always welcome to submit written comments or to call NMFS and speak to someone directly. Comments provided over the phone during the comment period are considered part of the public record.

Comment 28: NMFS needs to mail fishermen information about public hearings to notify permit holders. While we were mailed information about the hearings for the proposed rule, we did not hear about the scoping meetings.

Response: NMFS announces its intentions in a variety of methods including automated infolines, the HMS Fax network, the HMS web page, the weekly electronic newsletter *FishNews,* and through mailings. Because some permit holders have told NMFS that they feel many of the mailings sent are equivalent to junk mail, in this case NMFS limited the mailing to information regarding the actual proposed rule and not the scoping meetings. However, for both the scoping and proposed rules, NMFS used all other methods to announce relevant information. If you would like to be included on any of these automatic distributions (*e.g.,* the HMS Fax network or *FishNews*) please call the HMS Management Division at (301) 713–2347 or visit the NMFS home page at *http://www.nmfs.noaa.gov* for more information.

Changes From the Proposed Rule

NMFS has made several changes to the proposed rule. These changes are outlined below.

(1) In the proposed rule, NMFS proposed a LCS rebuilding time frame of 27 years from 2004. In the final rule, NMFS corrects an error in calculating the mean generation time for LCS. The correction of this error leads to a rebuilding time frame of 26 years from 2004 in the final rule.

(2) In the proposed rule, NMFS proposed a LCS quota of 1,109 mt dw (2.4 million lbs dw) based on a 40-percent reduction from MSY. Based on public comment regarding the proposed reduction, a review of the draft Amendment 1 by the Southeast Fisheries Science Center, and revisions to the proposed time/area closure, NMFS increased the quota reduction to 45 percent. Thus, this final rule establishes the annual LCS quota at 1,017 mt dw (approximately 2.2 million lbs dw) based on a 45-percent reduction from MSY.

(3) NMFS proposed a prohibition on drift gillnet gear while allowing strikenet gear in order to reduce protected species interactions while allowing gillnet vessels to continue to fish. In the comment period, NMFS heard that strikenet gear was not an efficient method of fishing for SCS, almost all the gillnet fishermen would go out of business, and it would be difficult for enforcement to tell if a shark was taken via strikenet or drift gillnet gear. Thus, this final rule does not prohibit drift gillnet. Instead, NMFS will consider other methods to reduce bycatch in the drift gillnet fishery in a future rulemaking.

(4) NMFS proposed a time/area closure for bottom longline gear off the coasts of Virginia, North Carolina, and South Carolina in order to reduce catch of dusky sharks and juvenile sandbar sharks. While some fishermen agreed with the principle of closing areas in nursery grounds, they commented that the proposed area was too large and encompassed more than just nursery grounds. Fishermen also suggested closing areas only in shallow waters. As a result, NMFS refined the time/area closure. The time/area closure for bottom longline gear in this final rule encompasses an area off of part of North Carolina out to approximately 60 fathoms.

(5) In order to enforce the proposed time/area closure for bottom longline

gear and the existing time/area closure for gillnet gear, NMFS proposed the installation and use of VMS on vessels with bottom longline and gillnet gear on board. Analyses indicated that shark bottom longline vessels are not mobile. Therefore, the proposed rule required VMS on bottom longline vessels only between 32° and 38° N. latitude. Because NMFS has reduced the size of the time/area closure for bottom longline gear, this final rule also reduces the size of the area where VMS is required for directed shark vessels with bottom longline gear. This final rule requires directed shark vessels with bottom longline gear on board to have VMS on board from January through July when they are located between 33° and 36°30′ N. latitude, and directed shark vessels with gillnet gear on board to have VMS on board right whale calving season.

(6) NMFS also made several non-substantial changes to the final regulatory text to facilitate enforcement and clarify the regulations and their intent.

Annual Landings Quotas

The 2004 annual landings quotas for LCS and SCS are established at 1,017 mt dw (2,242,078 lbs dw) for LCS and 454 mt dw (1,000,888.4 lbs dw) for SCS. The 2004 quota levels for pelagic, blue, and porbeagle sharks are established at 488 mt dw (1,075,844.8 lbs dw), 273 mt dw (601,855.8 lbs dw), and 92 mt dw (202,823.2 lbs dw), respectively. These quotas are split equally between the two 2004 fishing seasons. The trimester seasons (*i.e.,* three four-month periods), finalized in this rule, will not go into effect until January 1, 2005.

In 2003, the first semiannual fishing season quota for ridgeback LCS was set at 391.5 mt dw and for non-ridgeback LCS was set at 465.5 mt dw. As of September 2003, approximately 451 mt dw ridgeback LCS and 461 mt dw non-ridgeback LCS had been reported landed. This constitutes an overharvest for the first 2003 semiannual fishing season for the LCS complex of 55.4 mt dw. Thus, consistent with § 635.27(b)(1)(vi), the first 2004 semiannual fishing quota for LCS is established at 453.1 mt dw (508.5 mt dw–55.4 mt dw). Consistent with § 635.27(b)(1)(iii), this semiannual fishing season quota is further split between the three fishing regions as follows: Gulf of Mexico—190.3 mt dw (419,535.4 lbs dw); South Atlantic—244.7 mt dw (539,465.6 lbs dw); and North Atlantic—18.1 mt dw (39,903.3 lbs dw).

In the 2003 first semiannual fishing season for SCS, the quota was established at 163 mt dw. As of September 2003, approximately 109 mt dw had been reported landed. This constitutes an underharvest for the first 2003 semiannual fishing season of 54 mt dw. Thus, consistent with § 635.27(b)(1)(vi), the first 2004 semiannual fishing quota for SCS is established at 281 mt dw (227 + 54 mt dw). Consistent with § 635.27(b)(1)(iv), this semiannual fishing season quota is further split between the three fishing regions as follows: Gulf of Mexico—11.2 mt dw (24,691.5 lbs dw); South Atlantic—233.2 mt dw (514,112.7 lbs dw); and North Atlantic—36.5 mt dw (80,467.9 lbs dw).

The first 2004 semiannual quotas for pelagic, blue, and porbeagle sharks are established at 244 mt dw (537,922.4 lbs dw), 136.5 mt dw (300,927.9 lbs dw), and 46 mt dw (101,411.6 lbs dw), respectively. These are the same quotas that were established for the first 2003 semiannual season. As of September 2003, approximately 39 mt dw had been reported landed in the first 2003 semiannual fishing season in total for pelagic, blue, and porbeagle sharks combined. Additionally, data indicate that in 2002, 68 mt whole weight (ww) of blue sharks were discarded dead in the pelagic longline fishery. Thus, the pelagic shark quota does not need to be reduced consistent with § 635.27(b)(1)(vi).

NMFS will take appropriate action before July 1, 2003, in order to determine and announce the second 2004 semiannual quotas for Atlantic sharks.

Fishing Season Notification

The first semiannual fishing season of the 2004 fishing year for the commercial fishery for LCS, SCS, pelagic sharks, blue sharks, and porbeagle sharks in all regions in the western north Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, will open January 1, 2004. To estimate the closure dates of the LCS, NMFS calculated the average reported catch rates for each region from the first seasons from recent years (2000, 2001, 2002, and 2003) and used these average catch rates to estimate the amount of available quota that would likely be taken by the end of each dealer reporting period. Because state landings after a Federal closure are counted against the quota, NMFS also calculated the average amount of quota reported received after the Federal closure dates of the years used to estimate catch rates. Additionally, pursuant to § 635.5(b)(1), shark dealers must report any sharks received twice a month: those sharks received between the first and fifteenth of every month must be reported to NMFS by the twenty-fifth of that month and those received between the sixteenth and the end of the month must be reported to NMFS by the tenth of the following month. Thus, in order to simplify dealer reporting and aid in managing the fishery, NMFS will close the Federal LCS fishery on either the fifteenth or the end of any given month.

Based on average LCS catch rates in recent years in the Gulf of Mexico region, approximately 78 percent of the available LCS quota would likely be taken by the last week of February and 103 percent of the available LCS quota would likely be taken by the second week of March. Dealer data also indicate that, on average, approximately 27 mt dw of LCS have been reported received by dealers after a Federal closure. This is approximately 14 percent of the available quota. Thus, if catch rates in 2004 are similar to the average catch rates from 2000 to 2003, 92 percent (78 + 14 percent) of the quota could be caught over the entire semiannual season if Federal waters are closed during the last week of February. If the fishery remains open until the second week of March, the quota would likely be exceeded. Accordingly, the Assistant Administrator for Fisheries (AA) has determined that the Gulf of Mexico LCS quota for the first 2004 semiannual season will likely be attained by February 29, 2004. Thus, the Gulf of Mexico LCS fishery will close on February 29, 2004, at 11:30 p.m. local time.

Based on average LCS catch rates in recent years in the South Atlantic region, approximately 73 percent of the available LCS quota would likely be taken by the second week of February and 94 percent of the available LCS quota would likely be taken by the end of February. Dealer data also indicate that, on average, approximately 58 mt dw of LCS are reported received by dealers after a Federal closure. This is approximately 24 percent of the available quota. Thus, if catch rates in 2004 are similar to the average catch rates from 2000 to 2003, 97 percent (73 + 24 percent) of the quota could be caught over the entire semiannual season if Federal waters are closed during the second week of February. If the fishery remains open until the end of February, the quota would likely be exceeded. Accordingly, the AA has determined that the South Atlantic LCS quota for the first 2004 semiannual season will likely be attained by February 15, 2004. Thus, the South Atlantic LCS fishery will close on February 15, 2004, at 11:30 p.m. local time.

Based on average LCS catch rates in recent years in the North Atlantic region, approximately 33 percent of the available LCS quota would likely be taken by the second week of April and 42 percent of the available LCS quota would likely be taken by the end of April. Dealer data also indicate that, on average, approximately 10 mt dw of LCS are reported received by dealers after a Federal closure. This is approximately 60 percent of the available quota. Thus, if catch rates in 2004 are similar to the average catch rates from 2000 to 2003, 93 percent (33 + 60 percent) of the quota could be caught over the entire semiannual season if Federal waters are closed during the second week of April. If the fishery remains open until the last week of April, the quota would likely be exceeded. Accordingly, the AA has determined that the North Atlantic LCS quota for the first 2004 semiannual season will likely be attained by April 15, 2004. Thus, the North Atlantic LCS fishery will close on April 15, 2004, at 11:30 p.m. local time.

When quotas are projected to be reached for the SCS, pelagic, blue, or porbeagle shark fisheries, the AA will file notification of closure at the Office of the Federal Register at least 14 days before the effective date.

During a closure, retention of, fishing for, possessing or selling LCS are prohibited for persons fishing aboard vessels issued a limited access permit under 50 CFR 635.4. The sale, purchase, trade, or barter of carcasses and/or fins of LCS harvested by a person aboard a vessel that has been issued a permit under 50 CFR 635.4 are prohibited, except for those that were harvested, offloaded, and sold, traded, or bartered prior to the closure and were held in storage by a dealer or processor.

Classification

This final rule is published under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*

This final rule has been determined to be not significant for purposes of Executive Order 12866.

As required under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) for the draft Amendment 1 and its proposed rule (68 FR 45196, August 1, 2003) and prepared an FRFA for the final Amendment 1 and this final rule. The FRFA examines the economic impacts of the management alternatives on small entities in order to determine ways to minimize economic impacts. A summary of the information presented in the FRFA is below. Amendment 1 provides further discussion of the economic impacts of all the alternatives considered.

The need for and objective of the final rule are fully described in the preamble of the proposed rule (68 FR 45196, August 1, 2003) and in final Amendment 1 and are not repeated here.

As set forth above, NMFS received many comments on the proposed rule and draft Amendment 1 during the comment period. NMFS did not receive any comments specific to the IRFA, but did receive a limited number of comments on the potential for substantial impacts related to the proposed commercial quota reductions, implementation of trimester seasons and regional quotas, gillnet restrictions, VMS requirements, and the time/area closure. In summary, commenters noted that commercial quota reductions, VMS requirements, and the bottom longline time/area closure offshore North Carolina would put fishermen out of business and create less economic stability among industry participants; implementation of trimester seasons and regional quotas could disrupt existing markets and lead to insufficient income; and requiring the strikenet method only would not allow the commercial shark gillnet fishery to continue while minimizing interactions, as it was originally intended.

The economic analyses and IRFA for the proposed rule acknowledged that reductions in commercial quotas, implementation of trimesters, regional quotas, VMS requirements, and the time/area closure would likely result in economic impacts to the fishery as a whole, some of which may be significant for small entities/vessel owners. However, all of these alternatives, when compared to the other alternatives considered, mitigate undesirable or greater economic impacts associated with continued overfishing, shortened seasons, bycatch of vulnerable species, and economic instability of fishery participants and associated fishing communities in the long-term. The combination of these preferred alternatives is necessary for LCS to rebuild and SCS to achieve optimum yield, consistent with the objectives of this rule, the Magnuson-Stevens Act, and other domestic laws.

In order to mitigate some of the economic impacts, NMFS will delay effectiveness of trimester seasons, VMS requirements, and the time/area closure in order to give fishermen time to (1) purchase VMS units, (2) work with dealers to enhance market prices and plan out advertising strategies with grocers, and (3) prepare and plan for the closure. Furthermore, NMFS re-evaluated and refined the size of the proposed time/area closure. The revised time/area closure, which is anticipated to affect only eight vessels as opposed to 13 anticipated in the proposed rule, mitigates the economic impacts to small entities directly affected by the revised closure by $17,956 in total gross revenues as compared with the original preferred alternative. Finally, the final regulations will permit the use of drift gillnets with possible gear modifications or other measures being implemented in a future rulemaking, based upon further study.

NMFS considers all permit holders to be small entities. In October 2002, there were approximately 251 directed shark permit holders and 376 incidental shark permit holders for a total of 627 permit holders who were authorized to fish for sharks. As of September 2003, there were approximately 256 directed permit holders and 351 incidental permit holders for a total of 607 permit holders who are authorized to fish for sharks and could be affected by the preferred alternatives outlined in the final rule. Only about 20 percent of all permit holders are actually active in the fishery. Currently, 120 vessels (*i.e.*, number of vessels that reported landings of shark during 2001) would be directly affected by changes (*i.e.*, increases/decreases) in shark quotas or other changes to the commercial management measures.

The revised time/area closure would have a direct economic impact on a total of 23 vessels (out of 256 total directed permits issued in 2003 ~ 9 percent) with directed shark permits. As of September 2003, only eight vessels with home ports in North Carolina reported shark landings during 2001.

NMFS knows of fewer than 11 shark fishermen who have used drift gillnet gear to target sharks at some point in the past and only five in recent years. These five vessels would have been affected by the strikenet only requirement in the proposed rule; however, NMFS is not implementing that requirement.

The recreational requirements proposed in this rulemaking could affect all recreational HMS permit holders including HMS angling category permit holders (~ 18,249 as of September 2003) and HMS charter/headboat permit holders (~ 4,041 as of September 2003). These permit holders can target any HMS; however, few actually target sharks.

Other sectors of HMS fisheries such as dealers, processors, bait houses, and gear manufacturers might be affected by these regulations, particularly the shift to trimester seasons for commercial fisheries, reduction in commercial LCS

quota/increase in commercial SCS quota, and time/area closure off North Carolina during the winter commercial fishery. However, the final rule does not apply directly to them. Rather it applies only to permit holders and fishermen. As such, the economic impacts on these other sectors are not discussed in the FRFA.

Some of the preferred alternatives in this document may result in additional reporting, record-keeping, and compliance requirements. The final rule requires Atlantic directed shark fishermen located near the bottom longline time/area closure (approximately eight vessels) and approximately five shark gillnet vessels to install and activate a VMS unit. As discussed below, OMB has approved this collection of information. The costs associated with implementing a VMS program in the Atlantic shark gillnet fishery include an initial average cost per vessel of approximately $2,275 (not including postage costs for returning certification statement), an average annual maintenance cost of approximately $500/year, and approximately $197.28/year for communications during the right whale calving season. Costs associated with implementing a VMS program in the directed shark bottom longline fishery include an initial average cost per vessel of approximately $2,275 (not including postage costs for returning certification statement), an average annual maintenance cost of approximately $500/year, and approximately $305.28/year for communications during the seven month shark bottom longline time/area closure. The position reports generated by the VMS units are automatic so no time burden is imposed on the vessel operator. Installation of VMS will likely increase costs to the vessel owner but should not increase the needed skill level required for HMS fisheries.

The increase in the recreational bag and size limits, change in authorized gear types, addition of the bottom longline time/area closure, requirement to have and use release equipment, and requirement to move 1 nmi after interacting with a protected species may change the way and areas in which fishermen can fish and set their gear, require the possession and use of specific equipment, limit the gears authorized for use in recreational shark fisheries, and increase the skill level needed to participate in HMS fisheries. The increased recreational bag and size limit could result in positive economic benefits if they result in increased tournament participation and business profits within the charter/headboat industry for sharks. NMFS does not expect changes to the recreational authorized gear to have any substantive economic impacts, because sharks caught recreationally in Federal waters cannot be sold and the majority of HMS recreational fishermen already use the gears being authorized in this final rule. The bottom longline time/area closure and VMS could have significant economic impacts, particularly for those fishermen in states bordering the closure (*i.e.,* North Carolina). However, for vessels not directly affected by the closure there might be a few economic benefits, and NMFS anticipates long-term benefits to the fishery as a whole when the LCS complex rebuilds. The bycatch release equipment and moving 1 nmi after an interaction would likely only have minor economic impacts (*e.g.*, the purchase of stainless-steel hooks and release equipment and minor increases in fuel costs to move one mile after an interaction). Although the release equipment is relatively simple to use, limited training may be required to use them effectively.

No economic impacts are anticipated from the display permit alternative, because this is an administrative name change that does not affect current application processes or related regulations. In addition, the quotas and fishing seasons in this final rule are not likely to change reporting or compliance in the fishery.

NMFS considered a number of alternatives that could minimize the economic impact of the preferred alternatives, particularly those pertaining to LCS commercial quota reductions, revised time/area closures, VMS requirements, and use of corrodible hooks and release equipment aboard bottom longline vessels. Detailed analyses relating to the economic impacts of each alternative considered are provided in the final Amendment 1; a summary is provided here.

The final actions for commercial management measures (*i.e.*, the LCS complex classification, regional quotas, trimester seasons, MSY based quotas, and no minimum size) were designed to minimize economic impacts incurred on fishermen, while simultaneously enhancing equity among users groups, allowing healthy stocks to be managed at optimum yield, and allowing overfished stocks to rebuild. For the LCS complex classification, NMFS considered four alternatives: (1) Ridgeback/non-ridgeback groups with different closure dates (no action); (2) ridgeback/non-ridgeback groups with the same closure date; (3) aggregate LCS complex (final action); and (4) species-specific groups. Compared with the other alternatives considered, aggregating the LCS complex may reduce costs associated with the lengthening of trips (*i.e.*, fuel, bait, and ice) due to sorting inefficiencies and simplify compliance and reporting requirements. The other classification alternatives, in conjunction with the preferred alternative for the quota basis alternatives, could result in larger quotas; however, those classification alternatives were rejected because they could increase confusion in the fishery and, inconsistent with the Magnuson-Stevens Act, may result in delays for LCS to rebuild.

For quota administration, NMFS considered five alternatives: (1) Semi-annual seasons (no action); (2) no regional quotas (no action); (3) regional quotas (final action); (4) trimester seasons (final action); and (5) quarterly seasons. Implementation of regional quotas is not anticipated to result in any changes to economic benefits or costs because it maintains current fishing patterns based on dealer reports and is anticipated to enhance equity among user regions. Trimester seasons would spread open seasons out more evenly over the calendar year and could, in the long-term, result in greater economic stability for fishermen and associated communities because the amount of time between open and closed seasons would likely be reduced. Thus, in the long-term, the combination of regional quotas and trimester seasons could help minimize any economic impacts caused by other final actions. While maintaining the semiannual seasons and no regional quotas would have no negative economic impacts in the long- or short-term, these alternatives would have no positive economic benefits either.

NMFS considered a wide range of quotas that resulted from the combination of the four LCS complex classification alternatives and the three quota basis alternatives which included: (1) Quota basis from the 1999 HMS FMP (no action); quota based on MSY (final action); and (3) quota based on average landings for past three years. The economic impacts of the quota basis alternatives vary depending on the classification alternatives, thus, the two issues are considered together. Specifically, NMFS evaluated seven different commercial quotas for LCS (ranging from 816 mt dw and 2,559 mt dw) and three different commercial quotas for SCS (ranging from 300 mt dw to 454 mt dw). NMFS carefully considered the results of the 2002 stock assessments for LCS and SCS in evaluating possible quotas. The final action alternatives (quota based on MSY

and aggregating the LCS complex) will implement commercial quota levels of 1,017 mt dw for the LCS aggregate and 454 mt dw for the SCS aggregate, resulting in a 21-percent reduction in LCS quota and a 10-percent increase in SCS quota, respectively, from the baseline quotas outlined in Amendment 1. While combinations of other alternatives could result in increased quotas for LCS, those combinations were rejected because they are likely to result in rebuilding delays for the LCS stock, which is inconsistent with the Magnuson-Stevens Act. Moreover, economic impacts could be incurred in the fishery over the long-term should LCS stocks continue to decline.

NMFS considered six commercial minimum size alternatives: a 4.5 ft FL for ridgeback LCS (no action), no minimum size (final action), and four other alternatives with varying minimum size requirements. This final rule eliminates the current commercial minimum size, thus relieving a restriction that would impose negative economic impacts on the commercial shark fishery. The other alternatives would have imposed varying minimum sizes and were rejected because they would have had greater economic impacts and because other alternatives that protect juvenile sharks, as recommended in the stock assessment, are being implemented in this rule. Given that the current minimum size for commercial fishery has never been implemented due to litigation, NMFS does not anticipate any significant changes in economic benefits or costs from this final action.

Similar to the final actions for commercial quotas, the final action alternatives for recreational retention (*i.e.*, existing limits plus one bonnethead) and minimum size limits (*i.e.*, existing size limits plus no minimum size for bonnethead) were designed to minimize the economic impacts on recreational fishermen, while simultaneously allowing healthy stocks to be managed at optimum yield and overfished stocks to rebuild. NMFS considered seven recreational retention limits including: (1) One shark per vessel per trip plus one Atlantic sharpnose shark per person (no action); (2) one shark per vessel per trip plus one Atlantic sharpnose and one bonnethead shark per person per trip (final action); (3) no limit; (4) catch and release only; and (5) other retention limits. Since the final retention allows the additional retention of bonnethead sharks, this alternative may increase revenues to charter/headboats and other small entities above the no action and catch and release only alternatives. Even though other alternatives were considered, such as no retention limit, that might further minimize economic impacts, they were rejected because they do not meet fishery management plan goals and objectives including rebuilding overfished LCS and preventing overfishing of Atlantic sharks.

NMFS considered six size limit alternatives including: (1) 4.5 ft FL for all sharks and no size limit for Atlantic sharpnose sharks (no action); (2) 4.5 ft FL for all sharks and no size limit for Atlantic sharpnose and bonnethead sharks (final action); and (3) various other size limits ranging from no size limit to different size limits depending on the species and the area fished. The final size limit alternative takes into account the fact that bonnethead sharks do not reach the minimum size currently in place and simplifies compliance for small entities with the final retention limits for bonnethead sharks. The final size limit alternative is anticipated to increase the willingness to pay, angler consumer surplus, and current revenues to charter/headboat captains and other small entities who rely on the recreational shark fishery for income. Other recreational size limit alternatives were rejected because of economic and stock status concerns.

The final action regarding recreational authorized gear limits fishermen in the recreational fishery to handline and rod and reel and addresses the need for NMFS to clarify which gear types are authorized specifically for recreational fishing activities. Most recreational HMS fishermen already use handline as well as rod and reel in the fishery. As such, there are no anticipated economic costs or benefits associated with implementation of the final action. The no action alternative would have no economic costs but was rejected because it is not consistent with other HMS fisheries and because other, more commercial gears, have higher post-release mortality rates, which could delay rebuilding of LCS. No other alternatives were considered because handline and rod and reel are the only gears typically used for recreational fishing for sharks.

The final action to remove the deepwater and other sharks from the management unit seeks to simplify compliance and reporting requirements under the final rule for small entities. No economic costs are anticipated with from this alternative or from the no action alternative.

The final action that retains the current 19 prohibited species and establishes a criteria for the addition/removal of other species to/from the prohibited species group, also simplifies compliance and reporting requirements. Given the possibility that recreationally or commercially valuable species may either be added/removed from the prohibited species group, it is possible that economic impacts/benefits would be experienced by small entities. While removing or adding sharks to the prohibited list could have economic impacts, maintaining the status quo while establishing a process to add or remove, should not have economic impacts on a substantial numbers of small entities. Some of the other alternatives considered (returning to five prohibited species, adding finetooth sharks, or removing dusky sharks) could have varying positive or negative economic impacts. These alternatives were rejected because they could delay rebuilding of LCS, inconsistent with Magnuson-Stevens Act, and could result in long-term negative economic impacts if stocks decline further. The other alternative considered (adding deepwater and other sharks) was rejected for similar reasons to those that resulted in removing the group from the management unit.

NMFS considered nine alternatives for bycatch reduction including a no action alternative, modifying authorized gears, limiting gears or soak times, and not allowing any discards. The final actions for bycatch reduction (*i.e.*, install and activate VMS, obtain and use release equipment, use non-stainless steel corrodible hooks, and move 1 nmi after an interaction with a protected species) were designed to minimize the economic impacts on fishermen, while simultaneously promoting bycatch reduction of protected species in shark fisheries. Installation of VMS units could result in economic impacts to small entities in the short-term. However, in the long-term, this alternative could result in increased revenues by preventing more burdensome regulations and allowing more fishing time. Additionally, bottom longline vessels would be able to traverse the closed area, while gillnet vessels may require less observer coverage. No other alternatives are available at this time that are as effective at enforcing closed areas.

Under the VMS requirement approximately five gillnet shark fishing vessels and approximately eight directed category bottom longline shark fishing vessels will need to install VMS units. Requiring VMS for only a portion of the shark fishing fleet, minimizes the economic impact on the remainder of the fleet. Economic analyses of the impacts associated with VMS requirements on small entities indicate

that the average gross revenue by permit holder, during the first year of implementation, will be reduced by nine percent. For every year thereafter, economic analyses on small entities indicate that the average gross revenue by permit holder will be reduced by two percent. As noted above, to minimize economic impacts, NMFS is delaying the effective date of this requirement and will, in the future, type approve VMS units for use in the Atlantic shark fisheries.

The final alternative regarding release equipment, corrodible hooks, and moving after an interaction with a protected species would likely result in minor economic impacts to small entities, primarily because the cost associated with purchasing release equipment is minimal and is a one time cost. Although many shark fishermen may already use non-stainless steel corrodible hooks, this may increase the financial burden on fishermen who will have to purchase new hooks. The requirement to move one nautical mile after an interaction with a marine mammal, sea turtle, or sawfish would likely increase fuel costs due to increased time transiting to another fishing area and increased time needed to fish if alternate fishing grounds are not as productive for target species. However, because few marine mammals, sea turtles, or protected species have been observed caught, NMFS does not believe that this requirement would affect more than a few trips for all vessels combined, each year.

Because the no action alternative does not modify the existing regulations, this alternative is not expected to have any substantive economic impacts. However, this alternative also does not reduce bycatch to the extent practicable as required by the Magnuson-Stevens Act. Some of the other alternatives considered (banning gillnet gear or allowing only strikenet gear) could have significant economic impacts and put some vessels out of business. While these alternatives would reduce bycatch, NMFS has made a commitment to consider other, less burdensome alternatives in a future rulemaking. The alternative that would limit the length of the mainline, limit the soak time, and require corrodible steel hooks could have various negative economic impacts depending on the fishing practices of the fishermen. These alternatives were rejected due to safety and enforcement concerns and due to a lack of sufficient information.

NMFS is also finalizing a time/area closure for sandbar and dusky shark nursery and pupping areas offshore North Carolina during the winter fishery. This alternative is designed to reduce bycatch of neonate and juvenile sandbar sharks and prohibited dusky sharks by 92 percent and 61 percent, respectively. This alternative is likely to have significant impacts on the small entities/vessel owners directly affected by the closure. As discussed above, NMFS has refined the size of the time/area closure in this final action, thus reducing the number of vessels affected from 13 to 8 and mitigating the economic impacts by $17,956 in total gross revenues for the small entities directly affected by the closure as compared with the original preferred alternative.

For those vessels affected by the time/area closure, the closure would impose a reduction in catch and income from areas traditionally relied upon and affect fishing practices by requiring fishermen to travel further offshore. Due to greater distances traveled, fishermen would spend more time at sea, and associated costs of food, fuel, and labor could increase. This could cause some fishermen to go out of business, move to new areas, or alter fishing patterns in other ways. This alternative could result in a change in the distribution of benefits and costs, with the financial costs of operating in the fishery increasing and benefits decreasing. However, the time/area closure will facilitate rebuilding of the LCS complex, thus providing for longer term economic stability, and it minimizes the economic impacts compared to the other larger time/area closure alternative considered. The no action/no closure alternative would not impose short-term economic impacts, but could have long-term economic impacts if LCS do not rebuild.

None of the four alternatives considered for identifying EFH would affect small entities in any way that would complicate compliance and reporting requirements for EFH or result in significant economic impacts for small entities.

For EFPs, NMFS considered a no action alternative and an alternative that would administratively separate EFPs for scientific research from display permits. Neither alternative is expected to affect small entities in any way that would complicate compliance and reporting requirements for EFPs or result in significant economic impacts for small entities.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number.

This final rule contains new collection-of-information requirements subject to review and approval by OMB under the PRA. The requirement for installation and activation of VMS aboard vessels with bottom longline or shark gillnet gear on board has been cleared by OMB under control number 0648–0483. The public reporting burden for this collection of information is estimated at: 4 hours for installation of a VMS, 5 minutes for completion of a VMS certification statement, 2 hours per year for VMS maintenance, and 0.3 seconds for an automated position report from a VMS.

This final rule also contains collection-of-information requirements that have been approved by OMB under control number 0648–0471. These requirements and their estimated response times are 30 minutes for an application for a shark display permit, 5 minutes for a catch report from a holder of a shark display permit, 30 minutes for a year-end report by a permit holder, 5 minutes for a notification 24 hours prior to a fishing trip, and 2 minutes for the application of a Passive Integrated Responder tag at the time of collection of a shark.

These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates, or any other aspect of these data collections, including suggestions for reducing the burden to NMFS and OMB (*see* **ADDRESSES**).

These regulations are not expected to have an adverse impact on protected species under the ESA. A BiOp issued October 29, 2003, in response to the proposed rule for Amendment 1 concluded that the level of anticipated take in the Atlantic shark fishery is not likely to jeopardize the continued existence of endangered green, leatherback, and Kemp's ridley sea turtles, the endangered smalltooth sawfish, or the threatened loggerhead sea turtle. Furthermore, it concluded that the actions in the rule are not likely to adversely affect marine mammals.

The species of sea turtles that are expected to be affected by the actions in this final rule are all highly migratory. NMFS believes that no individual members of any of the species are likely to be year-round residents of the action area. Individual animals will make migrations into nearshore waters as well as other areas of the North Atlantic

Ocean, Gulf of Mexico, and the Caribbean Sea. Therefore, the range-wide status of the affected species of sea turtles most accurately reflects the species' status within the action area. Sea turtles can be captured as a result of the use of bottom longlines, gillnets and rod and reel/handline fishing gear. Captured turtles can be released alive uninjured or can be killed as a result of the interaction. Some turtles that are released alive from bottom longline gear may die later as a result of the ingestion of a hook, endangerment in the gear, or the trailing of gear that was not cut away prior to release.

Smalltooth sawfish are not highly migratory species, although some large, mature individuals may engage in seasonal north/south movements. The U.S. Distinct Population Segment (DPS) of smalltooth sawfish is confined to only a small portion of the action area, mainly waters off Florida and possibly occasionally off Georgia. Only large, mature individuals are known to occur in the action area. Information is not available regarding how much time smalltooth sawfish of different sizes spend at different depths. Generally smaller (younger) animals are restricted to shallower waters, whereas large animals are believed to roam over a larger depth range. The smalltooth sawfish may only be present in the U.S. EEZ intermittently, spending the rest of their time in shallower waters. Based on this information, the range-wide status of smalltooth sawfish most accurately reflects the species' status within the action area. Smalltooth sawfish can also be captured as a result of the use of bottom longlines, gillnets and rod and reel/handline. The October 2003 BiOp for Atlantic shark fisheries represents the first Federal fishery to undergo formal consultation for this species.

In the bottom longline fishery a total of 43 sea turtles were observed caught from 1994 through 2002 based on 862 observed sets. Of the 43 sea turtles observed, 31 were loggerhead sea turtles of which 17 were released alive. Another nine loggerheads were released in an unknown condition and five were released dead. Based on extrapolation of observer data and reported effort from the logbook data, the BiOp estimates that a total of 2,003 loggerhead sea turtles were taken in the shark bottom longline fishery from 1994 through 2002. An additional 503 unidentified sea turtles were estimated to have been taken. On average, 222 loggerhead sea turtles and 56 unidentified sea turtles were taken annually during this time period in the shark bottom longline fishery. The BiOp estimates that approximately 123 loggerheads are killed per year on bottom longline gear.

Four of the 43 observed sea turtles taken in the bottom longline fishery were leatherback sea turtles; three of these were released in an unknown condition and one was released dead. Based on these observations, the BiOp estimates that 269 leatherback sea turtles were taken in the shark bottom longline fishery during 1994 through 2002. On average, approximately 30 leatherback sea turtles each year were taken by the shark bottom longline fishery during 1994 through 2002 and an estimated 17 leatherbacks were killed per year.

Smalltooth sawfish have also been observed caught (seven known interactions, six released alive, one released in unknown condition) in shark bottom longline fisheries from 1994 through 2002. Based on extrapolation of these observations, a total of 466 sawfish are estimated to have been taken in this fishery from 1994 to 2002, resulting in an average of 52 takes per year. All of the sawfish takes observed, except for one, were released alive. Based on this information, NMFS expects no smalltooth sawfish will be killed on bottom longline gear as a result of the measures in this final rule over the next five years.

In the shark gillnet fishery, loggerhead sea turtles are rarely caught. During the 1999 right whale calving season no loggerhead sea turtles were caught in this fishery. No loggerhead sea turtles were observed caught with strikenets during the 2000–2002 right whale calving seasons. However, three loggerhead sea turtles have been observed caught with drift gillnets during right whale calving season, one each year from 2000 to 2002. During the 2000 and 2001 non-right whale calving seasons, no loggerhead sea turtles were observed caught in gillnets fished in a strikenet method while one loggerhead sea turtle was observed caught and released alive in gillnets fished in a driftnet method. No loggerhead sea turtles were caught outside of the right whale calving season in 2002. Expanded take estimates for sea turtles in the shark drift gillnet fishery provides the following estimated takes of loggerhead sea turtles by year: 1999—none; 2000—one mortality and 4.4 live takes; 2001—one live take; and 2002—1.7 live takes.

In the shark gillnet fishery, leatherback sea turtles are sporadically caught. During the 1999 right whale calving season, two leatherback sea turtles were caught in this fishery, and both were released alive. No leatherback sea turtles were observed caught with strikenets during the 2000–2002 right whale calving seasons. Leatherback sea turtles have also been observed caught with gillnets including fourteen in 2001 and two in 2002. NMFS temporarily closed the shark gillnet fishery (strikenetting was allowed) from March 9 to April 9, 2001, due to the increased number of leatherback interactions that year (66 FR 15045, March 15, 2001). During the 2000 and 2001 non-right whale calving seasons, no leatherback sea turtles were observed caught in gillnets fished in strikenet or driftnet methods. No leatherback sea turtles were caught outside of the right whale calving season in 2002. The estimated takes of leatherback sea turtles by year were as follows: 1999—none; 2000—none; 2001—two mortalities and 12 live takes; and 2002—3.4 live takes.

To date there has been only one observed catch of a smalltooth sawfish in shark gillnet fisheries. The sawfish was taken on June 25, 2003, in a gillnet set off of southeast Florida and it was released alive. The set was characteristic of a typical drift gillnet set, with gear extending 30 to 40 feet deep in 50 to 60 feet of water. The previous absence of smalltooth sawfish incidental capture records is likely attributable to the relatively low effort in this fishery and the rarity of smalltooth sawfish, especially in Federal waters. These factors may result in little overlap of the species with the gear. The recently observed smalltooth sawfish was cut from the net and released alive with no visible injuries. This indicates that smalltooth sawfish can be removed safely if entangled gear is sacrificed.

As discussed in the proposed action, gillnets are also used to ''strikenet''. When strike gillnetting fishers target and encircle specific schools of sharks after visually detecting them (usually by spotter pilot). Given the large and or distinct morphology of smalltooth sawfish, this species would likely be detected visually, as well as distinguished from shark species, and thus avoided. This fishing method has also been shown to reduce potential encounters by limiting the time that gear is in the water. Strikenet sets are typically only one to two hours in contrast to six to 10 hours for each drift gillnet set. Endangered and threatened species, or protected marine mammals have never been observed taken in strikenet sets.

Given the high rate of observer coverage in the shark gillnet fishery, NMFS believes that smalltooth sawfish takes in this fishery are very rare. The fact that there were no smalltooth sawfish caught during the year 2001, when 100 percent of the fishing effort

was observed, indicates that smalltooth sawfish takes (observed or total) most likely do not occur on annual basis.

Recreational fishermen targeting sharks generally use bait and hook. Sea turtles are known to take baited hooks. NMFS has no data specifically showing that sea turtles are taken by recreational anglers fishing for sharks. Most recorded sea turtle captures by recreational fishermen occur off fishing piers where sea turtles are known to frequent due to lighting and the concentration of bait. There were no sea turtles caught during the June Gulf Coast Shark Census held each year between 1991 and 1999 (operating out of Sarasota) which happens offshore and not on fishing piers. The selected measures in Amendment 1 pertain to recreational shark fishing in Federal waters. Based on the information above NMFS believes that the chances of a recreational shark fishermen catching a sea turtle in Federal waters is discountable.

Smalltooth sawfish are known to be occasionally hooked with rod and reel and/or handline during recreational fishing. These captures occur most frequently in state waters in the vicinity of the Everglades National Park and Florida Bay, where the current population is concentrated. North of this area, the number of reported captures declines greatly. The National Park Service, Everglades National Park, monitors fishing activity and harvest in this area in part by conducting interviews with anglers and fishing guides at local boat ramps. These interviews indicate that the majority of anglers do not try to catch any particular kind of fish. Target species of the minority group that did try to catch a particular type, however, included snook, spotted sea trout, red drum, and tarpon. Thus the vast majority of incidental smalltooth sawfish captures are not from shark fishing.

The only indication that smalltooth sawfish may be occasionally hooked by a fishermen targeting sharks stems from the June Gulf Coast Shark Census between 1991 and 1999. Five smalltooth sawfish were captured and released in 20,000 line hours of recreational fishing effort. The captures, however, were all from either inside the barrier islands or just offshore from barrier islands, along the southwest Florida coast between Cape Romano and Saint Petersburg; thus all within state waters.

Given the overall scarcity of smalltooth sawfish encounters in state waters where this species is believed to occur in greater abundance and density, the chances of a smalltooth sawfish being encountered during recreational fishing in Federal waters are extremely rare. The MRFSS database has no records of smalltooth sawfish captured in Federal waters, let alone one during fishing targeting sharks. Therefore, NMFS believes that the chances of a recreational shark fisherman catching a smalltooth sawfish in Federal waters are discountable.

The final action to reduce the LCS commercial quota from 1997–2002 levels, resulting in a 45 percent reduction, is expected to reduce fishing effort for the shark bottom longline fishery. Effort reductions are not expected in the shark gillnet fishery because it primarily targets SCS, and drift gillnet fishing will not be eliminated by this final rule. The 2003 BiOp for the Atlantic shark fishery found that the reduction in bottom longline effort may result in a reduction of the number of sea turtle interactions. NMFS has no way of quantifying the effect on sea turtles at this time. Any such effort reductions will only reduce smalltooth sawfish interactions if effort reductions occur in the southern fishing areas where smalltooth sawfish are known to occur.

Although the time/area closure of North Carolina is expected in part to reduce the bycatch of prohibited species such as the dusky shark, the 2003 BiOp found it may have the added benefit of reducing potential sea turtle interactions. This benefit depends however, on how much effort reduction actually results from this action. Most bottom longline fishermen tend to fish close to their home port, so if redistribution of effort does occur, the effort is expected to redistribute to areas adjacent to or seaward of the closure. Sea turtle interactions may occur in these areas as well, thus reduced sea turtle interactions may not be realized if effort is merely redistributed. The time/area closure occurs north of where smalltooth sawfish occur, thus will provide no benefit to smalltooth sawfish. Conversely, should effort redistribute to the southern fishing grounds, smalltooth sawfish interactions could potentially increase as a result of the time area closure. Based on the expected area of any effort redistribution, however, NMFS believes the time/area closure will have no smalltooth sawfish impacts.

The requirement to have VMS on directed shark gillnet and bottom longline vessels will aid in enforcement of the time/area closure. Additionally, this measure could lead to improvements in effort data in this area which is used in estimating takes of protected species. Any such improvements however, would only potentially benefit sea turtles, as again this would be in areas outside the range of smalltooth sawfish.

NMFS is not reducing the recreational bag limit but is working towards increasing compliance with existing regulations. NMFS is also restricting the authorized gear in the recreational fishery to handline and rod and reel. Post-release mortality of these gear types is lower than that of traditional commercial gears such as bottom longline or gillnet. Since these gears are presently not used in recreational fishing, little benefit to sea turtles and smalltooth sawfish is expected.

Some of the regulations in this final rule were specifically designed to reduce, to the extent practicable, bycatch and bycatch mortality of sea turtles and marine mammals. These alternatives include: requiring the use of corrodible hooks, de-hooking devices (once a de-hooking device is approved), dipnets, and line cutters on bottom longline vessels (similar to the requirements for pelagic longline vessels); and requiring bottom longline vessels to move 1 nmi after an interaction with a protected species (also similar to the requirement for pelagic longliners). The 2003 BiOp found these measures are expected to have a positive impact on protected species. Additionally, the 2003 BiOp concluded that non-stainless steel corrodible hooks for the directed shark bottom longline fishery will minimize impacts to sea turtles and smalltooth sawfish if they are accidentally hooked. De-hooking equipment should also safely release incidentally caught sea turtles.

Based on observer data, observed and self-reported effort data, and the distribution and density of sea turtles in the action area, NMFS anticipates that the continued prosecution of the Atlantic shark fisheries may result in take of protected species. Currently available information on the relationship between sea turtles and sawfish and the Atlantic shark fishery indicates that injury and/or death of sea turtles and smalltooth sawfish is likely to occur. Therefore, pursuant to section 7(b)(4) of the ESA, the 2003 BiOp anticipates an actual 5-year total incidental take for the Atlantic shark fishery of: (1) 172 leatherback turtles, of which 88 will be lethal; (2) 1370 loggerhead turtles of which 755 will be lethal; (3) 30 total in any combination of hawksbill, green, and Kemp's ridley, with 5 lethal takes per species; and (4) 261 smalltooth sawfish, of which no lethal takes are expected. The above take estimates were further broken down by gear type. These limits

represent the number of total estimated takes, based on observed takes extrapolated across total effort levels for this fishery. Each gear type must be considered independently, and if the actual calculated incidental captures or mortalities exceed the amount estimated below for a gear type, the 2003 BiOp specifies that formal consultation for that gear type must be re-initiated immediately.

The AA has determined that the list of actions in this rule, which seek to rebuild the LCS complex, prevent overfishing of the LCS complex, and prevent overfishing of other species of sharks, are consistent to the maximum extent practicable with the enforceable policies of the coastal states in the Atlantic, Gulf of Mexico, and Caribbean that have Federally approved coastal zone management programs under the CZMA. NMFS asked for states' concurrence with this determination during the proposed rule stage. Ten states replied affirmatively regarding the consistency determination. NMFS presumes that the remaining states that have not yet responded also concur with the determination. One state, Georgia, replied that allowing the use of gillnets, including the proposed strikenet method, is not consistent with the State's CZMA program.

The State of Georgia objects to the consistency determination due to the continuing operation of the shark gillnet fishery in Federal waters impacting resources shared by adjacent state waters. Specifically, the State of Georgia raises a concern regarding the impact of the shark gillnet fishery on sea turtles, marine mammals, and sport fish. NMFS acknowledges the concern raised; however, under the Magnuson-Stevens Act's (16 U.S.C. 1801 *et seq.*) National Standards, the Agency must, among other things, base its actions upon the best scientific information available; implement conservation and management measures to prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery; and minimize bycatch and bycatch mortality to the extent practicable (16 U.S.C. 1851(a)(2), (1), and (9)).

National Standard 2, which requires that management measures be based on the best scientific information available, would preclude a closure of the shark gillnet fishery in Federal waters, or a partial closure just off Georgia, in this action. At this time, there is insufficient information to support such management measures. Data currently available indicate relatively low rates of bycatch and bycatch mortality of protected species and other finfish in this fishery. Incidental capture of threatened and endangered species is regulated under the ESA. As discussed above, according to the October 29, 2003, BiOp prepared pursuant to the ESA, there are relatively low rates of bycatch and bycatch mortality in the shark gillnet fishery. The BiOp, which incorporates the best scientific information available, did not conclude that continuation of the shark gillnet fishery would jeopardize any endangered or threatened resources and included a new incidental take statement for the fishery. Therefore, NMFS is not prohibiting the use of this gear at this time.

In its decision to not ban gillnet gear, NMFS also considered other requirements of the Magnuson-Stevens Act, including but not limited to National Standards 1 and 9. Shark gillnets are the commercial gear that are used to primarily target SCS, a complex that is not, according to the latest SCS stock assessment, overfished. Based on the best scientific information available, this Amendment will manage the fishery for OY, consistent with National Standard 1, by preferring a quota level that would increase the SCS commercial quota from the level in the 1999 HMS FMP. Given that a quota increase is warranted under the stock assessment, closing the shark gillnet fishery in Federal waters would not achieve, on a continuing basis, the OY from the fishery.

With regard to bycatch, this Amendment minimizes bycatch and bycatch mortality to the extent practicable, consistent with National Standard 9. While this final rule does not prohibit the use of gillnet gear, NMFS did consider an alternative that would allow only the strikenet method in the shark gillnet fishery and also a permanent closure of the fishery, which would make this rule fully consistent with Georgia's CZMA program. However, NMFS did not prefer either alternative, due to the lack of sufficient data and also taking into consideration the significant, negative social and economic impacts on the five vessels actively fishing in the shark gillnet fishery. Instead, this final rule will require all shark gillnet vessels to install and activate VMS during right whale calving season. In a future rulemaking, NMFS will examine additional gear modifications or other alternatives to reduce bycatch and bycatch mortality in this fishery. NMFS will also continue to work with existing take reduction teams and Fishery Management Councils to examine methods of reducing bycatch. Thus, NMFS finds that the final regulations implemented in the FMP Amendment are consistent with Georgia's Coastal Zone Management Program to the maximum extent practicable.

Several measures in this final action (implementation of the commercial LCS and SCS quotas through regional quotas, removal of the commercial minimum size, and allowing recreational fishermen to retain one bonnethead shark per person per vessel with no minimum size) relieve restrictions. Currently, the Atlantic commercial shark fishery is operating under quotas established under an emergency rule extension that will expire on December 29, 2003 (68 FR 31983, May 29, 2003). The extension implements quotas based upon the 2002 LCS and SCS stock assessments and temporarily suspends a commercial minimum size and quotas from the 1999 HMS FMP, which were based upon a 1998 assessment. When the extension expires, the 1999 quotas and commercial minimum size will go back into effect. This final rule would increase the LCS and SCS quotas that would come into effect on December 30, 2003, with the expiration of the existing emergency rule. Specifically, the overall LCS quota would increase from 816 mt dw (1999 HMS FMP) to 1,017 mt dw and the SCS quota would increase from 359 mt dw (1999 HMS FMP) to 454 mt dw, thus relieving a restriction by allowing more retention of fish. Removal of the commercial minimum size and changes to the recreational minimum size and retention limit would also relieve regulatory requirements. Because this regulation relieves requirements, as stated above, pursuant to 5 U.S.C. 553(d)(1), the 30-day delayed effectiveness period for the above management measures is not applicable and these provisions will become effective on December 30, 2003.

In addition, there is good cause, pursuant to 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness for the commercial quotas and removal of the commercial minimum size. After reviewing peer reviews of the 1998 assessment, which were required as part of a court-approved settlement agreement, NMFS determined that portions of that assessment did not constitute the best available science. The LCS and SCS quotas in this final action, which are based on the 2002 assessments, must be effective by December 30, 2003, otherwise, quotas that are more restrictive and not based on the best available science will go into effect, which is inconsistent with National Standard 2 of the Magnuson-Stevens Act. If the commercial minimum size is not removed by December 30, 2003, fishermen may

incur additional fuel and supply costs in order to fish further offshore to target larger fish. During development of this final rule, NMFS provided many opportunities for public participation and made the FEIS for Amendment 1 available to the public for 30 days prior to making its final decision (68 FR 64621, November 14, 2003). Thus, members of the public were aware of what the rule was likely to contain. It would be contrary to the public interest to delay the implementation of these measures because of the economic impact on fishermen. Therefore, pursuant to 5 U.S.C. 553(d)(3), there is good cause to waive the delay in effectiveness for the commercial quotas and minimum size.

List of Subjects

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: December 17, 2003.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR parts 600 and 635 are amended as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for 50 CFR part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. In § 600.725, section IX of the list of authorized fisheries and gears in paragraph (v) is revised to read as follows:

§ 600.725 General prohibitions.

* * * * *

(v) * * *

Fishery	*Authorized gear types*
* * * * * * *	
IX. SECRETARY OF COMMERCE	
1. Atlantic Tunas, Swordfish, and Sharks Fisheries (FMP):	
A. Swordfish handgear fishery	A. Rod and reel, harpoon, handline, bandit gear.
B. Pelagic longline fishery	B. Longline.
C. Shark gillnet fishery	C. Gillnet
D. Shark bottom longline fishery	D. Longline.
E. Shark handgear fishery	E. Rod and reel, handline, bandit gear.
F. Shark recreational fishery	F. Rod and reel, handline.
G. Tuna purse seine fishery	G. Purse seine.
H. Tuna recreational fishery	H. Rod and reel, handline.
I. Tuna handgear fishery	I. Rod and reel, harpoon, handline, bandit gear.
J. Tuna harpoon fishery	J. Harpoon.
2. Atlantic Billfish Fishery (FMP):	
Recreational fishery	Rod and reel.
3. Commercial Fisheries (Non-FMP)	Rod and reel, handline, longline, gillnet, harpoon, bandit gear, purse seine.

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PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 3. The authority citation for 50 CFR part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

■ 4. In § 635.2, in the definition of ''Management unit,'' paragraph (5) is revised, and new definitions for ''Display permit,'' and ''Mid-Atlantic shark closed area,'' are added in alphabetical order to read as follows:

§ 635.2 Definitions.

* * * * *

Display permit means a permit issued in order to catch and land HMS for the purpose of public display pursuant to § 635.32.

* * * * *

Management unit means in this part:

* * * * *

(5) For sharks, means all fish of these species in the western north Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, excluding those species listed in Table 2 of Appendix A.

* * * * *

Mid-Atlantic shark closed area means the Atlantic Ocean area seaward of the inner boundary of the U.S. EEZ from a point intersecting the inner boundary of the U.S. EEZ at 35°41′ N. lat. just south of Oregon Inlet, North Carolina, and connecting by straight lines the following coordinates in the order stated: 35°41′ N. lat., 75°25′ W. long. proceeding due east to 35°41′ N. lat., 74°51′ W. long.; then proceeding southeast to 35°30′ N. lat., 74°46′ W. long.; then proceeding southwest, roughly following the 55 fathom mark, to 33°51′ N. lat., 76°24′ W. long.; then proceeding due west to intersect the inner boundary of the U.S. EEZ at 33°51′ N. lat., 77°53′ W. long. near Cape Fear, North Carolina.

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■ 5. In § 635.3, paragraph (d) is revised to read as follows:

§ 635.3 Relation to other laws.

* * * * *

(d) An activity that is otherwise prohibited by this part may be conducted if authorized as scientific research activity, exempted fishing or exempted educational activity, or for public display, as specified in § 635.32.

■ 6. In § 635.5, paragraph (e) is revised to read as follows:

§ 635.5 Recordkeeping and reporting.

* * * * *

(e) *Inspection.* Any person authorized to carry out enforcement activities

under the regulations in this part has the authority, without warrant or other process, to inspect, at any reasonable time, catch on board a vessel or on the premises of a dealer, logbooks, catch reports, statistical records, sales receipts, or other records and reports required by this part to be made, kept, or furnished. An owner or operator of a fishing vessel that has been issued a permit under § 635.4 or § 635.32 must allow NMFS or an authorized person to inspect and copy any required reports and the records, in any form, on which the completed reports are based, wherever they exist. An agent of a person issued a permit under this part, or anyone responsible for offloading, storing, packing, or selling regulated HMS for such permittee, shall be subject to the inspection provisions of this section.

* * * * *

§ 635.16 [Removed and Reserved]

■ 7. Remove and reserve § 635.16.

■ 8. In § 635.20, paragraph (e) is revised to read as follows:

§ 635.20 Size limits.

* * * * *

(e) *Sharks.* All sharks landed under the recreational retention limits specified at § 635.22(c) must have the head, tail, and fins attached. All sharks, except Atlantic sharpnose and bonnethead sharks, landed under the recreational retention limits specified at § 635.22(c) must be at least 54 inches (137 cm) FL.

* * * * *

■ 9. In § 635.21, paragraph (d) is redesignated as paragraph (e), a new paragraph (d) is added, and the newly redesignated paragraphs (e)(3)(i) through (e)(3)(iv) and (e)(3)(vi) are revised to read as follows:

§ 635.21 Gear operation and deployment restrictions.

* * * * *

(d) *Bottom longlines.* For the purposes of this part, a vessel is considered to have bottom longline gear on board when a power-operated longline hauler, a mainline, weights and/or anchors capable of maintaining contact between the mainline and the ocean bottom, and leaders (gangions) with hooks are on board. Removal of any one of these elements constitutes removal of bottom longline gear. Bottom longline vessels may have a limited number of floats and/or high flyers onboard for the purposes of marking the location of the gear but removal of these floats does not constitute removal of bottom longline gear. If a vessel issued a permit under this part is in a closed area designated under paragraph (d)(1) of this section with bottom longline gear on board, it is a rebuttable presumption that any fish on board such a vessel were taken with bottom longline in the closed area.

(1) Effective January 1, 2005, if bottom longline gear is on board a vessel issued a permit under this part, persons aboard that vessel may not fish or deploy any type of fishing gear in the mid-Atlantic shark closed area from January 1 through July 31 each calendar year.

(2) When a marine mammal, sea turtle, or smalltooth sawfish is hooked or entangled by bottom longline gear, the operator of the vessel must immediately release the animal, retrieve the bottom longline gear, and move at least 1 nmi (2 km) from the location of the incident before resuming fishing. Reports of marine mammal entanglements must be submitted to NMFS consistent with regulations in § 229.6 of this title.

(3) The operator of a vessel required to be permitted under this part and that has bottom longline gear on board must:

(i) Undertake the same bycatch mitigation measures as specified in paragraphs (c)(5)(i), (ii), and (iii)(B) of this section to release sea turtles, prohibited sharks, or smalltooth sawfish, as appropriate. If a smalltooth sawfish is caught, the fish should be kept in the water while maintaining water flow over the gills and examined for research tags and the line should be cut as close to the hook as possible.

(ii) Possess and use a dehooking device that meets the minimum design standards. The dehooking device must be carried on board and must be used to remove the hook from any hooked sea turtle, prohibited shark, or other animal, as appropriate. The dehooking device should not be used to release smalltooth sawfish. NMFS will file with the Office of the Federal Register for publication the minimum design standards for approved dehooking devices. NMFS may also file with the Office of the Federal Register for publication any additions and/or amendments to the minimum design standards. **Note:** This paragraph (d)(3)(ii) is not effective until further notification is published in the **Federal Register**.

(e) * * *

(3) * * *

(i) No person may possess a shark in the EEZ taken from its management unit without a permit issued under § 635.4. No person issued a shark LAP under § 635.4 may possess a shark by any gear other than rod and reel, handline, bandit gear, longline, or gillnet. No person issued an HMS Angling permit or an HMS Charter/headboat permit under § 635.4 may possess a shark in the EEZ if the shark was taken from its management unit by any gear other than rod and reel or handline, except that persons on a vessel issued both an HMS Charter/headboat permit and a shark LAP may possess sharks taken with rod and reel, handline, bandit gear, longline, or gillnet if the vessel is not engaged in a for-hire fishing trip.

(ii) No person may fish for sharks with a gillnet with a total length of 2.5 km or more. No person may have on board a vessel a gillnet with a total length of 2.5 km or more.

(iii) Provisions on gear deployment for the southeast U.S. shark gillnet fishery to implement the Atlantic Large Whale Take Reduction Plan are set forth in § 229.32(f) of this title.

(iv) While fishing for Atlantic sharks with a gillnet, the gillnet must remain attached to at least one vessel at one end, except during net checks.

* * * * *

(vi) Vessel operators are required to conduct net checks every 0.5 to 2 hours to look for and remove any sea turtles, marine mammals, or smalltooth sawfish. Smalltooth sawfish should not be removed from the water while being removed from the net.

* * * * *

■ 10. In § 635.22, paragraph (c) is revised as follows:

§ 635.22 Recreational retention limits.

* * * * *

(c) *Sharks.* One shark from either the large coastal, small coastal, or pelagic group may be retained per vessel per trip, subject to the size limits described in § 635.20(e), and, in addition, one Atlantic sharpnose shark and one bonnethead shark may be retained per person per trip. Regardless of the length of a trip, no more than one Atlantic sharpnose shark and one bonnethead shark per person may be possessed on board a vessel. No prohibited sharks from the management unit, which are listed in table 1(d) of appendix A to this part, may be retained. The recreational retention limit for sharks applies to any person who fishes in any manner, except to a person aboard a vessel who has been issued an Atlantic shark LAP under § 635.4. If an Atlantic shark quota is closed under § 635.28, the recreational retention limit for sharks may be applied to persons aboard a vessel issued an Atlantic shark LAP under § 635.4, only if that vessel has also been issued an HMS Charter/Headboat permit issued under § 635.4 and is engaged in a for-hire fishing trip.

* * * * *

■ 11. In § 635.27, paragraph (b) is revised to read as follows:

§ 635.27 Quotas.

* * * * *

(b) *Sharks.* (1) *Commercial quotas.* The commercial quotas for sharks specified in paragraphs (b)(1)(i) through (b)(1)(vi) of this section apply to sharks harvested from the management unit, regardless of where harvested. Commercial quotas are specified for each of the management groups of large coastal sharks, small coastal sharks, and pelagic sharks. No prohibited sharks from the management unit, which are listed in table 1(d) of appendix A to this part, may be retained except as authorized under § 635.32.

(i) *Fishing seasons.* For the 2004 fishing year, the commercial quotas for large coastal sharks, small coastal sharks, and pelagic sharks will be split between two fishing seasons: January 1 through June 30 and July 1 through December 31. Starting on January 1, 2005, and for each following year, the commercial quotas for large coastal sharks, small coastal sharks, and pelagic sharks will be split between three fishing seasons: January 1 through April 30, May 1 through August 30, and September 1 through December 31.

(ii) *Regions.* The commercial quotas for large coastal sharks and small coastal sharks are split between three regions. The regions are: Gulf of Mexico, South Atlantic, and North Atlantic. For the purposes of this section, the Gulf of Mexico region includes all waters of the U.S. EEZ west and north of the boundary stipulated at 50 CFR 600.105(c). The South Atlantic region includes all waters east of the Gulf of Mexico region north to the border between North Carolina and Virginia at roughly 36°30' N. lat., including the waters surrounding the Caribbean. The North Atlantic region includes all waters north of the North Carolina and Virginia border at roughly 36°30' N. lat.

(iii) *Large coastal sharks.* The annual commercial quota for large coastal sharks is 1,017 mt dw, unless adjusted pursuant to paragraph (b)(1)(vi) of this section. This annual quota is split between the regions as follows: 42 percent to the Gulf of Mexico, 54 percent to the South Atlantic, and 4 percent to the North Atlantic. The length of each fishing season will be determined based on the projected catch rates, available quota, and other relevant factors. At least 30 days prior to the beginning of the season, NMFS will file with the Office of the Federal Register for publication the length of each season.

(iv) *Small coastal sharks.* The annual commercial quota for small coastal sharks is 454 mt dw, unless adjusted pursuant to paragraph (b)(1)(vi) of this section. This annual quota is split between the regions as follows: 4 percent to the Gulf of Mexico, 83 percent to the South Atlantic, and 13 percent to the North Atlantic.

(v) *Pelagic sharks.* The annual commercial quotas for pelagic sharks are 92 mt dw for porbeagle sharks, 273 mt dw for blue sharks, and 488 mt dw for pelagic sharks other than porbeagle or blue sharks, unless adjusted pursuant to paragraph (b)(1)(vi) of this section.

(vi) *Annual adjustments.* (A) NMFS will adjust the next year's fishing season quotas for large coastal, small coastal, and pelagic sharks to reflect actual landings during any fishing season in any particular region. For example, a commercial quota underharvest or overharvest in the fishing season in one region that begins January 1 will result in an equivalent increase or decrease in the following year's quota for that region for the fishing season that begins January 1. NMFS will file any adjustment with the Office of the Federal Register for publication at least 30 days prior to the start of the next fishing season.

(B) NMFS will reduce the annual commercial quota for pelagic sharks by the amount that the blue shark quota is exceeded at least 30 days prior to the start of the next fishing season.

(C) Sharks taken and landed from state waters are counted against the fishery quota for the applicable region and time period.

(2) *Public display and research quota.* The annual quota for persons who collect sharks from any of the management groups under a display permit or EFP is 60 mt whole weight (43 mt dw). All sharks collected under the authority of a display permit or EFP, subject to restrictions at § 635.32, will be counted against this quota.

* * * * *

■ 12. In § 635.28, paragraph (b) is revised to read as follows:

§ 635.28 Closures.

* * * * *

(b) *Sharks.* (1) The commercial fishery for large coastal sharks will remain open in each region under the fishing seasons and regional quotas, as specified at § 635.27(b)(1). From the effective date and time of a season closure in a particular region until additional quota becomes available, the fishery for large coastal sharks in that particular region is closed.

(2) When the fishing season quota for small coastal sharks or pelagic sharks specified in § 635.27(b)(1) is reached for a particular region, or is projected to be reached, NMFS will file for publication with the Office of the Federal Register, a notice of closure at least 14 days before the effective date. From the effective date and time of the closure until additional quota becomes available, the fishery for the appropriate shark species group in that particular region is closed.

(3) When the fishery for a shark species group in a particular region is closed, a fishing vessel, issued an Atlantic Shark LAP pursuant to § 635.4, may not possess or sell a shark of that species group in that region, except under the conditions specified in § 635.22 (a) and (c), and a shark dealer in that region, issued a permit pursuant to § 635.4, may not purchase or receive a shark of that species group from a vessel issued an Atlantic Shark LAP, except that a permitted shark dealer or processor may possess sharks that were harvested, off-loaded, and sold, traded, or bartered, prior to the effective date of the regional closure and were held in storage. Under a regional closure for a shark species group, a shark dealer issued a permit pursuant to § 635.4 may, in accordance with state regulations, purchase or receive a shark of that species group if the sharks were harvested, off-loaded, and sold, traded, or bartered from a vessel that fishes only in state waters and that has not been issued a Shark LAP, HMS Angling permit, or HMS Charter/Headboat permit pursuant to § 635.4.

* * * * *

■ 13. In § 635.32, paragraph (a) is revised; paragraphs (c)(2) and (c)(3) are removed; paragraphs (d) and (e) are redesignated as paragraphs (e) and (f), respectively; a new paragraph (d) is added; and the newly redesignated paragraphs (e) and (f) are revised to read as follows:

§ 635.32 Specifically authorized activities.

(a) *General.* Consistent with the provisions of § 600.745 of this chapter, except as indicated in this section, NMFS may authorize for the conduct of scientific research or the acquisition of information and data, for the enhancement of safety at sea, for the purpose of collecting animals for public education or display, or for investigating the reduction of bycatch, economic discards or regulatory discards, activities otherwise prohibited by the regulations contained in this part. Activities subject to the provisions of this section include, but are not limited to, scientific research resulting in, or likely to result in, the take, harvest or incidental mortality of Atlantic HMS, exempted fishing and exempted educational activities, or programs

under which regulated species retained in contravention to otherwise applicable regulations may be donated through approved food bank networks. Such activities must be authorized in writing and are subject to all conditions specified in any letter of acknowledgment, exempted fishing permit, scientific research permit, or display permit issued in response to requests for authorization under this section. For the purposes of all regulated species covered under this part, NMFS has the sole authority to issue permits, authorizations, and acknowledgments. If a regulated species landed or retained under the authority of this section is subject to a quota, the fish shall be counted against the quota category as specified in the written authorization. Inspection requirements specified in 635.5(e) of this part apply to the owner or operator of a fishing vessel that has been issued a exempted fishing permit, scientific research permit, or display permit.

* * * * *

(d) *Display permits.* (1) For activities consistent with the purposes of this section and § 600.745(b)(1) of this chapter, NMFS may issue display permits.

(2) Notwithstanding the provisions of § 600.745 of this chapter and other provisions of this part, a valid display permit is required to fish for, take, retain, or possess an HMS in or from the Atlantic EEZ for the purposes of public display. A valid display permit must be on board the harvesting vessel, must be available when the fish is landed, must be available when the fish is transported to the display facility, and must be presented for inspection upon request of an authorized officer. A display permit is valid for the specific time, area, gear, and species specified on it. Species landed under a display permit shall be counted against the appropriate quota specified in § 635.27 or as otherwise provided in the display permit.

(3) To be eligible for a display permit, a person must provide all information concerning his or her identification, numbers by species of HMS to be collected, when and where they will be collected, vessel(s) and gear to be used, description of the facility where they will be displayed, and any other information that may be necessary for the issuance or administration of the permit, as requested by NMFS.

(4) Collectors of HMS for public display must notify the local NMFS Office for Law Enforcement at least 24 hours, excluding weekends and holidays, prior to departing on a collection trip, regardless of whether the fishing activity will occur in or outside the EEZ, as to collection plans and location and the number of animals to be collected. In the event that a NMFS agent is not available, a message may be left.

(5) All live HMS collected for public display are required to have either a conventional dart tag or a microchip Passive Integrated Transponder (PIT) tag applied by the collector at the time of the collection. Both types of tags will be supplied by NMFS. Conventional dart tags will be issued unless PIT tags are specifically requested in the permit application and their use approved by NMFS. Terms and conditions of the permit will address requirements associated with the use of the tags supplied on a case-by-case basis.

(e) *Applications and renewals.* Application procedures shall be as indicated under § 600.745(b)(2) of this chapter, except that NMFS may consolidate requests for the purpose of obtaining public comment. In such cases, NMFS may file with the Office of the Federal Register for publication notification on an annual or, as necessary, more frequent basis to report on previously authorized exempted fishing, scientific research, or public display activities and to solicit public comment on anticipated EFP, SRP, LOA, or public display permit requests. Applications for EFP, SRP, and public display permit renewals are required to include all reports specified in the applicant's previous EFP, SRP, or public display permit including the year-end report, all delinquent reports for EFPs, SRPs, and public display permits issued in prior years, and all other specified information, in order for the renewal application to be considered complete. In situations of delinquent reports, renewal applications will be deemed incomplete and a permit will not be issued under this section.

(f) *Terms and conditions.* (1) Written reports on fishing activities and disposition of catch for all HMS either retained, discarded alive or dead, or tagged and released under a permit issued under this section, must be submitted to NMFS, at an address designated by NMFS, within 5 days of the fishing activity, without regard to whether the fishing activity occurs in or outside the EEZ. Also, an annual written summary report of all fishing activities and disposition of all fish captured under the permit must be submitted to NMFS, at an address designated by NMFS, within 30 days after the expiration date of the permit. NMFS will provide specific conditions and requirements as needed, consistent with the Fishery Management Plan for Atlantic Tunas, Swordfish and Sharks, in the permit. If an individual issued a Federal permit under this section captures no HMS in any given month, either in or outside the EEZ, a ''no-catch'' report must be submitted to NMFS within 5 days of the last day of that month.

(2) Permit conditions regarding fishing activities, such as gear deployment, monitoring, or soak time, may be specified by NMFS if warranted, on a case-by-case basis.

(3) NMFS may select for at-sea observer coverage any vessel issued a permit under this section. Selected vessels must comply with the requirements for observer accommodation and safety specified at §§ 635.7, 600.725, and 600.746 of this chapter.

14. In § 635.34, paragraph (b) is revised and paragraph (c) is added to read as follows:

§ 635.34 Adjustment of management measures.

* * * * *

(b) In accordance with the framework procedures in the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks and the Fishery Management Plan for Atlantic Billfishes, NMFS may establish or modify for species or species groups of Atlantic HMS the following management measures: maximum sustainable yield or optimum yield levels based on the latest stock assessment or updates in the SAFE report; domestic quotas; recreational and commercial retention limits, including target catch requirements; size limits; fishing years or fishing seasons; shark fishing regions or regional quotas; species in the management unit and the specification of the species groups to which they belong; species in the prohibited shark species group; classification system within shark species groups; permitting and reporting requirements; Atlantic tunas Purse Seine category cap on bluefin tuna quota; time/area restrictions; allocations among user groups; gear prohibitions, modifications, or use restrictions; effort restrictions; essential fish habitat; and actions to implement ICCAT recommendations, as appropriate.

(c) NMFS may add species to the prohibited shark species group specified in Table 1 of appendix A if, after considering the criteria in paragraphs (c)(1) through (4) of this section, the species is determined to meet at least two of the criteria. Alternatively, NMFS may remove species from the prohibited shark species group and place them in the appropriate shark species group in Table 1 of appendix A if, after

considering the criteria in paragraphs (c)(1) through (4) of this section, NMFS determines the species only meets one criterion.

(1) Biological information indicates that the stock warrants protection.

(2) Information indicates that the species is rarely encountered or observed caught in HMS fisheries.

(3) Information indicates that the species is not commonly encountered or observed caught as bycatch in fishing operations for species other than HMS.

(4) The species is difficult to distinguish from other prohibited species.

■ 15. In § 635.69, paragraphs (a), (e), and (h) are revised to read as follows:

§ 635.69 Vessel monitoring systems.

(a) *Applicability.* To facilitate enforcement of time-area and fishery closures, an owner or operator of a commercial vessel, permitted to fish for Atlantic HMS under § 635.4 and that fishes with a pelagic or bottom longline or strikenet gear, is required to install a NMFS-approved vessel monitoring system (VMS) unit on board the vessel and operate the VMS unit under the following circumstances:

(1) Whenever the vessel is away from port with pelagic longline gear on board;

(2) Whenever a vessel, issued a directed shark LAP, is away from port with bottom longline gear on board, is located between 33°00′ N. lat. and 36°30′ N. lat., and the mid-Atlantic shark closed area is closed to bottom longline fishing as specified in § 635.21(d)(1); or

(3) Whenever a vessel, issued a directed shark LAP, is away from port with a gillnet on board during the right whale calving season specified in the Atlantic Large Whale Take Reduction Plan in § 229.32(f) of this title. **Note:** Paragraphs (a)(2) and (a)(3) of this section are not effective until further notification is published in the **Federal Register.**

(4) A vessel is considered to have pelagic longline gear on board, for the purposes of this section, when gear as specified at § 635.21(c) is on board. A vessel is considered to have bottom longline gear on board, for the purposes of this section, when gear as specified at § 635.21(d) is on board. A vessel is considered to have gillnet gear on board, for the purposes of this section, when gillnet, as defined in § 600.10, is on board a vessel that has been issued a shark LAP.

* * * * *

(e) *Operation.* Owners or operators of vessels permitted, or required to be permitted, to fish for HMS, that have pelagic or bottom longline gear or gillnet gear on board, and that are required to have a VMS unit installed, as specified in paragraph (a), must activate the VMS to submit automatic position reports beginning 2 hours prior to leaving port and continuing until the vessel returns to port. While at sea, the unit must operate without interruption and no person may interfere with, tamper with, alter, damage, disable, or impede the operation of a VMS, or attempt any of the same. Vessels fishing outside the geographic area of operation of the installed VMS will be in violation of the VMS requirement.

* * * * *

(h) *Access.* As a condition to obtaining a LAP for Atlantic swordfish, sharks, or tunas, all vessel owners or operators using pelagic or bottom longline or gillnet gear, subject to the VMS provisions of this section must allow NMFS, the USCG, and their authorized officers and designees access to the vessel's position data obtained from the VMS at the time of or after its transmission to the vendor or receiver, as the case may be.

■ 16. In § 635.71, paragraphs (a)(1), (a)(2), (a)(7), (a)(14), (a)(17), (a)(18), (a)(23), (a)(26), (a)(34), (a)(37), (b)(7), (b)(8), (c)(1), (d)(10), (d)(12), and (d)(13) are revised, and paragraphs (a)(39) and (a)(40) are added to read as follows:

§ 635.71 Prohibitions.

* * * * *

(a) * * *

(1) Falsify information required on an application for a permit submitted under § 635.4 or § 635.32.

(2) Fish for, catch, possess, retain, or land an Atlantic HMS without the appropriate valid vessel permit, LAP, EFP, SRP, or display permit on board the vessel, as specified in §§ 635.4 and 635.32.

* * * * *

(7) Fail to allow an authorized agent of NMFS to inspect and copy reports and records, as specified in § 635.5(e) or § 635.32.

* * * * *

(14) Fail to install, activate, repair, or replace a vessel monitoring system prior to leaving port with pelagic longline gear, bottom longline gear, or gillnet gear on board the vessel as specified in § 635.69.

* * * * *

(17) Fish for Atlantic tunas or swordfish with a gillnet or possess Atlantic tunas or swordfish on board a vessel with a gillnet on board, as specified in § 635.21 (b), (e)(1), and (e)(4)(ii).

(18) Fail to retrieve fishing gear and move after an interaction with a protected species, as specified in § 635.21 (c)(3) or (d)(2).

* * * * *

(23) Fail to comply with the restrictions on use of a pelagic longline, bottom longline, or gillnet as specified in § 635.21 (c), (d), or (e)(3).

* * * * *

(26) Violate the terms and conditions or any provision of a permit issued under §§ 635.4 or 635.32.

* * * * *

(34) Fail to disengage any hooked or entangled sea turtle with the least harm possible to the sea turtle as specified at § 635.21 (c)(5) or (d)(3).

* * * * *

(37) Fail to report to NMFS, at the number designated by NMFS, the incidental capture of listed whales with shark gillnet gear and sea turtle mortalities associated with pelagic longline gear as required by § 635.5.

* * * * *

(39) Deploy or fish with any fishing gear, from a vessel with a bottom longline on board, in any closed area during the time periods specified at § 635.21(d)(1).

(40) Deploy or fish with any fishing gear, from a vessel with bottom longline gear on board, without carrying a dipnet, line clipper, and dehooking device as specified at § 635.21(d)(3).

(b) * * *

(7) Fish for, catch, retain, or possess a BFT with gear not authorized for the category permit issued to the vessel or to have such gear on board when in possession of a BFT, as specified in § 635.21(e)(1).

(8) Fail to request an inspection of a purse seine vessel, as specified in § 635.21(e)(1)(vi)(B).

* * * * *

(c) * * *

(1) Retain a billfish on board a vessel with a pelagic longline on board or harvested by gear other than rod and reel, as specified in § 635.21(e)(2).

* * * * *

(d) * * *

(10) Retain, possess, sell, or purchase a prohibited shark, as specified under § 635.22(c) and § 635.27(b)(1) or fail to disengage any hooked or entangled prohibited shark with the least harm possible to the animal as specified at § 635.21(d)(3).

* * * * *

(12) Fish for Atlantic sharks with unauthorized gear or possess Atlantic sharks on board a vessel with unauthorized gear on board as specified in § 635.21(e)(3).

(13) Fish for Atlantic sharks with a gillnet or possess Atlantic sharks on board a vessel with a gillnet on board, except as specified in § 635.21(e)(3).

* * * * *

[FR Doc. 03–31483 Filed 12–23–03; 8:45 am]

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Federal Register

Wednesday,
December 24, 2003

Part V

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 405 and 491

Medicare Program; Rural Health Clinics: Amendments to Participation Requirements and Payment Provisions; and Establishment of a Quality Assessment and Performance Improvement Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 405 and 491

[CMS–1910–F]

RIN 0938–AJ17

Medicare Program; Rural Health Clinics: Amendments to Participation Requirements and Payment Provisions; and Establishment of a Quality Assessment and Performance Improvement Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule amends Medicare certification and payment requirements for rural health clinics (RHCs) as required by the Balanced Budget Act of 1997 (BBA). It changes the definition of a qualifying rural shortage area in which a Medicare RHC must be located; establishes criteria for identifying RHCs essential to delivery of primary care services that we can continue to approve as Medicare RHCs in areas no longer designated as medically underserved; and limits waivers of certain nonphysician practitioner staffing requirements. This final rule imposes payment limits on provider-based RHCs and prohibits ''commingling'' (the use of the space, professional staff, equipment, and other resources) of an RHC with another entity. The rule also requires RHCs to establish a quality assessment and performance improvement program that goes beyond current regulations. Finally, this final rule addresses public comments received on the February 28, 2002 proposed rule and makes other revisions for clarity and uniformity and to improve program administration.

EFFECTIVE DATE: These regulations are effective on February 23, 2004.

FOR FURTHER INFORMATION CONTACT: David Worgo (payment and certification policy), (410) 786–5919.

Mary Collins (quality policy issues), (410) 786–3189.

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I. Background

A. General

The Rural Health Clinic Services Act of 1977 (Pub. L. 95–210, enacted December 13, 1977), amended the Social Security Act (the Act) by enacting section 1861(aa) to extend Medicare and Medicaid entitlement and payment for primary and emergency care services furnished at a rural health clinic (RHC) by physicians and certain nonphysician practitioners, and for services and supplies incidental to their services. ''Nonphysician practitioners'' included nurse practitioners and physician assistants. (Subsequent legislation extended the definition of covered RHC services to include the services of clinical psychologists, clinical social workers, and certified nurse midwives).

According to House Report No. 95–548(I), the purpose of Pub. L. 95–210 was to address an inadequate supply of physicians to serve Medicare and Medicaid beneficiaries in rural areas. The program addressed this problem by providing qualifying clinics located in rural, medically underserved communities with payment on a cost-related basis for outpatient physician and certain nonphysician services furnished to Medicare and Medicaid beneficiaries. (The Medicare payment provisions for rural health clinics are in sections 1833(a)(3) and 1833(f) of the Act and in our regulations beginning at 42 CFR 405.2462.)

Qualifying clinics, among other criteria, had to be located in a nonurbanized area as defined by the Census Bureau and in a health professional shortage area or medically underserved area as designated by the Health Resources and Services Administration or (since the Omnibus Budget Reconciliation Act of 1989 (OBRA '89, Pub. L. 101–239, enacted on December 19, 1989), section 6213(c)) by the chief executive officer of the State. (*See* section 1861(aa)(2) of the Act, following subparagraph (K).) There are three types of shortage area designations applicable to RHC qualification: health professional shortage areas, medically underserved areas, and governor-designated shortage areas. The clinic's service area must have, in addition to being located in a nonurbanized area, one of these shortage area designations if the clinic is to qualify to receive RHC status.

Qualifying clinics also must employ a nonphysician practitioner and, to meet requirements of the OBRA '89, must have a nurse practitioner, a physician assistant, or a certified nurse midwife available to furnish patient care services at least 50 percent of the time the RHC operates.

Growth of RHCs in the Medicare Program

After a slow start, the program has recently grown at a rapid rate—from less than 1,000 Medicare-approved RHCs in 1992 to more than 3,300 in early 2001. While part of this increase has improved access to primary care services in rural areas for Medicare and Medicaid beneficiaries, there are instances in which these additional RHCs have not expanded access.

Continuing Participation

A significant factor in the growth of RHCs stems from the original (pre-BBA) RHC legislation, which included a ''grandfather clause'' to promote the development of RHCs. (See section 1(e) of Pub. L. 95–210, 42 U.S.C. 1395x *note.* Also see 42 CFR 491.5(b)(2).) Specifically, the third sentence of section 1861(aa)(2) of the Act stated that:

A facility that is in operation and that qualifies as a rural health clinic (under the Medicare or Medicaid program) and that subsequently fails to satisfy the requirements of clause (i) (in the second sentence of section 1861(aa)(2), pertaining to the rural and underserved location requirement), is considered as still satisfying the requirement of this clause.

This provision protected the clinic's RHC status despite any possible changes to the rural or underserved status of its service area. It allowed clinics to remain in the RHC program even though their service areas were no longer considered rural or medically underserved.

The Congress established this protection to encourage clinics to attract needed health care professionals to underserved rural areas and to retain them without being concerned about losing the shortage area designation, which would make the clinics ineligible for RHC status and its reimbursement

incentives. Once the clinic successfully attracted the needed health care professionals to the area, the Congress wanted to ensure that the service area did not return to its previous underserved status because we removed the clinic's RHC status and reimbursement incentives.

Although the grandfather provision was based on justifiable policy considerations, we are now confronted with RHC participation in some service areas with extensive health care delivery systems where Medicare and Medicaid beneficiaries are not having difficulty obtaining primary care. Both the General Accounting Office (GAO) and the Department of Health and Human Services' Inspector General (DHHS/IG) recommended the establishment of a mechanism, under the survey and certification process for Medicare facilities, to discontinue RHC status and its payment incentives in those service areas where they are no longer justified. (See the next paragraph.) In section 4205(d)(3) of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33, enacted on August 05, 1997), the Congress responded to these recommendations by amending the grandfather provision to provide protection only to clinics essential to the delivery of primary care.

Medically Underserved Designations

Another reason for the continued growth of the RHC program was that two types of shortage area designations, specifically the medically underserved area (MUA) and Governor's designations, did not have a statutory requirement for regular review and were not systematically reviewed and updated for some time. As a result, some new RHCs may have been certified in areas that would no longer be designated as underserved if reviewed with current data. In response, as discussed below, the Congress amended the legislation by requiring that only those clinics located in shortage areas that were recently designated or updated will qualify for purposes of the RHC program.

Commingling

The growth of RHCs has also been stimulated by industry practices that are designed to maximize Medicare payment by obtaining RHC status for an integrated practice that submits both RHC and non-RHC Medicare claims. We define the term ''commingling'' to mean the simultaneous operation of an RHC and another physician practice, thereby mixing the two practices. The two practices share hours of operation, staff, space, supplies, and other resources. Commingling occurs in RHCs that are an integral part of another provider, such as a hospital, as well as in RHCs that are independent.

A common approach taken by independent RHCs is to operate a private physician practice in the RHC at the same time the physician is furnishing RHC services to patients. We believe this could lead to incorrect billing or duplicate payments.

Government Reports

Both the GAO and the DHHS/IG concluded that the growth of RHCs is not proportional to community need and that many RHCs no longer require cost-based reimbursement as a payment incentive. They also concluded that the payment methodology for provider-based RHCs lacks sufficient cost controls and recommended establishing payment limits and screens on reasonable costs for these providers. (A provider-based RHC is an integral and subordinate part of a Medicare participating hospital, skilled nursing facility, or home health agency, and is operated with other departments of the provider under common licensure, governance, and professional supervision. All other RHCs are considered to be independent.) For more information on these reports see ''Rural Health Clinics: Rising Program Expenditures Not Focused on Improving Care in Isolated Areas'' (GAO/HEHS–97–24, November 22, 1996), and ''Rural Health Clinics: Growth, Access and Payment'' (OEI–05–94–00040, July 1996).

B. Legislation

Refinement of Shortage Area Requirements

Refinement of the shortage area requirements involves two phases.

1. *Phase I.* Section 4205(d)(1) and (2) of the BBA pertain to the requirements in the second sentence of section 1861(aa)(2) of the Act that RHCs must be located in a nonurbanized area as defined by the Bureau of the Census, as well as in a health professional shortage area (HPSA), an MUA, or in a shortage area designated by a State governor. The Congress amended those provisions to state that the rural area must also be one in which there are insufficient numbers of needed health care practitioners as determined by the Secretary. This BBA change will be addressed by our sister agency, the Health Resources and Services Administration (HRSA), under separate rules. The Congress also amended that sentence to specify that, to be used in RHC certification, shortage area designations made by the Department or by a State governor must have been made within the previous 3-year period.

2. *Phase II.* Section 4205(d)(3)(A) of the BBA, which amended the third sentence of section 1861(aa)(2) of the Act, the Congress revised the ''grandfather clause'' that permitted an exception to the termination of RHC status for a clinic located in an area that is no longer a rural area or a shortage area. This revision amended the grandfather clause to specify that an exception is available only if the RHC is determined to be essential to the delivery of primary care services that would otherwise be unavailable in the geographic area served by the RHC. These amendments were made effective upon issuance of implementing regulations that the Congress directed us to issue by January 1, 1999.

Staffing Waiver

Previous to the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) (Pub. L. 101–508, enacted on November 5, 1990), an RHC was required to employ a physician assistant, nurse practitioner, or certified nurse midwife who must furnish their services 50 percent of the time the RHC operates. Section 4161(b)(2) of the OBRA added section 1861(aa)(7) to the Act to provide us with the authority to grant a 1-year staffing waiver of this requirement if the clinic can demonstrate that it has been unable, in the previous 90-day period, to hire one of these non-physician primary care providers.

Section 4205(c) of the BBA amended section 1861(aa)(7)(B) of the Act to restrict our authority to waive RHC staffing requirements. Under section 4205(c) of the BBA, a staffing waiver may only be granted to an RHC that is qualified and participating in the Medicare program.

Payment Limits for Provider-Based RHCs

Before the BBA, the payment methodology for an RHC depended on whether it was ''provider-based'' or ''independent.'' Payment to provider-based RHCs for services furnished to Medicare beneficiaries was made on a reasonable cost basis by the provider's fiscal intermediary in accordance with our regulations at part 413. Payment to independent RHCs for services furnished to Medicare beneficiaries was made on the basis of a uniform all-inclusive rate payment methodology in accordance with part 405, subpart X. Payment to independent RHCs was also subject to a maximum payment per visit as set forth in section 1833(f) of the Act.

Section 4205(a) of the BBA amended section 1833(f) of the Act. It now holds provider-based RHCs to the same payment limit and all-inclusive payment methodology as independent RHCs. This provision also provides an exception to the payment limit for those clinics based in small rural hospitals with fewer than 50 beds.

Expanding Access to Rural Health Clinics

Under the BBA, the independent RHC all-inclusive payment methodology and annual payment limit was also used for provider-based RHCs. This BBA provision also provided an exception to the RHC payment limit for those RHCs based in small ''rural'' hospitals.

Section 224 of BIPA expanded the eligibility criteria for receiving an exception to the RHC annual payment limit, effective July 1, 2001. Specifically, this section of BIPA extends the exemption to RHCs based in small urban hospitals. Thus, all hospitals of less than 50 beds (see section 1833(f) of the Act) are now eligible to receive an exception from the per visit payment limit for their RHCs.

Payment for Certain Physician Assistant Services

Sections 4511 and 4512 of the BBA removed the restrictions on the types of areas and settings in which the Medicare Part B program pays for the professional services of nurse practitioners, clinical nurse specialists, and physician assistants. This provision also expanded the professional services benefits for nurse practitioners and clinical nurse specialists by authorizing them to bill the program directly for their services when furnished in any area or setting. However, these BBA provisions maintained the current policy that payment for physician assistant services can be made only to the physician assistant's employer regardless of whether the physician assistant is directly employed or serving as an independent contractor.

Section 4205(d)(3)(B) of the BBA amended section 1842(b)(6)(C) of the Act to provide that payment for physician assistant services may be made directly to a physician assistant under certain circumstances. As an exception to the payment requirement under the physician assistant professional services benefit, this provision permits Medicare to pay a physician assistant directly who was the owner of an RHC (as described in section 1861(aa)(2) for a continuous period beginning before the date of the enactment of the BBA and ending on the date the Secretary determines the RHC no longer meets the requirements of section 1861(aa)(2) of the Act, for those services provided before January 1, 2003).

Section 222 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) (Pub. L. 106–554, enacted on December 21, 2000) amended section 1842(b)(6)(C) of the Act to permit physician assistants who owned RHCs, and subsequently lost RHC status, to receive direct Medicare payment for their services, effective December 21, 2000. This BIPA provision eliminates the January 1, 2003 sunset date.

Quality Assessment Program

Currently, quality of RHC care is addressed in § 491.11, which requires a clinic to evaluate its total program annually. The evaluation must include reviewing the utilization of the clinic's services, a representative sample of both active and closed clinical records, and the clinic's health care policies. The purpose of the evaluation is to determine whether the utilization of services was appropriate, the established policies were followed, and any changes are needed. The clinic's staff considers the findings of the evaluation and takes the necessary corrective action. These requirements focus on the meeting and documentation of the clinic's evaluation of its quality care and do not account for the outcome of these activities. Section 4205(b) of the BBA amended section 1861(aa)(2)(I) of the Act to authorize us to require that an RHC have a quality assessment and performance improvement program. A quality assessment and performance improvement program enables the organization to systematically review its operating systems and processes of care to identify and implement opportunities for improvement.

We recognize that some RHCs are already incorporating a QAPI program into their normal operating activities. Others will begin to search for guidance in developing an appropriate QAPI program as they transition from complying with the current annual evaluation requirement. For some time now, professional and governmental organizations have been engaged in formulating guidance and in providing samples of QAPI related activities to entities interested in developing QAPI programs. In addition, state offices of rural health are excellent resources at a local level.

The Department of Health and Human Services has previously contracted with the National Association of Rural Health Clinics to develop technical assistance materials for Rural Health Clinics to provide guidance in complying with QAPI requirements. The Department, working through the Health Resources and Services Administration's Office of Rural Health Policy (*http://www.ruralhealth.hrsa.gov*), will make those materials available widely and develop other technical assistance material as needed to help RHCs make the transition to the quality requirements of the final rule.

There are additional on-line resources that offer a wide range of support services to RHCs. Some of the more well known are as follows: The Rural Assistance Center (*http://www.raconline.org*), The National Rural Health Association (http://www.nrharural.org), The Rural Policy Research Center (*http://www.rupri.org*), and The National Association for Rural Health Clinics (*http://www.narhc.org*).

We expect RHCs that have no experience with QAPI programs to take advantage of the resources that are available. RHCs are encouraged to explore a variety of resources so that they can become familiar with the variety of approaches that exist to develop a QAPI program. An RHC that chooses to implement the QAPI resources (that is, model QAPI programs) provided by the Department and other on-line resources mentioned in this regulation will be considered to meet the QAPI condition for certification (CfC) provided that the model program chosen is one that is relevant to the RHC and its patient population.

II. Provisions of the Proposed Rule

On February 28, 2000, we published a proposed rule in the **Federal Register** (65 FR 10450) to implement the BBA amendments concerning the participation of RHCs in Medicare or Medicaid programs.

Definition of Shortage Area for RHC Certification

Section 6213 of OBRA '89 amended 1861(aa)(2) of the Act to expand the types of shortage areas eligible for RHC certification. Until then, the eligible areas included only those designated by the Secretary as areas having a shortage of personal health services and those designated as geographic health professional shortage areas under section 332(a)(1)(A) of the PHS Act. The OBRA '89 amendment expanded the eligible areas to also include high impact migrant areas designated under section 329(a)(5) of the PHS Act; areas containing a population group HPSA designated under section 332(a)(1)(B) of the PHS Act; and areas designated by

the Governor of a State and certified by the Secretary as having a shortage of personal health services. Later, however, the Health Centers Consolidation Act of 1996 (Pub. L. 104–299) renumbered section 329 of the PHS Act and repealed the requirement for designation of high migrant impact areas.

We proposed to amend § 491.2 to conform the regulations to the above statutory changes, by defining shortage areas for RHC purposes to include all four remaining types of designated areas. The types of shortage areas eligible for RHC certification are geographic and population based HPSAs, MUAs, and areas designated by the Governor of the State.

A. Refinement of Shortage Area Requirements

As noted above, section 4205(d)(1) of the BBA amended the second sentence of section 1861(aa)(2) of the Act to require the use of shortage areas designated ''within the previous 3-year period.'' We proposed to amend § 491.3(b), to refer to ''a current shortage area for which a designation is made or updated within the current year or the previous 3 years.'' In §§ 491.3 and 491.5, we proposed to establish the procedures and standards for granting an exception to clinics essential to the delivery of primary care that would otherwise be unavailable in the geographic area served by the clinic.

Eligibility for an Exception

In § 491.3, we specified that an RHC located in a rural area that is no longer designated as medically underserved, is eligible to apply for an exception. Those RHCs located in an area no longer designated as a nonurbanized area as defined by the Census Bureau are not eligible to apply for an exception.

Additionally, in § 491.3(c), we specified procedures for submitting an exception request.

Criteria for Exception

We proposed, in § 491.5, to allow an exception to an existing RHC that can satisfy one of the following tests:

Sole Community Provider. We proposed to classify an existing RHC as ''essential'' if it is the only Medicare or Medicaid primary care provider within the service area. Specifically, it is the only participating provider within 30 minutes travel time.

Traditional Community Provider. We also proposed to classify an existing RHC as essential if it is the sole RHC for its community and the only primary care provider that has traditionally served Medicare, Medicaid, and uninsured patients in the community despite the fact that there may be other primary care providers that have recently begun participating within reasonable travel time of the RHC.

Major Community Provider. We also proposed to classify an existing RHC as essential if it is treating a disproportionate greater share of the patients in its community compared to other RHCs that are within 30 minutes travel time.

Specialty Clinic Test. We proposed to classify an existing RHC as ''essential'' if it exclusively provides pediatric services or obstetrical/gynecological (OB/GYN) services for its community.

Graduate Medical Education (GME) Test. We proposed to classify an existing RHC as ''essential'' if it is actively participating in an accredited GME program.

B. Payment Limits for Provider-Based RHCs

We proposed to amend § 405.2462 to provide payment to all RHCs on the basis of an all-inclusive rate per visit, subject to the per-visit payment limit. We also proposed to include within this section the definition for identifying small rural hospitals with fewer than 50 beds for purposes of the exception to the payment limit.

For hospitals that are the primary source of health care in their rural community as defined at § 412.92, we proposed to look to the hospital's average daily census rather than bed size in determining whether RHC services are subject to the upper payment limit.

C. Staffing Requirements

Practitioners Available 50 Percent of the Time

Under our current regulations, an NP or PA must be available to furnish patient care services at least 60 percent of the time the RHC operates. However, section 6213(a)(3) of OBRA '89 amended the staffing requirements for an RHC, described in section 1861(aa)(2)(J) of the Act, to require that a CNM, NP, or PA be available to furnish patient care services at least 50 percent of the time the RHC operates.

Therefore, we proposed to revise § 491.8(a) to require that a nurse practitioner, physician assistant, or certified nurse midwife be available to furnish patient care at least 50 percent of the time the RHC operates.

Temporary Staffing Waiver

We proposed to amend § 491.8 to provide that only currently participating RHCs (not facilities applying for participation) are eligible for this waiver. We also proposed to amend § 491.8 to include procedures for when the waiver expires.

D. Commingling

We proposed to revise § 405.2401(b), ''Scope and definitions,'' to clarify that the term ''rural health clinic'' means a facility that meets certain other requirements, and does not share professional staff, space, supplies, records, and other resources with another Medicare and Medicaid entity.

E. Quality Assessment and Performance Improvement Program

We proposed the requirement that an RHC set priorities for performance improvement based on the prevalence and severity of identified problems. We proposed to replace the existing requirements in § 491.11 with the proposed quality assessment and performance improvement (QAPI) program that contains three standards that would address: (1) The components of a performance improvement program; (2) monitoring performance activities; and (3) program responsibilities. In § 491.11(a), the first standard, would require that an RHC objectively evaluate the following critical areas: clinical effectiveness; access to care; and patient satisfaction. We did not propose specific language to set a minimum level of effort for clinics. Instead, we specifically invited comments on the best approaches to achieve a minimum level of effort.

Section 491.11(b), the second standard, would require that for each of the areas listed under the standard in § 491.11(a), the clinic must measure, analyze, and track aspects of performance that the clinic adopts or develops that reflect processes of care and clinic operations.

Section 491.11(c), the third proposed standard, would require that the RHC's professional staff, administration officials, and governing body (where applicable) ensure that there is an effective quality assessment and performance improvement program as well as the current requirement for assessing utilization.

III. Analysis of and Responses to Public Comments on the Proposed Rule

On February 28, 2000, we published a proposed rule on RHCs in the **Federal Register** (65 FR 10450), on which we received 110 letters of comments. Commenters included individuals and health care professionals. A summary of those comments and responses follows:

Several comments were not directed to a specific provision of the February

2000 proposed rule, but concerned the implementation of the proposed rule and the potential impact on RHCs financial viability and access to care. Specifically, the loss of RHC status and the cost of additional regulatory requirements on clinics could negatively impact providers, especially small clinics, and their patients.

We share the commenters' concerns with preserving access to care for Medicare and Medicaid beneficiaries and the cost impact of establishing additional regulatory requirements. However, we believe the clarifications and changes that we are making to the regulations will eliminate or significantly reduce negative impact on rural providers and their communities.

Several commenters raised issues unrelated to the provisions of this rule. In this final rule, we only address the comments pertaining to the RHC proposed rule published on February 28, 2000, in the **Federal Register** (65 FR 10450).

Scope and Definitions (§ 405.2401)

Comment: Several commenters indicated that the definition of ''shared space'' should be clarified. For example, can an RHC lease or rent to a specialist during RHC hours of operation? Also, can an independent laboratory operate within RHC space during clinic hours as long as the cost is not included on the clinic's cost report?

Response: We are revising, in § 405.2401(b), the definition of *Rural health clinic (RHC)* to state that the RHC definition applies to physicians and nonphysician practitioners working for the entity to furnish RHC services. These practitioners are prohibited from operating a private Medicare or Medicaid practice during RHC hours of operation. Therefore, a specialist and an independent diagnostic laboratory can operate practices in leased or rented space within the RHC. The RHC definition was never intended to prohibit the operation of a multipurpose facility. The operation of a multipurpose facility and the sharing of common space (for example, waiting room), staff, and other resources is permissible as long as the costs are appropriately excluded from the RHC cost report.

Comment: Several commenters indicated belief that the proposed rule would prohibit RHCs from performing nonprimary care services. The commenters suggested that we not force the provider to set up two separate facilities.

Response: As discussed above, the RHC definition was never intended to prohibit the operation of a multipurpose facility. The operation of a multipurpose facility and sharing a common space, staff, and resources is permissible as long as the costs are appropriately excluded from the RHC cost report. Therefore, in § 405.2401(b)(1), we are revising the regulation to clarify that physicians and nonphysician practitioners working for the RHC cannot operate a private Medicare or Medicaid practice during RHC hours of operation, using clinic resources.

Comment: Several commenters pointed out that problems associated with commingling should be addressed by improving cost reporting. The commenters stated that we should require the fiscal intermediaries to pay close attention to the Medicare Part B services on the Medicare cost report.

Response: We disagree with the commenters. We believe that the issue of commingling cannot be effectively addressed through the cost reports. When a practitioner who is working for an RHC shifts from patient to patient for billing Medicare and Medicaid (for example, simultaneously operates as a private practice under Medicare Part B and as an RHC under Medicare Part A), both the provider and the Medicare fiscal intermediary would have a difficult time accurately apportioning the cost associated with RHC patients. We believe the administrative burden of accurately allocating cost for the Medicare and Medicaid programs, as well as for the provider, would out weigh the benefits derived from this type of commingling.

Comment: One commenter suggested that we prohibit a single health care professional from billing both Medicare Part A and Part B in the RHC setting.

Response: Our proposed policy was established for the primary purpose of prohibiting health care professionals assigned to the RHC from billing Medicare Part B during clinic hours, using clinic resources. Therefore, we are revising proposed § 405.2401(b)(1) to clarify that physicians and nonphysician practitioners working for the RHC cannot operate a private Medicare or Medicaid practice during RHC hours of operation, using RHC space and resources.

Comment: A commenter indicated that it would be extremely difficult to conduct a pediatric practice in which publicly funded patients and privately funded patients were not treated equally in the same environment at the same time.

Response: The RHC definition prohibits physicians and nonphysician practitioners who are working for the RHC from billing fee-for-service under Medicare and Medicaid during RHC hours, using RHC space and resources. We do not intend to regulate clinic policies for privately insured patients.

Comment: A commenter suggested that we allow more flexibility in the provisions of this regulation to recognize unique rural situations. Improving or maintaining access to care in rural communities requires adaptability to local situations.

Response: RHCs should not be paid for professional and facility costs through the Medicare cost reports while its practitioners simultaneously use RHC space and resources to bill fee-for-service benefits, which include these costs. Furthermore, we believe that the clarifications and changes that we are making to this policy, based on public comments, will provide sufficient flexibility for rural clinics to address access problems within their communities.

Comment: A commenter asked us to clarify § 495.2401(b)(1) that addresses practices other than Medicare, such as Medicaid and private pay, to ensure that practitioners are able to comply with the commingling rule.

Response: The RHC definition will preclude RHC practitioners from operating private Medicare and Medicaid practices during clinic hours, using RHC space and resources.

Comment: A commenter suggested that RHCs eligible for essential provider status should be given an exception to the commingling rules.

Response: The proposed changes to the RHC definition are intended to remove opportunity to duplicate billing and payments. This concern applies to all RHCs. Therefore, all RHCs must comply with the definition as stated in § 405.2401(b).

Comment: A commenter recommended that we provide RHCs with a specific list of CPT codes that should be included in the cost report. Many RHCs provide services beyond primary care and bill these services to Medicare Part B and deduct the costs from the RHC cost report. The commenter believes that an RHC definition specifying CPT codes would resolve the current issue of commingling.

Response: We disagree with the commenter. We do not believe it is appropriate to dictate the scope of the RHC practice by creating a list of medical services that must be billed and paid for outside the RHC benefit. We would run the risk of creating either an incomplete or overly inclusive list for participating RHCs, which vary in size and scope. Moreover, to do so would be contrary to the statute and therefore unenforceable. We believe the best approach for maintaining program

integrity for the RHC benefit is to require that RHC physicians and nonphysician practitioners remain devoted to the RHC and its patients during clinic hours of operation as stated in § 405.2401(b)(1).

Comment: Several commenters suggested that an exception to the commingling rule should be granted to all rural hospitals or at a minimum to small rural hospitals with less than 50 beds. Rural hospitals, other than critical access hospitals (CAHs), experience difficulty recruiting sufficient staff to cover the RHC and emergency room simultaneously.

Response: We wish to clarify that the sharing of staff between hospital and the RHC is not commingling. We agree that any rural hospital with limited resources should be allowed to share staff between its RHC and emergency room. As discussed above, the primary purpose of § 405.2401 is to preclude physicians and nonphysician practitioners working for the RHC from operating a private Medicare or Medicaid practice during RHC hours of operation, using RHC space and resources. Therefore, it is permissible for any hospital-based RHC to share its health care practitioners with emergency rooms, as long as the clinic continues to meet RHC certification requirements and sufficient documentation is provided to allocate costs on consistent and rational basis.

Comment: A commenter expressed belief that the CAH exemption should be expanded to include rural hospitals that meet CAH requirements, but have chosen not to participate in the CAH program.

Also, several commenters suggested that in proposed § 405.2401, we should consider exempting RHCs located in extremely rural communities, such as frontier areas (less than six persons per square mile). These facilities face limitations on their available medical resources similar to CAHs.

Response: We agree that any rural hospital with limited resources should be allowed to share staff between its RHC and emergency room. We removed references to CAH and have clarified the purpose and scope of § 405.2401 to address both concerns.

Comment: Two commenters raised concerns about the necessary documentation to receive an exception to the commingling rule. The commenters suggested that the documentation should be done through the cost reports instead of through detailed practitioner logs, which can be very burdensome.

Response: We revised the regulation to clarify that any rural hospital with limited resources should be allowed to share staff between its RHC and emergency room. With regard to the documentation issue, we will delegate to our intermediaries the decisions regarding acceptable accounting methods for allocation of staff costs between the RHC and other entities to be used in this documentation. We agree that maintenance of detailed practitioner logs on an ongoing basis is very burdensome, and other alternatives exist to achieve the desired results of assuring a proper allocation of costs, on a consistent and rational basis.

Comment: Several commenters recommended that RHCs be allowed to have nonclinic providers and medical specialists in their establishments during RHC hours of operation as long as all expenses are deducted out of the cost report.

Response: We never intended to restrict or preclude these arrangements. We are revising the regulation to clarify that physicians and nonphysicians who are employed to furnish RHC services are precluded from billing fee-for-service under Medicare and Medicaid during RHC hours of operation. Medical specialists who lease or rent space from the clinic can bill for their services during the clinic's hours. RHCs are also allowed to share common space (for example, waiting room), staff, and other resources with these specialists as long as the RHC appropriately removes the costs from its cost report.

Comment: Two commenters asked us to clarify whether RHC physicians who are on-call with an emergency room would violate the commingling rule. RHC physicians who provide on-call services, as opposed to being on-duty, should be allowed under this rule. Failure to amend the regulations to clarify this issue could reduce the availability of emergency room care for many rural communities.

Response: We agree that RHC physicians who provide on-call services for an emergency room should not be considered in violation of the commingling rule. It is clearly permissible for RHC physicians to provide on-call services for an emergency room as long as the clinic continues to meet RHC certification requirements and costs are appropriately excluded from the RHC cost report.

Comment: A commenter believes that sole community providers also need to commingle staff and equipment for financial and operational reasons.

Response: We agree with the commenter. We are revising proposed § 405.2401 to state that any hospital-based RHC is allowed to share its health care practitioners with the emergency room as long as sufficient documentation is provided allocating costs.

Comment: A commenter believes providers should be allowed to operate an RHC and an emergency room in the same facility (especially small rural hospitals). There should be no sharing of staff during the hours of RHC operation, but we should acknowledge there are instances of common resource sharing. For example, it is customary for providers to share medical supply cabinets.

Response: We agree that providers should be allowed to operate an RHC and an emergency room in the same facility. In the case of shared storage space (shared medical supply cabinets), patient care supplies should be clearly distinguishable from those of any other entity in every respect.

Payment for Rural Health Clinic Services and Federally Qualified Health Clinic Services (§ 405.2462)

Comment: Several commenters suggested that the United States Department of Agriculture (USDA) Urban Influence Codes 5 through 7 should also be considered for rural hospital eligibility for the exception. There are many smaller rural communities surrounding cities, but they do not fall within the codes of 8 or 9.

Response: In defining rural for the Medicare program, we have consistently used the definition of Metropolitan Statistical Area (MSA) as established by the Office of Management and Budget (OMB). The available bed definition at § 412.105 is also a longstanding definition used in the Medicare program. We believe that these definitions are reasonable and appropriate for identifying eligible RHCs based in small rural hospitals. The alternative definition of bed size and rural was proposed to accommodate, based on industry concerns, extremely rural hospitals operating under extenuating circumstances. Communities that fall in the levels 5 through 7 are considerably less rural than those in level 8 or level 9. For example, a level 5 is a rural county with a city exceeding a population of 10,000 adjacent to a metropolitan area where a level 8 is a rural county that has a city with a population of less than 10,000 not adjacent to a metropolitan area. In light of the stark differences in rurality of these areas, we see no basis for changing the standard.

Comment: Several commenters strongly urged the adoption of the

broader rural definition under the Balanced Budget Refinement Act of 1999 (BBRA) for the exception to the payment limit for RHCs based in small rural hospitals. This definition, which is purported to be an improvement over the MSA definition, addresses the problem experienced in certain western States.

Response: In 2000, section 224 of BIPA expanded the eligibility criteria for receiving an exception to the RHC annual payment limit, effective July 1, 2001. Specifically, this section of BIPA extends the exemption from the upper payment limit to RHCs based in small urban hospitals. Thus, all hospitals of less than 50 beds are now eligible to receive an exception from the per visit payment limit for their RHCs. Therefore, we are revising § 405.2462(a)(3) to reflect changes made by BIPA. Please note that we will continue to use the bed size definition at § 412.105(b) to determine which RHCs are eligible for the payment limit exception. We will continue to apply to the alternative definition of bed size (patient census) only extremely rural hospitals operating under extenuating circumstances as set forth at § 405(a)(3)(ii)(A).

Comment: A commenter encouraged us to adopt the RHC definition of rural for purposes of exemption to the payment limit. This rural definition resolves the problems with the MSA definition as it relates to western States.

Response: As discussed above, we are revising § 405.2462(a)(3) to reflect changes made by BIPA.

Comment: A commenter recommended that the payment limit exception should be based on whether the provider is in a rural area or whether its average daily census is less than 50 beds.

Response: Although section 224 of BIPA expanded the eligibility criteria for receiving an exception to recognize RHCs based in small urban and rural hospitals, it maintained the bed size test. Consequently, we are retaining that requirement in our rules at § 405.2462(a)(3).

Comment: A commenter believes that allowing any hospitals with an average daily census of 40 is very generous and will probably continue the abuse of the RHC program.

Response: We agree with the commenter; therefore, we will retain the requirement in § 405.2462(a)(3)(ii)(A), which states that the average daily census criterion would apply only to extremely rural, sole community hospitals.

Comment: Several commenters indicated that the 50-bed requirement should be defined using average daily census. Rural hospitals with an average daily census of below 50 beds are the types of facilities the Congress is concerned about. Also, this information is reflective of the number of patients served and the size of the hospital.

Response: Although there are a number of ways to define a hospital bed size (that is, licensed, certified, staffed, or patient census), we believe our available bed definition (staffed) is appropriate and generous compared to the other existing definitions. We believe it is the most reflective method for identifying the actual size of a hospital. As a general measure, the average daily census definition for counting inpatient hospital beds would be too generous for this provision, as it is less reflective in terms of identifying the actual size of a hospital. For example, this definition could qualify hospitals staffed or licensed for 75 beds or more. We believe qualifying those hospitals for the RHC payment limit exception would be inconsistent with the congressional intent.

Comment: Several commenters suggested changing the proposed threshold pertaining to the fluctuation of patient census at or above 150 percent of the lowest monthly average census to a more reasonable level or eliminating the standard. Many vulnerable hospitals do not have a single period of seasonal fluctuation in census, but instead experience multiple, and unpredictable, fluctuation in patient census.

Response: We share the commenters' concerns that some rural hospitals may experience multiseasonal activity making it impossible, for an otherwise eligible facility, to meet the 150 percent fluctuation occupancy threshold. Therefore, we are revising proposed § 405.2462(a)(3)(ii) to eliminate the proposed 150 percent fluctuation threshold for patient census.

Comment: Two commenters suggested that we use the ambulatory payment classification (APC) system when defining rural for the payment limit exception. The commenters believe that this system would allow physicians in the rural census tracks of MSAs to be considered rural. The commenter asked us to use the same rural definition being used for the APC system.

Response: The current APC system uses the OMB ''rural'' definition as well as the Goldsmith modifier. As discussed above, the BIPA expanded the location requirement to include rural and urban areas. Consequently, the Congress has resolved this issue by recognizing small hospitals in urban and rural communities as qualifying for the payment exception.

Comment: Two commenters suggested an automatic exception should be given to small rural hospitals with an average daily census of 15 beds or less, regardless of the number of licensed or staffed beds, and any hospital in a frontier area.

Response: We do not have the discretion to waive the 50-bed requirement for hospitals located in frontier areas. Furthermore, we fail to see the merit, as it relates to the intent of this provision, in providing an automatic exception to hospitals with very low occupancy rates that are staffed or licensed with more than 50 beds. This provision was established to help small rural hospitals and their clinics that represent the sole source of health for their communities remain financially viable. An automatic exception of this type could grant an exception to hospitals with significant excess capacity located in marginally rural areas. Even for hospitals in frontier areas, we do not have the authority to grant an automatic exception to extremely rural hospitals that cannot satisfy the 50-bed requirement.

Comment: A commenter recommended extending the payment limit exception in § 405.2462 to clinics based in rural hospitals with less than 50 beds and to freestanding clinics in the same rural area.

Response: We do not have the authority to grant exceptions to the RHC payment limit for these providers. Only RHCs based in small hospitals with fewer than 50 beds are eligible for the exception.

Comment: Two commenters recommended that the 40 or less average daily patient census requirement should be increased to 45. Hospitals in remote rural areas should not be required to hold their inpatient acute care occupancy to a level that is significantly below the 50-bed maximum requirement in the BBA. Very rural hospitals do not have the ability to transfer, and should not be required to reject patients just to meet this requirement.

Response: We believe this requirement is necessary and appropriate for this provision. The 40 or less average daily patient census requirement was established to meet the needs of small hospitals in extremely rural areas experiencing seasonal fluctuations. Without significant fluctuations in patient census, these hospitals would be operating with less than 50 staffed beds. Hospitals with an average daily patient census in excess of 40, in spite of seasonal fluctuations, would likely have to operate with more

than 50 staffed beds, which is contrary to the statute.

Definition of Shortage Area for RHC Purposes (§ 491.2)

Comment: Several commenters suggested that we clarify in proposed § 491.2 that an area designated as a low-income HPSA would qualify for RHC certification.

Response: We believe the rule is sufficiently clear regarding the applicability of low-income HPSAs for RHC certification. Section 491.2(c) states that population group HPSAs, which include low-income population group HPSAs, meet the definition of shortage area for RHC purposes.

Comment: A commenter asked for clarification of the guidelines that would be used to determine HPSAs. Specifically, will there be changes that would impact those areas that are currently designated as HPSAs?

Response: The designation of HPSAs and medically underserved populations (MUPs) is delegated by the Secretary to HRSA, and is not covered by these RHC regulations. HRSA issued a proposed rule in September 1998 (63 FR 46538) to revise the regulations for designation of shortage areas, but this proposal was withdrawn in July 1999 because of a high level of public concern about its potential impact. HRSA has been conducting further analysis to address these concerns, and plans to issue new proposed rules for designation of HPSAs and MUPs in 2004.

Comment: A commenter pointed out that the BBA amended the RHC provisions to state that ''the rural area must also be one in which there are insufficient numbers of needed practitioners as determined by the Department.'' The January 2000 proposed rule does not address this amendment. There is a need for regulations in this area because current designations do not define an acceptable range for supply of providers to population.

Response: By statute, we are required to rely on HRSA to designate areas as medically underserved. As previously discussed, HRSA is currently developing another proposed rule to revise its methods and standards for designating shortage areas. HRSA's regulation will address the issue of provider supply to population.

RHC Procedures (§ 491.3)

Comment: A commenter pointed out that it is unfair to apply the 3-year currency requirement for MUAs. There is not a systematic review of MUAs. The 3-year requirement should only apply to underserved designations that are systematically reviewed.

Response: Section 4205(d) of the BBA requires clinics entering the RHC program, as well as participating RHCs, to be located in a service area designated or updated within the previous 3-year period. This statutory requirement also applies to all medically underserved designations for RHC qualification purposes. We do not have the authority to exclude certain designations, such as MUAs. However, we believe that affected clinics must be given sufficient time to submit an application to update their service areas. We believe it is imperative that these clinics be given adequate time to submit applications to avoid being unnecessarily disqualified from the RHC program. We also believe these clinics should be protected from RHC disqualification while their applications are under review. Therefore, we are revising § 491.3(b)(2) to clarify that RHCs located in service areas with outdated shortage area designations will have 120 days, from the date we notify the facility about its compliance issue, to submit an application to update its medically underserved designation. In addition, we clarify in new § 491.3(b)(3) that the RHC will be protected from disqualification while its applications are under review. That is, affected clinics will not be considered out of compliance with the 3-year currency requirement for 120 days from the date HRSA formally receives the application. In rare cases where HRSA or the State cannot complete their review within 120 days, clinics will continue to be protected from RHC disqualification until a formal decision is made.

Typically, applications for updating shortage area designations are reviewed within 90 days. We will work closely with HRSA to ensure that all applications are processed within this timeframe.

As stated above, HRSA is responsible for the designation of HPSAs and MUAs, and certification of Governor's designations of eligible areas for the RHC program. HRSA works closely with the State Primary Care Office (PCO) in each State in administering the HPSA and MUA review activity, and in the certification of Governor's designations. Individuals or facilities interested in seeking a new or updated HPSA or MUA, or who wish to inquire regarding a possible Governor's designation, are encouraged to contact the appropriate State PCO. (A list of these contacts is available by calling 1–800–400–2742, or online at *http://www.bphc.hrsa.gov/*.) Information on the HPSA and MUA criteria, procedures, frequently asked questions, and current designation status is also available at this web site. (For further information on HPSAs and MUAs, please contact Andy Jordan, Acting Chief, Shortage Designation Branch, National Center for Health Workforce Analysis, Bureau of Health Professions, at HRSA (301–594–0816).)

Comment: Several commenters indicate belief that an extension from RHC disqualification should be granted to clinics while their medically underserved status is being formally updated. The application process for updating underserved designation may unintentionally disqualify otherwise eligible clinics.

Response: We agree that some clinics, that are otherwise eligible, may be disqualified as an RHC if their service area cannot be updated in a timely manner. In § 491.3, paragraphs (b)(2) and (b)(3), we clarify the regulation to protect RHCs from disqualification that are in the process of formally updating their shortage area designations. Clinics that exceed the 3-year requirement will not be disqualified from RHC participation while their service area is in the process of being formally updated by HRSA or the State.

Comment: Two commenters suggested that the 3-year currency requirement in § 491.3(b) is too short. The costs and structural changes needed to set up an RHC cannot be recouped in 3 years.

Response: Section 4205(d) of the BBA requires clinics entering the RHC program, as well as participating RHCs, to be located in a service area designated or updated within the previous 3-year period. We do not have the authority to modify this requirement.

Comment: A commenter recommended that we require States to contact all providers by mail before an underserved area designation is revoked. If the community or clinic appeal the decision, CMS regional offices should have the authority to stop an RHC from having its designation revoked.

Response: We rely on HRSA to designate shortage areas. HRSA's review process provides affected communities and providers with advanced notice of a designation withdrawal and the right to appeal this decision. Our process for terminating RHC status does not start until HRSA formally withdraws the shortage area designation.

Comment: A commenter suggested that we should continue to recognize an area for RHC certification unless the area has been de-designated two times in a 3-year succession.

Response: We do not have the authority to recognize an area for RHC

participation unless it has been recently designated or updated (within the previous 3 years). The BBA mandates the use of current shortage area designations.

Comment: A commenter suggested the proposed rule should be coordinated with the rules for designating shortage areas. Some RHCs may have a difficult time coping with these regulations if they are finalized all at once.

Response: We are aware of the interrelationship between these regulations and their potential impact on rural providers. HRSA is developing a new proposed rule that would address the major issues raised through the public comment period on its proposed rule published on September 1, 1998 in the **Federal Register** (63 FR 46538) Designation of Medically Underserved Populations and Health Professional Shortage Areas. Although we do not know exactly when a new proposed rule will be issued, the two agencies are in close contact and are striving to establish and coordinate their policies in a way that is sensitive to the needs and concerns of rural underserved communities.

Comment: Several commenters recommended that we revise the proposed 90-day timeframe for submitting an application for an exception.

Several commenters recommended a 6-month timeframe. The commenters believe that the data needed to qualify for exception may not be readily available; therefore, RHCs should be given ample time to gather and submit the necessary information.

Another commenter supported the proposed 90-day timeframe as reasonable, but recommended that we build in some flexibility to extend this application period if the time is too short.

Further, a commenter suggested that the sole and traditional community provider tests are needed, but suggested that the 90-day timeframe for submitting an exception application based on this test be extended. The commenter indicated belief that it will be difficult for providers to research and demonstrate compliance.

Response: Although we believe the proposed 90-day timeframe for submitting an application for an exception is sufficient for most cases, we recognize that some applicants may need additional time. Thus, we revise § 491.3(c)(2) to provide clinics with 180 days to submit an application.

Comment: Several commenters recommended extending the proposed 90-day timeframe for removing RHC status. The adjustment period following de-certification needs to be longer to allow practitioners who choose to remain after de-certification to establish independent practices. For example, the affected RHCs will need to obtain a new provider number, which could take 4 to 6 months.

Response: Although we believe that the 90-day timeframe for removing RHC status is a sufficient amount of time for most providers to arrange to receive Medicare and Medicaid fee-for-service payments, we acknowledge that some providers may need additional time. Consequently, we are revising § 491.3(c)(5) to provide until the final day of the 6th month from the date of notification for ineligible clinics to transition from RHC status to a different Medicare and Medicaid payment and billing system.

Comment: Several commenters, in addition to extending the timeframe for removing RHC status, suggested making the termination effective date the last day of the month for administrative reasons.

Response: In terms of cost reporting and billing, we see merit in making the effective date for RHC termination the last day of the month. Consequently, we are revising proposed § 491.3(c)(5) to specify that the effective date for termination will be the final day of the 6th month from the date of notification that the clinic's location no longer meets program requirements. However, the RHC may be terminated earlier based on noncompliance with other certification requirements.

Comment: A commenter recommended that the regulation clearly state that we are responsible for notifying a clinic that its RHC status is in jeopardy and the 90-day timeframe should begin after receipt of this notice.

Response: We believe that this final rule is sufficiently clear regarding this issue. Sections 491.3(c)(2) and 491.3(c)(5) state that we notify the clinic of its ineligibility to participate in the Medicare program as an RHC.

Comment: A commenter suggested making an exception permanent unless the community is no longer considered rural. To reapply is an unnecessary waste of the provider's limited time.

Response: Clinics receiving essential provider status must meet certain conditions. Therefore, we believe it is necessary and reasonable to expect these clinics to demonstrate continued compliance with these conditions. Clinics receiving this special status will be required to provide to us, every 3 years, assurances that they continue to meet the conditions for being an essential clinic.

Comment: A commenter asked us to clarify that an exception can be renewed every 3 years.

Response: We are revising proposed § 491.3(c)(3) to clarify that an essential clinic can renew its RHC status every 3 years as long as the facility can provide assurances to us that they continue to meet one of the tests at § 491.5(b).

Location of Clinic (§ 491.5)

Comment: A commenter suggested that we extend the grandfather provision for a limited period of 10 years for existing clinics in areas no longer designated as rural and underserved. A less favorable option would be to implement a phase-out over a minimum of 10 years, with reimbursement reduced from 100 percent to 80 percent. In a 10-year period, an RHC affected by de-designation would have adequate time to plan for its future.

Response: Section 4205(d) of the BBA requires us to terminate RHC status for clinics no longer located in a rural or underserved area. An exception from termination is only available if the RHC is determined to be essential to the delivery of primary care. Consequently, we do not have the authority to grant an automatic 10-year extension from RHC disqualification, nor do we have the discretion to implement a phase-out of RHC reimbursement.

Comment: A commenter believes an RHC should be considered ''essential'' if there is a lack of resources to absorb and appropriately serve the client population in the absence of the RHC. If an RHC has a Medicaid, Medicare, uninsured payer mix of 60 percent or greater, it should be considered an essential RHC.

Response: The major community provider test is based on the premise that the clinic is essential because it cares for a substantial number of low-income patients (Medicaid and uninsured) within the community and that there are insufficient providers willing or capable of serving these patients. In order to ensure that the major community provider test takes into account this issue, CMS will consider willingness and resources of other providers to accept Medicare, Medicaid, and uninsured patients when determining essential provider status. For example, CMS will look at the size and scope of the other participating providers as well as their level of participation in the Medicaid program. Additional guidance regarding this review criterion will be provided through Medicare manuals following issuance of this final rule. As explained in the proposed rule, the issuance of an

exception as a major community provider was not intended to be a routine occurrence. We examined the issue of using an absolute Medicare, Medicaid and uninsured payer mix threshold for defining a major community provider and we rejected this idea because it may not accurately determine essential clinics at the community level due to wide variability in population composition and utilization. However, for those clinics applying as major community providers, CMS would require the RHC applicant to have, at a minimum, Medicare, Medicaid and uninsured utilizations rates reasonably consistent with the national average.

The Office of Rural Health Policy, within the Department of Health and Human Services, recently conducted a national RHC survey. Their survey-based data indicate that the average RHC utilization rates are as follows: Medicare (30 percent), Medicaid (25 percent) and uninsured (15 percent). An RHC applicant would be required to demonstrate under the major community provider test that their combined utilization rates for low-income patients (Medicaid and uninsured) would, at a minimum, equal or exceed 31 percent to even be considered eligible to apply for a major community provider exception. An RHC applicant could also meet a combined minimal utilization rate for Medicare, Medicaid and uninsured patient threshold of 51 percent to satisfy this screen. CMS believes the above minimal national utilization patient threshold is reasonable in light of the national average utilization rates and necessary to ensure consistency and fairness with respect to identifying major community providers.

Comment: A commenter suggested that priority be given to clinics that provide a real medical home for their patients. For example, clinics that have a full time physician with hospital admitting privileges and provide 24-hour coverage for their patients should be granted priority as essential clinics.

Response: The proposed tests for identifying an essential clinic are based on whether the RHC is the sole or major source of primary care for Medicare beneficiaries and low-income patients (Medicaid beneficiaries and uninsured). Although we believe that an after hours coverage system and full time physician care are important factors, the clinic must still demonstrate that it has an open door policy regarding low-income patients. As discussed above, CMS is requiring that these essential provider tests must take into account the willingness and resources of other providers to accept and treat Medicare and Medicaid beneficiaries and the uninsured.

Comment: Several commenters believe clinics that have lost their rural status should be allowed to apply for an exception as an essential clinic. The regulation could exclude some RHCs that are still in medically underserved communities but fail to meet the rural location requirement. The CMS proposed policy could result in the loss of an essential RHC for uninsured and Medicaid patients.

Response: We agree with the commenters that an RHC that has lost its rural status but is still located in a valid shortage (geographic and population-based HPSAs, MUAs, and areas designated by the Governor of the State) area should be permitted an opportunity to apply for an exception from RHC disqualification. CMS recognizes that there may be some RHCs located in small, isolated urbanized service areas that are marginally above the minimum population threshold for qualifying as non-urbanized but represent the sole or major source of outpatient physician care for outlying rural areas designated as medically underserved. Consequently, we are revising § 491.5 to allow RHCs located in medically underserved ''urban'' service areas to apply for an exception as a sole, major, or specialty community provider. However, we believe that these clinics should also be required to demonstrate that they are an essential provider of primary care for patients residing in a rural area. The RHC program was established for the purpose of improving and maintaining access to primary care for ''rural'' underserved communities. In order to retain RHC status, CMS believes every RHC must be able to show that it continues to satisfy this basic program objective. It would be inconsistent with Congressional intent to grant exceptions from RHC disqualification to clinics non-essential to the delivery of primary care for rural patients. Consequently, CMS is requiring that at least 51 percent of the applicant's clinic patients reside in rural areas. We believe that a rural patient origin threshold of 51 percent is very reasonable in light of the statutory objective of the RHC.

Comment: Two commenters suggested that we conduct an extensive needs assessment of each community before rescinding the clinic's designation. If RHC status is removed, it may diminish the quantity and quality of health care services to an already underserved population.

Response: We believe that an extensive needs assessment is unnecessary in light of the fact that HRSA already has made a determination that the area is no longer medically underserved. Furthermore, the purpose of granting essential provider status to RHCs is to ensure that access to quality care for Medicare, Medicaid, and uninsured patients is preserved despite the fact that the area is no longer considered rural or medically underserved.

Comment: A commenter suggested that the grandfather protection regarding essential provider status should be extended to rural clinics that lose their medically underserved designation. The commenter believes that if protection cannot be provided to these clinics in this manner, we should amend the exception process by including poverty level and access problems to transportation as eligibility factors.

Response: Section 4205(b) of the BBA requires us to determine whether a clinic is essential despite the fact that its area is no longer considered rural or medically underserved. We believe it would be inconsistent with congressional intent to provide an automatic exception to every clinic no longer located in a designated shortage area without making a determination whether the clinic is essential.

Comment: A commenter believes that any clinic that received its underserved designation to establish an RHC should be able to retain its status. Providers that have established clinics in very rural areas and successfully recruited physicians to these areas should receive an exception.

Response: We believe clinics that can demonstrate that they are essential based on the proposed conditions should be granted an exception. With regard to expanding the exception process to include clinics located in very rural areas, we believe this suggestion merits consideration. Please see the discussion below on how we intend to address this concern.

Comment: A commenter pointed out that some of the proposed exception tests may not be based on community need. Some of the tests do not distinguish between clinics with one physician and clinics with several physicians.

Response: We agree that the proposed tests need to take into account the willingness and resources of other providers to accept and treat Medicare, Medicaid, and uninsured patients. In light of this, we are requiring that the essential provider test must take into account the willingness and resources of other providers to treat and accept Medicare and Medicaid beneficiaries, and the uninsured.

Comment: A commenter encouraged us to establish an extension process for the RHC certification of the area losing its underserved designation if it can be demonstrated that with the closure of the RHC, the areas would qualify as an underserved area.

Response: We believe the proposed conditions for being considered essential addresses this type of situation. However, as discussed above, we are clarifying § 491.5 to require that the proposed tests for determining essential provider status must take into account the willingness and resources of other providers to accept and treat Medicaid, Medicaid, and uninsured patients.

Comment: A commenter encouraged us to look at why and how the service area has solved its shortage problem. It may to be due the RHC recruiting additional providers.

Response: We believe that our proposed conditions for granting essential provider status speak directly to this issue. This is particularly true for the sole community provider test. We will grant an exception when the successful recruitment of additional health care professionals by an RHC results in the dedesignation of the shortage area. This was proposed to make sure that these sole community clinics and their new practitioners remain viable providers.

Comment: A commenter encouraged us to more clearly define ''community'' as it is used in the exception process. For example, does it mean the service area of the RHC or the town in which the clinic operates?

Response: The RHC's service area for determining essential provider status is based on 30 minutes travel time from the RHC applicant. We are revising proposed § 491.5(b)(1) to clarify this determination at it relates to all the essential provider tests.

Comment: A commenter questioned whether more than one RHC could qualify for an exception in a given geographic area, assuming that each RHC meets the requirements for an exception.

Response: It is very possible that more than one RHC within a particular service area could receive essential provider status. In other words, there is no restriction on granting multiple exceptions within a specific service area as long as each RHC meets the conditions for receiving an exception.

Comment: Several commenters believe special consideration should be given to clinics that make house calls and provide after hours coverage for their community. These providers may be essential in communities with inadequate transportation services.

Response: We believe that these are important factors, but supplementary to the provider's overall importance to community. In other words, providers that have devoted their practice to treating Medicare beneficiaries and low-income patients (Medicaid beneficiaries and the uninsured) should be able to satisfy one of the tests in this final rule without relying on an after hours coverage system or on making house calls. Our proposed essential provider tests were designed to recognize clinics that are the sole or major source of primary care for Medicare beneficiaries and low-income patients (Medicaid beneficiaries and the uninsured.)

Comment: The commenter suggested that special consideration should be given to clinics that provide pharmacy, x-ray, and lab services that otherwise would be unavailable.

Response: Although these are important services, we believe that essential provider status must focus on the professional services of physicians and nonphysicians, which are core RHC services. We also believe that these exceptions must be based on the clinic's dedication towards treating low-income patients (Medicaid beneficiaries and the uninsured).

Comment: Several commenters believe that the criteria for identifying essential clinics should factor in rural service areas with inadequate transportation services.

Response: We believe the proposed tests for identifying essential providers should address the issue of inadequate transportation services. However, since this condition cannot be easily measured or identified on a national level, we believe the best way of addressing this issue is by allowing for more than one RHC in a given service area to receive an exception as an essential clinic under the major and specialty provider tests. As discussed below, we are revising the proposed rule to permit, when warranted, multiple exceptions in a service area.

Comment: A commenter suggested that in counties that lose their underserved classification, we should apply a standard deviation or percentage test to determine if the county is so vulnerable that they should be granted an exception.

Response: Section 4205(d) of the BBA requires us to determine whether the facility is essential to the delivery of primary care for its community. Although the tests in this final rule indirectly take into account these issues, we cannot grant an exception without assessing the importance of the clinic to primary care for Medicare, Medicaid, and uninsured patients within that community. In other words, we are obligated by statute to determine whether the facility is essential to the delivery of primary care.

Comment: A commenter believes that we should provide our regional offices the authority to grant an exception on a case-by-case basis. There may be legitimate circumstances that would warrant an exception as an essential clinic that cannot be properly identified under our specific tests.

Response: We disagree with the commenter. We believe that the proposed specific tests and the additional refinements that we have made to these conditions, based on provider comments, will minimize or eliminate any negative impact on access to care for rural communities. We also believe the additional clarifications and changes to the essential provider tests should provide our regional offices with enough flexibility to recognize these circumstances.

Comment: Several commenters believe clinics located in very rural areas should automatically be granted an exception. We should recognize frontier areas and consider at least the inclusion of level 8 and level 9 USDA urban influence codes. Recruiting and retaining practitioners in remote areas is a constant struggle and we should eliminate the anxiety and cost associated with the possible loss of RHC status.

Response: We believe this suggestion has merit. Rural areas that are sparsely populated are more vulnerable to losing their shortage area designations. For example, the recruitment of just one additional practitioner in a frontier area could trigger a disqualification of the area's underserved status. In light of this, we believe clinics located in very rural areas should receive an exception. Consequently, we are revising § 491.5 to grant an exception to any RHC located in a frontier county or a rural area or in a level 8 or level 9 nonmetropoltan county using urban influence code as defined by the USDA. However, we will only provide an exception to these very rural clinics if they can demonstrate that they have traditionally served Medicare, Medicaid, and uninsured patients and continue to maintain an open door policy.

Comment: A commenter suggested that any RHC 50 miles or more from the next nearest hospital should be granted an exception.

Response: We believe that these clinics will qualify as an essential RHC under one of the tests. The commenter seems to be describing a situation where

the area is very remote and has limited health care resources. Because our proposed tests target these situations, we see no reason for changing the regulation.

Comment: Several commenters indicate that we should automatically recognize essential provider status for clinics affiliated with critical access hospitals (CAHs), Medicare dependent hospitals (MDHs), and sole community hospitals (SCHs). The criteria for essential provider status are extensive, ranging from shortage area status to treating the uninsured. Consequently, it would seem appropriate and consistent with essential provider status for the RHC program.

Response: Although we agree that some of the criteria for CAH and SCH status are consistent with essential provider status for the RHC program, clinics applying for this special status should not automatically receive an exception because of their hospital affiliation. There could be cases where the clinic of the CAH or SCH would not satisfy the requirements for being an essential RHC. Therefore, the RHC should be required on its own to demonstrate compliance with the essential provider conditions.

Comment: Several commenters suggested that we should reduce the time and distance standard, for example, change it to 20 minutes or 15 miles. Many Medicare and Medicaid patients have a barrier to transportation services in rural areas. Furthermore, some rural communities have special populations, such as prison, indigent, or Medicaid.

Response: We agree that the proposed tests for identifying essential providers should address the issue of inadequate transportation services. However, regarding this specific issue, we believe it more appropriate and effective to grant an exception to more than one RHC in a given service area under the major and specialty provider tests than reducing the time and distance standards. Consequently, we are revising § 491.5 to clarify that we will, for the major and specialty provider tests, grant multiple exceptions within a specific service area as long as each RHC meets the conditions for receiving an exception.

Comment: A commenter suggested that we should establish a special population exception criteria to reflect certain populations (for example, the Amish) and rural communities with a high proportion of elderly or low-income residents. Additionally, rural areas designated as a low income HPSA or MUA should also qualify for the special population exception.

Response: The proposed essential provider tests already address the issue of special populations. All of the tests focus on the clinic's devotion to treating Medicaid, Medicaid, and uninsured patients. For establishing a special population exception for low-income HPSAs or MUAs, rural clinics located in service areas that have a current (within the previous 3 years) designation of this type are not in jeopardy of RHC disqualification.

Sole Community Provider Test

Comment: Several commenters suggested that the sole community provider test should be applied to clinics that are the sole source of primary care for their small rural town that are 8 to 10 miles apart from other small rural towns. The commenter believes that, under the proposed 30-minute test, the time and distance of the roundtrip may deny access to care for Medicare and Medicaid patients.

Response: Although we believe the time and distance standards in the proposed rule are reasonable, we acknowledge the need to preserve RHC status for sole community clinics located in small rural towns. The residents of these rural towns, especially those who lack access to transportation, may experience difficulty obtaining needed health care if the clinic cannot remain financially viable. Consequently, we are revising proposed § 491.5(b) at § 491.5(b)(l)(ii) to clarify that we will, when appropriate, grant an exception to more than one RHC within a specific service area, as long as each RHC meets the conditions for receiving an exception. We believe this will allow RHCs that are the major or primary source of health care for their small rural town to receive an exception.

Comment: A commenter believes the our proposed 30-mile test is inconsistent with published HPSA criteria of 25 miles.

Response: We agree that HRSA applies a 25-mile test for areas connected by interstate highways. We are revising proposed § 491.5(b)(1)(iii) to correct this inconsistency.

Comment: A commenter asked how the distances would be measured for determining the sole community provider test. The commenter questioned, for example, whether the distance will be based on actual driving time or on results from a mapping software program.

Response: For administrative efficiency, we will apply the time and distance test using a mapping software program.

Comment: A commenter pointed out that using the RHC as the geographic center does not take into account the distance a large percentage of patients travel in the opposite direction of the ''other'' primary care practice.

Response: We believe the proposal to use the RHC as the geographic center for identifying sole community provider status is reasonably accurate and feasible from an administrative standpoint. We have applied this method for the SCH and CAH programs. Therefore, we believe it is also appropriate for the RHC program.

Comment: A commenter believes that we need to provide a standard definition under this rule for the terms such as ''secondary roads'' and ''primary roads.'' The use of these terms without providing a clear definition could lead to misinterpretation.

Response: HRSA has consistently applied the definitions in the Rand McNally Road Atlas for identifying primary, secondary, and interstate highways for purposes of the 30-minute travel test. We will also apply these standard definitions when reviewing essential provider applications.

Comment: A commenter recommended that RHCs requesting exception status should be immune from the 30-minute test if they have a formal sliding fee scale in place and 10 percent or more of their encounters are indigent patients.

Response: The sole community provider test already requires the applicant to demonstrate that it accepts Medicare, Medicaid, and uninsured patients that present themselves for treatment. Therefore, to waive the 30-minute test would simply make the sole community provider test a weakened form of the major community test, and would mean that it would no longer be focused on clinics that are the sole source of primary care for Medicare and Medicaid patients in their community.

This specific essential provider test recognizes clinics as sole community providers for Medicare beneficiaries and low-income patients (Medicaid beneficiaries and the uninsured). For example, a clinic could receive this sole clinic status if it is the sole source of primary care for Medicaid and uninsured patients. If the clinic is not the sole source of care for Medicare, Medicaid, or uninsured patients, it can qualify as a major community provider by demonstrating it is a significant source of health care for indigent patients, such as Medicaid and uninsured patients.

Comment: A commenter recommended that the ''participating primary care provider'' language under

the sole and traditional community provider test should be expanded to require that these other providers must actively accept and treat uninsured patients, be engaged in full-time practice and be currently accepting new patients. Allowing an RHC to be de-designated because of the presence of other primary care providers who are semi-retired or only work part-time would place access to care for the community at risk.

Response: We agree that the proposed tests need to take into account the willingness and resources of other providers to accept and treat Medicaid, Medicaid, and uninsured patients. In light of this, we are requiring that the essential provider test must take into account the willingness and resources of other providers to treat and accept Medicare, Medicaid, and uninsured patients. The major and specialty provider tests must take into account the acceptance and treatment of Medicare and Medicaid beneficiaries, and the uninsured (regardless of their ability to pay.) The sole community provider test already stipulates that other providers in the community must accept Medicare, Medicaid, and uninsured patients to be considered.

Comment: A commenter suggested consideration for a system of care network under the exception process for essential clinics. A single multisite health care system is often the sole organization providing health care in a rural area. The commenter believes a system's clinics could lose their designation due to the physical location of another clinic.

Response: If the service area is no longer considered medically underserved or rural, each RHC will be required to demonstrate that it is essential based on the specific tests set forth in this final rule. An entity that owns and operates several RHCs would not be permitted to submit one application on behalf of all its clinics. The essential provider tests can only be appropriately applied on a facility specific basis.

Comment: A commenter questioned why we did not establish a time and distance standard based on the standard used for sole community hospitals. The commenter indicated belief that we should make the criteria more consistent to avoid confusion and ensure more equitable treatment of sole community RHCs and hospitals.

Response: Our proposed time and distance criteria are based on published HPSA criteria because these shortage area designations represent a core qualification requirement for RHC participation. In light of this linkage, we believe it is more appropriate to apply the HRSA criteria instead of the SCH standards.

Traditional Community Provider Test

Comment: Several commenters believe the traditional community provider test should require that new providers must demonstrate that they have been accepting Medicare, Medicaid, and uninsured patients for a 5-year period. In addition, a determination should be made whether the non-RHC providers have the resources to treat an expanded patient population that would be created if the RHC would be closed.

Response: We are folding the traditional community provider test into the major community provider test to streamline and simplify the exception process for potential applicants. CMS believes, based on the many comments and different scenarios presented, that it would be more reasonable to combine these two tests. Clinics with an open door policy that are also the sole participating RHC for its community should be allowed to receive an exception as long as they represent a major source of primary care for its community. With regard to the specific issue of non-RHC providers having sufficient resources, we are requiring that the major community provider test must take into account the willingness and resources of other providers to accept Medicare, Medicaid and uninsured patients.

Comment: A commenter asked for clarification regarding the 5-year status for treating Medicare, Medicaid, and uninsured patients and how it is affected by a change of ownership.

Response: As stated above, CMS is combining the traditional and major community provider test for simplification. Consequently, CMS is no longer explicitly imposing the 5-year requirement. However, CMS expects the sole participating RHC to be a traditional primary care provider compared to other Medicare and Medicaid participating providers within the community.

Comment: A commenter suggested that the traditional community provider test should be expanded to address the situation where the rural community has two RHCs and both see Medicare, Medicaid, and uninsured patients.

Response: In addition to combining the traditional and major community provider tests, we are revising the major community provider test to address this issue. We acknowledge that there could be a situation where a rural community may have more than one RHC that represents a major source of primary care for its Medicare, Medicaid, and uninsured patients. We are revising proposed § 491.5(b) at (b)(1)(ii) to clarify that more than one RHC in a given service area may receive an exception as a major community provider.

We are also revising this provision to eliminate the requirement that an RHC must be treating a ''disproportionately greater share'' of Medicare, Medicaid, and uninsured patients compared to other participating RHCs to allow for more than one exception. As stated above, there could be a situation where there are two RHCs in the service area and both equally share the responsibility of treating the indigent patients within the community.

Comment: A commenter asked us to clarify the length of time requirement for treating Medicare, Medicaid, and uninsured patients.

Response: As stated above, CMS is combining the traditional and major community provider test for simplification. Consequently, CMS is no longer explicitly imposing the 5-year requirement.

Comment: Several commenters recommended, for the essential provider tests, independent verification of information submitted by another community provider. This type of information is critical to accurately determining whether the provider has an open or closed practice to Medicaid and uninsured patients.

Response: Our regional offices require supporting information to verify these claims and use, when feasible, their own data (enrollment and billing information) to determine whether the other primary care providers have an open practice to Medicare, Medicaid, and uninsured patients.

Major Community Provider Test

Comment: Several commenters requested specific guidelines for the major community provider. The proposed language could lead to misapplications and misuse. For example, how will the term ''disproportionate'' be defined and how will the percentages be calculated?

Response: The applicant will not be required to meet an absolute threshold in terms of Medicare and Medicaid utilization. The premise behind this test is to grant an exception to an RHC that has an open practice to indigent patients (Medicaid and uninsured) and represents a major source of health care for these patients when other RHCs in the same service area do not provide or limit services to these patient groups. The applicant will be required to demonstrate that it has devoted its practice to serving Medicare, Medicaid,

and uninsured patients, and continues to maintain this open door policy. Furthermore, the clinic's utilization rates for low-income patients would have to be consistent with the claim that it is a major source of primary care for its service area. For example, if there are three RHCs located in a rural town, which is no longer considered medically underserved, and two of the RHCs claim to be major community providers because their utilization rates for low-income patients exceed 45 percent, we would consider these RHCs with the higher utilization rates as major community providers if the third RHC has utilization rates of less than 10 percent for low-income patients. Also, as explained above, CMS would require the RHC applicant to have, at a minimum, Medicare, Medicaid and uninsured utilization rates consistent with the national minimal patient utilization threshold. An RHC applicant would be required to demonstrate under the major community provider test that their combined utilization rates for low-income patients (Medicaid and uninsured) would, at a minimum, equal or exceed 31 percent to be eligible to apply for a major community provider exception.

Comment: Several commenters pointed out that multiple RHCs may be necessary to share the uncompensated and indigent care load. Multiple RHCs do not necessarily mean excess capacity.

Response: We acknowledge that there may be a situation where more than one RHC in a particular rural area represents the major source of primary care for Medicare, Medicaid, and uninsured patients. For example, there may be three RHCs located in a rural town that is no longer considered medically underserved, but only two of the three RHCs treat the Medicaid and uninsured population for that rural community. Therefore, we are revising proposed § 491.5(b)(1)(ii) to clarify that more than one RHC in a given service area can receive an exception as a major community provider. However, as discussed above, there must be supporting evidence that the applicants represent a major source of primary care for the patient population of the service area.

Comment: A commenter recommended that if we establish a national minimum utilization standard for the major community provider test, it should be set no higher than a combined Medicare, Medicaid, and uncompensated care rate of 60 percent.

Response: We rejected the idea of using a specified Medicare, Medicaid, and uninsured payer mix for defining a major community provider because it may not accurately determine essential clinics at the community level due to a wide variability in utilization from region to region. We believe the best approach is to require the clinic to demonstrate that it represents a significant source of primary care for Medicare and indigent patients (Medicaid and uninsured).

Comment: Several commenters requested clarification of the situation when a ''provider'' may not be limited to one discreetly certified site.

Response: Health care entities that own and operate multiple RHCs would not be permitted to submit one application on behalf of all its clinics. The essential provider tests can only be appropriately applied on a facility specific basis.

Comment: A commenter believes we should state, for the major community provider test, that a disproportionate share of Medicare, Medicaid, and uninsured patients is defined as serving a higher percentage of these patients than the percentage in the community at large.

Response: The goal of this essential provider test is to identify clinics that are the major source of primary care for Medicare, Medicaid, and uninsured patients. We believe the test must *not* be solely based on whether the clinic is serving a higher percentage of these patients compared to other RHCs in the community, but based on whether the clinic represents a major source of primary care for these patients. The test, for example, will identify whether, without the presence of the clinic, other RHCs have the capacity or willingness to fill the void in terms of furnishing care to Medicare, Medicaid, and uninsured patients.

Comment: A commenter asked whether the RHC applying for the exception would be compared to other RHCs or all primary care providers.

Response: Clinics applying under this exception test will be compared only to other RHCs. However, in situations where the clinic is the only participating RHC, the test will compare the RHC to other primary care providers.

Specialty Provider Test

Comment: Several commenters expressed belief that the specialty provider test should be expanded to include mental health services. Recent reports have indicated a serious need for mental health services in rural underserved areas.

Response: We acknowledge that many rural areas are seriously underserved in terms of mental health services. We see the merit of expanding the specialty provider test to include RHCs that provide mental health services. Therefore, we are revising proposed § 491.8(a)(6) to expand this essential provider test to recognize RHCs that employ a clinical psychologist or clinic social worker. We are expanding the specialty provider test in § 491.5 to grant exceptions to RHCs that represent the sole source of mental health care for their communities and that furnish these covered mental health services on-site.

Comment: Several commenters recommended that the exclusive provider language under the specialty provider test should be changed to give exemptions to specialty providers that see the majority of Medicare, Medicaid, and uninsured patients. There could be two pediatric clinics in the community, but only one clinic sees a disproportionate share of Medicare, Medicaid, and uninsured patients.

Response: We agree with the commenters that this essential provider test should take into account the possibility that there may be more than one specialty clinic furnishing primary care to Medicare, Medicaid, and uninsured patients. We share the commenters' concern that there may be two specialty clinics in the service area that equally share in treating indigent patients or, as described above, there may be two clinics and only one sees the majority of low-income patients. Consequently, we are revising § 491.5(b)(1)(ii) to eliminate the sole source of care requirement. We clarify that more than one RHC within a service area can receive an exception under this test as long as the applicant can demonstrate that it represents a major source of care for indigent patients (Medicaid and uninsured). Furthermore, the RHC applicants would be required to demonstrate that their utilization rates for low-income patients (Medicaid and uninsured) would, at a minimum, exceed equal or 31 percent to even be considered eligible to apply for a specialty clinic test as a major source of pediatric or OB/GYN care. We are making this change to be consistent with the major community provider test.

Comment: A commenter believes clarification may be needed, under the specialty test, regarding general medicine RHCs that include part-time or full-time OB/GYN or pediatric care.

Response: This test was established to specifically target clinics that exclusively provide pediatric and OB/GYN care. We believe the other tests in this final rule will give those clinics that do not limit their practice by gender or

age an opportunity to qualify as an essential provider.

Comment: Several commenters suggested that the specialty provider test should recognize other services, such as geriatrics, cardiology, gastroenterology, orthopedics, oncology, and other specialty services at the discretion of the Secretary.

Response: The specialty provider test was established to specifically target clinics that exclusively provide pediatric and OB/GYN care. Although we agree that these are vital services, they go beyond the intended scope of the RHC program. The only exception to this will be geriatrics, which we believe is addressed by the other essential provider tests.

Comment: A commenter asked us to consider expanding the test over a wider geographic area. RHCs may be the sole providers of specialty services in the surrounding communities.

Response: We are revising § 491.5(b)(2)(iii) for this test to grant exceptions to specialty clinics that are the sole or major source of primary care for their communities. We believe this change diminishes the importance of how we define the boundaries of the clinic's service area.

Comment: A commenter recommended that the definition of specialty clinic provider should be revised to address a defined population rather than the entire census population.

Response: We are revising § 491.5(b)(2)(iii) to grant exceptions to specialty clinics that are the sole or major source of primary care for Medicare (where applicable), Medicaid, and uninsured patients. We acknowledge that pediatric clinics that have lost their medically underserved status may only be able to demonstrate that they are the sole or major source of primary care for Medicaid, and uninsured patients.

Comment: A commenter suggested that this test should be expanded to include women's health services as an essential service provider. In some States, RHCs are the exclusive provider of breast and cervical screening for Medicare, Medicaid, and uninsured patients.

Response: The specialty provider test was established to specifically target clinics that exclusively provide pediatric and OB/GYN care. We believe it is unnecessary to further target other specialties. Rural clinics that provide these important services should easily qualify under one of the other tests as set forth in this final rule.

GME Test

Comment: Several commenters recommended that RHCs providing supervised training to nonphysician practitioners should also be eligible under the GME test. They pointed out that this would bolster the Congress' intent to encourage the use of these practitioners to improve access in rural areas. The commenters also indicated that the Federal government has for many years actively supported training through title VII and title VIII of the PHS Act.

Response: We disagree that this essential provider test should be expanded to include RHCs that are part of a formal training program for nonphysician practitioners. CMS believes that the GME test is no longer needed in light of all the refinements and clarifications made to the other essential community provider tests. In other words, CMS strongly believes that any RHC receiving direct GME payment will now be able to easily satisfy one of the several other tests for being considered essential to the delivery of primary care. When this test was first proposed on February 28, 2000, CMS expected that there would be a significant number of RHCs receiving direct GME payments by the time this test was formally issued. Unfortunately, this has not occurred. In light of this fact and the many refinements to the rule, which have expanded on the other essential community provider tests, CMS is revising the regulation to eliminate the GME test.

Comment: Several commenters suggested that we should expand the GME test to include clinics that have a formal arrangement with a medical school to rotate medical students through the clinic.

Response: As discussed above, we are eliminating the GME test.

Staffing and Staff Responsibilities (§ 491.8)

Comment: A commenter suggested that an RHC that can document ongoing recruitment efforts should be allowed additional time for waivers in filling the vacancy. The commenter stated that for some rural communities it is difficult to attract nonphysician providers.

Response: We disagree with the commenter. Section 4161(b)(2) of the OBRA '90 added section 1861(aa)(7) to the Act to provide us with the authority to grant a 1-year waiver of the mid-level requirement for existing RHCs and RHC applicants. The BBA amended section 1861(aa)(7)(B) of the Act to restrict our authority to allow a waiver for RHC applicants. Therefore, we are retaining the requirement in the new § 491.8(d)(1).

Comment: We received several comments regarding the nonphysician practitioner requirement for RHCs. One commenter recommended that the requirement be eliminated for areas that are no longer health professional shortage areas. The commenter believes that a community that has been successful in recruiting physicians may no longer need a nonphysician practitioner to serve the area. A second commenter believes that the requirement may be difficult to comply with and mandate the hiring of personnel that are not cost effective.

Response: We do not have the authority to eliminate the nonphysician staffing requirement. Both the Federal statute and regulations mandate the use of nonphysician practitioners. Specifically, § 491.8(a)(6) clearly specifies that a nonphysician practitioner must be available to furnish patient care services at least 50 percent of the time the RHC operates.

Comment: A commenter suggested that start-up RHCs in extremely rural areas, such as a designated frontier county (less than six persons per square mile) should receive an exception from the staffing requirements in § 491.8 The difficulty in establishing, much less maintaining providers in frontier areas is well documented.

Response: Section 491.8(a)(6) states that a physician or nonphysician practitioner must be available to furnish patient services at all times during RHC hours of operation. Section 4205(c) of the BBA restricts our authority to grant a waiver to clinics applying for RHC status. The RHC applicant must demonstrate that it employs a nonphysician practitioner before it can receive approval as an RHC.

Comment: A commenter asked us to clarify the term ''operates'' as it relates to the requirement of staffing a nonphysician practitioner 50 percent of the time. For example, does it mean normal business hours and excludes extended hours?

Response: The term ''operates'' in § 491.8(a)(6) means the total operating schedule during which the clinic furnishes RHC services.

Quality Assessment and Performance Improvement (§ 491.11) (Condition for Certification (CFC) for Rural Health Clinics)

Comment: Most of the commenters agree that a quality assessment and performance improvement program is needed for RHCs. They also agreed with the flexibility of RHCs to design and carry out their own performance

improvement programs. One commenter stated support for our interpretation of congressional intent to implement quality assessment and performance improvement (QAPI) programs in RHCs. Another commenter was in favor of replacing the current ''annual evaluation'' process, stating that the current process is of little value.

Response: We appreciate the supportive comments. Our revised quality requirements in § 491.11 are directed at improving outcomes of care and satisfaction for patients while eliminating unnecessary procedural requirements. A QAPI program must be based on a continuous, proactive approach to both managing the RHC and improving outcomes of care and patient satisfaction. As stated in section II. E of this preamble discussion, the BBA requirement, the new QAPI standard will replace the current program evaluation condition for certification at § 491.11.

Comment: Many commenters stated that the requirement, as proposed, is too burdensome and would be counterproductive for clinics with limited staff and resources. They stated the clinics do not have the resources to carry out the volume of evaluation proposed. Further, some commenters stated that a QAPI program would increase the cost to deliver care at a rural health clinic. One commenter suggested a pilot program in provider-based facilities that can be later expanded to independent clinics with a cost allowance. Also, two commenters suggested a phase-in period be considered.

Response: There are two distinct steps to a QAPI program. The first step is to compare care delivered against an identified standard for a particular type of health care provider or delivery system. The second step is to correct or improve processes of care and clinic operations that are predictive of improved outcomes of care or actual care outcomes. Currently, RHCs are required to carry out or arrange for an annual evaluation or assessment of their total program, take necessary actions to correct remedial problems, review policies and guidelines for medical management of health problems, and review the utilization of clinic services. Currently, resources that are allocated to the annual program evaluation can be used to comply with the new QAPI requirement.

We anticipate that both large and small RHCs will use a variety of performance measures in their QAPI program. These measures may be designed by the clinic itself or by other sources outside the clinic. We are clarifying proposed § 491.11(b)(3) to state that the RHC will determine the number and frequency of distinct improvement projects it will conduct. The QAPI program could result in some immediate costs to an individual clinic. However, we believe that the QAPI program will result in real, but difficult to estimate, long-term economic benefits to the clinics (such as cost-effective performance practices or higher patient satisfaction that could lead to increased business for the clinic).

We disagree with a phase-in or pilot approach for the QAPI program. Clinics are currently performing, at a minimum, the evaluation or assessment portion of the new standard. The final rule will change the focus in performing the evaluations. Instead of focusing on the processes, we want clinics to focus on improving outcomes and patient satisfaction. Rather than making remedial changes (fixing problems once they occur), we prefer clinics to continuously improve the quality of care they provide. We expect a clinic's assessments to be based on objective data or information that will enable them to assess if changes are needed and to subsequently evaluate the effectiveness of the changes or interventions. Striving to improve care that is given must be the number one priority in delivering care for any provider. As currently permitted in existing § 491.11 for annual evaluation, clinics will be free to arrange for or to solicit outside assistance with their QAPI efforts.

Comment: A few commenters stated many RHCs already have quality assurance programs in place and those current programs should be considered for content and value. To eliminate duplication for provider-based clinics, several commenters recommended that we should accept QAPI programs designed to meet the requirement of an accrediting agency (that is, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO)) as meeting the minimum level of effort required by the proposed rule.

Response: There are no accrediting organizations that have been approved and granted deemed status for RHCs. Any assertion that RHC meet the QAPI requirements of any accrediting body does not substitute for onsite inspection by State survey agencies to ensure compliance with the Medicare requirements. We believe that the standards in § 491.11 are very basic to any QAPI program. For example, JCAHO's accreditation process for ambulatory care providers requires measurement in areas of clinical effectiveness, access to care, and patient satisfaction. All of these areas are under the umbrella of ''organizational processes, functions and services'' areas in which we require clinics to perform a self-assessment and improve performances. If a clinic currently has a QAPI program that addresses the requirements of this final rule, we do not see a need to require a clinic to duplicate its quality activities. To the extent that clinics are currently evaluating their processes, functions and services, they will be better prepared to comply with our QAPI rule. We expect RHCs that have no experience with QAPI programs to take advantage of the resources that are available. RHCs are encouraged to explore a variety of resources so that they can become familiar with the variety of approaches that exist to develop a QAPI program. An RHC that chooses to implement the QAPI resources (that is, model QAPI programs) provided by the Department and other on-line resources mentioned elsewhere in this regulation will be considered to meet the QAPI CfC provided that the model program chosen is one that is relevant to the RHC and its patient population.

Comment: One commenter stated that because of the physician credentialing process, board oversight process, State sentinel event laws, and malpractice suits, there is very little need for more quality assessment regulations from us. A few commenters stated that the introduction of the issue of specific attention to medical errors is troublesome in that there appears to be no legislative requirement for this specific area. These commenters believe that medical errors should not be addressed or required in the QAPI requirement. Another commenter stated that the responsibility for medical errors should be left to each State's licensing authority.

Response: While we agree that credentialing, oversight, and the reporting of sentinel events are fundamental activities that occur and are required on a State level, we disagree that these activities, or malpractice suits, negate the requirement for RHCs to have a QAPI program. The focus of any QAPI is to improve outcomes and patient care without being prompted by negative activities such as sentinel events or lawsuits. In fact, the prevention of the occurrences must be considered by the clinic when developing its QAPI strategy.

In the 1999 report entitled ''To Err is Human: Building a Safer Health System,'' the Institute of Medicine (IOM) of the National Academy of

Sciences discussed medical errors as one of the nation's leading causes of death and injury. The report estimated that more people die from medical errors each year than from highway accidents, breast cancer, or autoimmune deficiency syndrome. The Administration called for increased awareness and accountability in America's health care system. Further, the Secretary may impose requirements on providers if they are found necessary in the interest of the health and safety of the individuals who receive services from the providers. We believe it is appropriate to include a discussion on medical errors in the preamble language for the QAPI standards. In lieu of proposing a specific standard requiring RHCs to track and analyze medical errors, we believe that errors and the potential for errors will be detected and resolved through the clinic's QAPI activities.

Comment: Several commenters expressed caution about the elimination of structure and process criteria in favor of outcome measures. They stated that quality of care is a function, as well as a result of all three of the domains (clinical effectiveness, access to care, and patient satisfaction) in the proposed rule. One commenter further stated that there is insufficient evidence and experience to support a comprehensive shift solely to outcome standards. They also stated that care involving low-volume and high-risk procedures should also be a focus of assessment and improvement as needed.

Also, several commenters stated that the QAPI requirement provides very little flexibility and seems to require that improvement projects be done in all clinical and nonclinical areas annually on the basis of performance criteria that have yet to be determined.

Response: The fundamental purpose of the QAPI requirement is to set a clear expectation that RHCs must take a proactive approach to improve their performance and focus on outcomes of care. This does not eliminate the need for improving structures and processes that are indicative of improving outcomes.

However, after further consideration, in response to the commenters' concerns, we have removed, in this final rule, reference to the specific domains: access to care, patient satisfaction, and clinical effectiveness. While the domains are critical areas in which a clinic must evaluate its performance, the final rule allows clinics the flexibility to identify their own areas to address. RHCs are required to use objective measures to analyze organizational processes, functions, and services annually. RHCs are required to develop, implement, maintain, and evaluate an on-going self-assessment of the quality and appropriateness of care provided through their data-driven QAPI program. We do not intend and are not in a position to judge the measures themselves; instead, we will assess their utility for the clinic in its own efforts to improve its performance.

We also believe that it is critically important that RHCs identify opportunities to improve and expand the use of information technology (IT) to prevent medical errors and improve quality of care. This Administration is committed to working with other public and private stakeholders to develop means for improving and expanding the use of information technologies (such as, computerized patient records). We encourage RHCs, as they assess their organizational processes, functions, and services, to identify opportunities and make use of information technologies. We believe that the effective use of IT systems could prove invaluable to improving the quality and safety of patient care over time. We will allow RHCs to undertake programs of investment and development of IT systems that are designed to result in improvements in patient safety and quality of care as an alternative to performance improvement projects (see § 491.11(b)(5)). In recognition of the time and resources required to develop and implement these IT programs, we would not require that associated activities have a demonstrable benefit in their initial stages, but would expect that quality improvement goals and their achievement would be incorporated in the plans for these programs. We believe that this modification demonstrates this Administration's deep commitment to patients, high quality care, and flexibility to our partners.

Comment: Several commenters stated that quality assurance programs should be applied to all clinics that provide care to Medicare and Medicaid beneficiaries, not just those in underserved areas.

Response: We agree that all providers must have an effective quality assurance program. The purpose of this final rule is to implement requirements for RHCs as required by the BBA. We plan to systematically update regulations for all Medicare and Medicaid providers to require quality assessment and performance programs. We have already required quality assessment and performance programs for certain Medicare providers.

Comment: Several commenters stated that the proposed rule grossly underestimated the time required to implement the data requirements mandated by the QAPI program. Commenters further stated that it would take approximately 70 to 80 hours per year for an RHC to maintain this program. Commenters requested we minimize the data requirement in light of limited staff time.

Response: Under the Paperwork Reduction Act of 1995, we are required to provide notice and solicit comment before a collection of information requirement is submitted to OMB. In that proposed rule, under section III of that preamble, Collection of Information Requirements, we estimated that it would take each clinic a total of 1 hour per year to maintain the data required by the QAPI requirement. This estimation does not include the time it will take to collect and analyze data or perform the activities for the program. The hour is an estimation of the time it will take a member of the clinic's staff to store or file the documentation of the QAPI program activities. RHC resources that are currently used to comply with existing annual program evaluation can be used to comply with the new QAPI requirement. We have not established a specific amount of data to be collected. The minimum data, or information, required is that which will enable a clinic, with its available staff and resources, to assess change or improvement.

This QAPI CoP will replace the existing program evaluation CoP found at § 491.11. RHCs are currently required to perform an annual program evaluation and the burden reported for the annual evaluation will be used in the new QAPI requirement. We agree that the PRA collection (0938–0334) should be updated to increase burden for RHCs to develop a QAPI program and train staff. The estimation of 70 to 80 hours to maintain a QAPI program may be realistic for the clinic that commented. However, it is difficult to accurately state the impact of the QAPI requirement on RHCs without knowing the size and scope of the clinics and how complex the QAPI program will be for each clinic. We have developed this requirement with the flexibility that allows both large and small clinics to develop a program that reflects the resources and complexity of each clinic's organization and services.

We estimate that on average it will take a clinic approximately 40 hours to develop a QAPI program. For those clinics that are provider based and have experience with the QAPI process, this time will be reduced. This time will also vary based on the simplicity or complexity of the program that a clinic

develops. The QAPI CfC will replace the existing annual program evaluation CfC (42 CFR 491.11). The activities that are currently covered by the existing PRA on file with OMB are found in § 491.9—''Provisions of Services.'' These activities include—Patient care policies; guidelines for medical management of health care problems; and procedures to review and evaluate services furnished by the RHC. In the existing PRA for the current regulations, the burden hours for provisions of services include 10 hours (one time) for initial development, and 2 hours annually for review and revision. The next time we update its PRA submission for Part 491, we will add the 10 hours and 2 hours with the 40-hour initial burden for the QAPI program. We used the previous burden estimate for the annual evaluation, in part, to estimate the new QAPI requirement. It is difficult to accurately state the impact of the QAPI requirement on RHCs without knowing the size and scope of the clinics and how complex the QAPI program will be for each clinic. In developing the requirement, we wanted to assure flexibility for RHCs so that both large and small clinics can develop a program that reflects the resources and complexity of each clinic's organization and services. We estimate it will take a clinic approximately 40 hours to develop a QAPI program from a variety of assumptions. First, the hospital QAPI condition of participation estimates 80 hours for a hospital to develop the program. We expect that at the level-of-effort for a RHC would be less than that for a hospital QAPI program as hospitals provide more services than RHCs. For hospital provider-based clinics, we expect that they would already have experience with the QAPI process. Therefore, their level-of-effort would be reduced. The 40-hour time estimate also recognizes that the time will vary based on the simplicity or complexity of the program that a clinic develops. We also estimate that the RHC will spend an additional 4 hours a year collecting and analyzing data. In addition, we estimate that clinics will spend 3 hours a year training and or updating staff on their QAPI program. Since the QAPI program will replace the current annual evaluation requirement, the administrative burden and annual review of policies and procedures are currently covered by 0938–0334.

Requirement	Annual burden hours	One-time burden hours
Program Development	.....	40 hrs × 3,300 = 132,000
Data Collection and Analysis	13,200	
Training	.....	3 hrs × 3,300 = 9,000
Total	13,200	141,000

These are preliminary projections that may change slightly as we update the PRA submission.

Comment: Most of the commenters recommended that, rather than requiring a minimum number of QAPI projects, we require RHCs to demonstrate to the survey agency what projects they are doing and what progress is being achieved. Some commenters suggested requiring two projects annually, while others suggested only one project annually. Another commenter stated that the minimum level should be defined as requiring the RHCs to choose a single domain in which to undertake an evaluation and to perform a single performance improvement project within that selected domain on an annual basis. Still, other commenters stated that the rule should include specific and limited definition of minimal expectations of the QAPI program, particularly for the smaller clinics. Several commenters wanted clarification on how our expectation that the use of performance measures will be commensurate with the size and resources available to the clinic.

Response: We appreciate the comments regarding what must be the minimum expectation for the quality standard. We believe it is important to allow RHCs the flexibility to fulfill this requirement in a variety of ways. As evidenced by the variance in the comments received, clinics have different views regarding the manner in which a clinic must comply with the standard. Each clinic will approach this requirement differently based on its resources and orientation to performance improvement.

The final rule does not require a specific number of improvement projects to be conducted annually. However, we will require that an RHC conduct distinct improvement projects. The number and frequency of distinct improvement projects to be conducted by the clinic as a result of its self-assessment must reflect the level and complexity of the clinic's organization and services. While large provider-based clinics might be involved in a complex QAPI program with its host facility, small independent clinics might develop very simple straightforward mechanisms to evaluate and improve their performance. The QAPI standard is the same for both large and small clinics but it can be fulfilled in a number of ways. We do not expect or insist that very small independent clinics develop a complex program. In both instances, we expect clinics to be proactive in assessing and improving outcomes and patient satisfaction.

Comment: One commenter stated that proposed § 491.11(a)(2) and (a)(3) are misplaced and inappropriate as regulation. They recommended that these instructions be included in the interpretive guidance for surveyors. They further suggested that we replace ''and'' with ''or'' and remove the ''at a minimum'' statement.

Response: We agree with replacing ''and'' with ''or'' and removing the ''at a minimum'' statement and have done so in the final rule.

We disagree that proposed § 491.11(a)(2) and (a)(3) are misplaced and inappropriate for regulation. However, we have made minor clarifying changes to these provisions. Since we allow flexibility in areas of performance measures and the number and frequency of improvement projects, we maintain that it is important to state in the QAPI standards that RHCs are expected to prioritize their improvement activities that most directly affect patient safety and clinical outcomes. Therefore, we have combined the provisions of proposed § 491.11(a)(2) and (a)(3) and included them at § 491.11(b)(2) under the program activities standard.

In section II of the preamble, page 10459, of the February 28, 2000 proposed rule, we included a discussion clarifying how we would apply the term ''measure'' as it pertains to the QAPI requirement for RHCs. We defined the word ''measure'' to mean that the RHC would have to use objective means of

tracking performance that enables a clinic (and a surveyor) to identify the difference in performance between two points in time. Not all objective measures would have to be shown to be valid and reliable based on scientific methodology in order to be usable in improvement projects. These measures may be designed by the clinic itself or by other sources outside the clinic. We anticipate that both large and small RHCs will use a variety of performance measures in their QAPI program. The proposed standard at § 491.11(b) is now stated in paragraphs (b)(l)(i) and (b)(l)(ii).

In order to promote consistency in the language to describe quality activities, we have replaced the term ''performance criteria'' in the first sentence of the proposed provision at § 491.11(b) with ''performance measures'' in § 491(b)(l)(i). We also replaced the word ''criteria'' in the second sentence of § 491(b) with the word ''measures'' in § 491(b)(l)(ii).

Comment: One commenter recommended that there be requirements for providing preventive health care services. However, a few commenters stated that the issue of prevention should be withdrawn from the rule, unless we would agree to reimburse for preventive services provided.

Response: Section 1861(aa)(1)(A) of the Act describes rural health clinic services as physicians' services and those services and supplies covered under section 1861(s)(2)(A) of the Act if they are furnished as an incident to a physician's professional service and items and services described in section 1861(s)(10) of the Act. We agree that there are no requirements for the provision of preventive primary health services for an RHC and stated so in the February 28, 2000 proposed rule. However, since section 1861(s)(10) of the Act allows RHCs to provide pneumococcal, influenza, and hepatitis B vaccines, the topic of prevention was included under clinical effectiveness as an example of an area to evaluate if clinics were involved in these activities.

Comment: One commenter stated that availability of personnel to communicate with the patients they serve should be included under cultural competency.

Response: We agree that the ability to communicate with the patient population is an important part of cultural competency. However, the list in the February 2000 proposed rule under the ''access to care'' domain was given as an example and was not meant to be all-inclusive. Clinics will be free to identify and concentrate on areas that are priorities for them.

Comment: One commenter asked if emergency intervention meant that the clinic should have staff trained and competent in the delivery of cardiopulmonary resuscitation (CPR) and other services that might be necessary to maintain a very ill patient until care could be transferred to the emergency medical services system.

Response: A clinic is required to provide medical emergency procedures as a first response to common life threatening injuries and acute illnesses. The Emergency Medical Services (EMS) Systems Act defines first response services as a preliminary level of prehospital emergency care that includes CPR, monitoring vital signs and control of bleeding. Therefore, the clinic's staff should be competent in the delivery of first response emergency services.

Comment: One commenter stated that the surveyor should not be the only one to determine what constitutes an ''identifiable unit of measure.''

Response: As stated in section II of the preamble of the February 2000 proposed rule, we will not judge the measures themselves. Instead, we will assess how useful the measures are to the clinic in its overall program.

Comment: One commenter stated that surveyors should not have the authority to require an RHC to demonstrate what projects they are doing and the progress of the projects. Surveyors should only review and offer suggestions.

Response: The authority for surveyors to conduct onsite reviews of RHCs is contained in section 1864(a) of the Act. Surveyors acting on our behalf are expected to interview staff and probe on significant issues to determine if an entity meets RHC qualifications under section 1861(aa) of the Act.

We will develop interpretive guidelines and survey procedures to train surveyors on how to review QAPI program requirements, in addition to all other RHC requirements. As stated above, surveyors will not judge the performance measures but will look at elements that comprise each RHC's QAPI program, such as assessment data, rationale for prioritizing improvement activities, and progress on achieving improvement goals. As part of oversight, we would expect an RHC to make information on its QAPI program available to surveyors during initial certification, routine recertification, and complaint surveys to demonstrate how they meet the requirement.

We have stressed improvement in systems in order to improve processes and patient outcomes. The RHC's QAPI program will be evaluated for its effectiveness on the quality of care provided. Surveyors will not criticize the performance measures that RHCs choose to use in their QAPI program. Rather, surveyors will look at how well the RHC was able to mount an effective QAPI program. The surveyors will look at what the RHC has identified as an area for improvement, what the clinic did to address those areas of concern and what they are doing to maintain their improvement efforts. We will train surveyors on how to survey for an effective QAPI program. QAPI standards are designed to ensure that the providers have an effective process for continually measuring and improving care. The RHC QAPI supports the flexibility to establish, implement, maintain, and evaluate its individual QAPI program. Each RHC can custom-design a program that analyzes its own organizational processes, functions, and services, while maintaining the appropriate accountability. Performance improvement, as the basis for QAPI, fosters a ''blame-free'' environment and encourages providers to be proactive instead of being reactive.

Comment: One commenter suggested that the rule explicitly state that RHCs include the medical director of the clinic, a health care professional with experience in the delivery of services, or other ''reasonable'' individuals in determining appropriate measures.

Response: In § 491.11(c), we state that the RHC's professional staff, administrative officials, and governing body (if applicable) are responsible for the development, implementation, and evaluation of improvement actions. In addition, the clinic may develop a QAPI program using staff and resources it deems appropriate in accordance with its policies and procedures.

Comment: One commenter expressed concern regarding the reporting requirements, especially on small clinics. The commenter stated that small clinics should either be exempt from the proposed requirements or we should develop different standards for large and small clinics.

Response: The Congress has mandated that RHCs have a QAPI program as specified by the Secretary of the Department of Health and Human Services. We have not proposed that RHCs report the results of their evaluation and subsequent improvement activities to us. As a result, there is no need for any exemptions. However, as stated in § 491.11(b)(4), we will require a clinic to maintain records on its program and have them available for review by a surveyor.

Comment: One commenter noted that we did not emphasize the importance of pharmacists to quality care. As medication experts, pharmacists can play a significant role in ensuring that appropriate medications are given to patients in RHCs.

Response: We agree that pharmacists play a significant role in ensuring that appropriate medications are given to patients. The focus of the QAPI requirement is for RHCs to have a program to assess its processes, functions and services. If a clinic identifies a medication administration or dispensing problem, or is interested in assessing other quality of care issues, that involves pharmaceutical services, it would be appropriate for the RHC to solicit a pharmacist input into the QAPI activity.

Comment: One commenter stated the current requirements regarding protocols for the mid-level practitioners are restrictive and, in many cases, conflict with scopes of practices permitted in States' law. The commenter believes that midlevels should be allowed to practice to the highest level of scope of practice permitted by State law. This will ensure appropriate care to patients and enhance patient care and satisfaction.

Response: While we appreciate the commenter's concern, this issue is beyond the scope of this final rule.

Comment: Two commenters stated that since § 405.243(a) provides that a Federally Qualified Health Center (FQHC) must agree in its provider agreement with us to maintain compliance with requirements set forth in part 491, it could be read to apply to FQHCs. The commenter requested that we revise the February 2002 proposed rule to specifically state that § 491.11 does not apply to FQHCs stating that it would be duplicative to require FQHCs to meet this QAPI requirement because they are currently required to meet extensive performance standards established by the PHS. Section 330 of the Public Health Service Act requires grantees to undergo a rigorous PHS grant application process and the grantees are answerable to PHS in carrying out their grant activities; it is unnecessary to apply the RHC certification compliance process to FQHCs.

Response: We agree with the commenters that FQHCs currently have a QAPI program, as required under the PHS grant, that is more comprehensive than the requirements for RHCs. FQHCs and other health centers are required to have quality improvement systems to examine topics such as patient satisfaction and access, quality of clinical care, work force, work environment, and health status outcomes. In addition, FQHCs' quality improvement systems must have the capacity to measure performance using standard performance measures and accepted scientific approaches. In analyzing performance data, FQHCs must compare their results with other comparable providers at the State and national level and set realistic goals for improvement.

Since the BBA language did not specifically include FQHCs, and FQHCs are currently required under the section 330 grantees' program to have a continuous quality improvement and performance measurement program, we agree that it would be redundant to require health centers to comply with this condition. Even though FQHCs are required to comply with part 491 of the regulations, there are instances in part 491, based on statutory requirements, where the RHC requirements are different from the FQHC requirements. For example, FQHCs are allowed to contract for midlevels but as specified in § 491.8(a)(3), RHCs are not. Therefore, FQHCs must continue to comply with part 491 of the regulations except where noted.

IV. Provisions of the Final Rule

For the most part, this final rule incorporates the provisions of the February 28, 2002 proposed rule. However, we are making the following changes to the regulations:

We are revising, in § 405.2401(b), the definition of rural health clinic as follows:

- The definition of RHC only applies to physicians and nonphysician practitioners working for the entity to furnish RHC services.
- Those physicians and nonphysician practitioners may not operate a private Medicare or Medicaid practice during RHC hours of operation, using clinic resources.

We are revising § 405.2462 to eliminate a standard used to qualify RHCs that are based in small rural hospitals for an exception to the national RHC payment limit.

We are revising § 491.3(b)(l) to clarify that both participating RHCs as well as applicants must be located in a current shortage area.

We are revising § 491.3(b)(2) to specify that RHCs with outdated shortage area designations will have 120 days to submit an application to update their medically underserved designation with protection from disqualification while the application is under review.

We are revising § 491.3(c)(2) to increase the period that RHCs may apply for an exception from disqualification.

We are revising § 491.5(b) to clarify the test used to determine if an RHC is essential to the delivery of primary care.

We are revising § 491.5(b) to establish rural patient utilization thresholds for RHCs located in nonurbanized areas that demonstrate they are essential to the delivery of primary care.

We are revising § 491.5(b) to combine the traditional community provider test with the major community provider test.

We are revising § 491.5(b) to establish a minimum national utilization patient threshold for RHCs applying for an exception as a major community provider.

We are removing the graduate medical education test at proposed § 491.5(b)(5). This test is no longer needed due to the refinements and clarifications we have made to the other essential community provider tests.

We are revising § 491.11 to clarify the requirements of the quality assessment performance improvement program the RHCs must develop, implement, evaluate, and maintain.

V. Regulatory Impact Analysis

Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year).

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $5 to $25 million or less annually (see 65 FR 69432). For purposes of the RFA, all RHCs are considered to be small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory

impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds.

Section 202 of the Unfunded Mandates Reform Act of 1998 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any 1 year by State, local, or tribal government, in the aggregate, or by the private sector of $110 million. The rule does not have an effect on the governments mentioned, and private sector costs are less than the $110 million threshold.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct compliance costs on State and local governments, preempts State law, or otherwise has Federalism implications. The rule does not have an effect on the governments mentioned.

Although we view the anticipated results of these regulations as beneficial to the Medicaid and Medicare programs as well as to Medicare and Medicaid beneficiaries and State governments, we recognize that some of the provisions could be controversial and may be responded to unfavorably by some affected entities. We also recognize that not all of the potential effects of these provisions can definitely be anticipated, especially in view of their interaction with other Federal, State, and local activities regarding outpatient services. In particular, considering the effects of our simultaneous efforts to improve the delivery of outpatient services, it is impossible to quantify meaningfully a projection of the future effect of all of these provisions on RHC's operating costs or on the frequency of substantial noncompliance and termination procedures.

We believe the foregoing analysis concludes that this regulation does not have a significant financial impact on a substantial number of small entities, such as RHCs. This analysis, in combination with the rest of the preamble, is consistent with the standards for analysis set forth by the RFA.

Anticipated Effects

Effects on Rural Health Clinics

The total number of participating RHCs under Medicare and Medicaid as of February 1, 2001, was 3,341. Using 2000 Census data, there are approximately 100 urban clinics. At least 20 of these urban clinics do ''not'' have valid shortage area designations and would lose their RHC status.

With regard to the participating clinics that are still located in rural areas (about 3,200), at least 100 of these RHCs no longer have valid shortage area designations. Based on the above estimates, we know that about 180 would be eligible to apply for exception from RHC disqualification, but it is impossible to accurately predict how many will qualify for an exception. However, the estimated Medicare savings associated with the disqualification of certain RHCs from the Medicare program would be less than $10 million. Participating RHCs that are no longer located in rural, underserved areas could lose their RHC status and their cost-based reimbursement, which could cause them to reduce services or discontinue serving our beneficiaries. We believe, based on a recent study by the Maine Rural Health Research Center, that approximately 150 clinics will lose their RHC status. However, to minimize the impact of this provision on rural health care, the Congress has authorized us to grant, if needed, an exception to clinics essential to the delivery of primary care in these affected areas. Our criteria in § 491.5 identify the areas and clinics where RHC status and its payment methodology are still needed despite the fact the service area is no longer considered medically underserved.

Implementing the statutory requirement to replace the current payment method used by provider-based RHCs to the payment method used by independent RHCs will establish payment equity and consistency within the RHC program. Before the BBA, payment to provider-based RHCs was made without considering the number of patient visits provided by the RHC, and without a limit on the payment per visit. These criteria are applicable to independent RHCs that furnish the same scope of services. We have codified the statutory requirement to pay all RHCs under an all-inclusive rate per visit, which will avoid allocation of excessive administration costs to RHCs. We believe that about a thousand RHCs are affected by this rule.

We believe the fiscal impact of limiting payment to provider-based RHCs to the independent RHC rate per visit will result in program savings. Provider-based RHCs that have costs above the all-inclusive cost-per-visit limit required by the law could experience some decrease in their current reasonable cost basis payments. To reduce detrimental impacts of this decrease, the Congress authorized an exception to the annual payment limit to those clinics affiliated with small hospitals, that is, a hospital with fewer than 50 beds.

The QAPI requirement may increase burden in the short term because resources currently used for quality measurement will need to be directed to the development of a quality assessment and performance improvement program that covers the complexity and scope of the particular clinic. However, while the requirements could result in some immediate costs to an individual clinic, we believe that the QAPI program will result in real, but difficult to estimate, long-term economic benefits to the clinic (for example, cost-effective performance practices or higher patient satisfaction that could lead to increased business for the clinic).

Moreover, the QAPI and utilization review requirements replace the current annual evaluation requirement. Resources that the clinics are currently using for the annual evaluation could be devoted to the QAPI program. Therefore, we believe that there is no long-term increased burden to the clinics. Currently, a number of RHCs, primarily provider-based, have some type of quality improvement program in place. To the extent that clinics are familiar with collecting data on their operations and measuring quality, the new requirement will not impose significant additional burden.

Impact of the QAPI Provisions

We estimate that the additional one-time impact for the initial development of the QAPI provisions will be as follows:

Hours/Estimated Salary/Number of RHCs	One-time cost	Annual cost
1 physician/administrator at $58/hr × 3 hrs × 3,300 clinics for medical direction and overview of QAPI program	$574,200	
1 Mid-level practitioner (physician assistant, nurse practitioner) at $28/hr × 32 hrs × 3,300 clinics for program development	2,956,800	

Hours/Estimated Salary/Number of RHCs	One-time cost	Annual cost
1 clerical staff at $6/hr × 5 hrs × 3,300 clinics	99,000	
1 mid-level practitioner at $28/hr × 4 hrs × 3,300 clinics for data collection and analysis	.....	369,600
1 mid-level practitioner—3 hrs training	277,200	
Totals	3,907,200	369,000

In developing our estimates, we obtained information on the salaries and wage estimation from the American Medical Association.

OBRA '89 reduced the nonphysician staffing requirement for RHC qualification from 60 percent to 50 percent. This reduction should have a positive effect on RHCs by providing them more flexibility in satisfying their overall staffing needs.

Effects on Other Providers

We are aware of situations in which an RHC and a physician's private practice occupy the same space and Medicare is billed for the service, either as an RHC or physician service, depending upon which payment method produces the greater payment. Our revision requires an RHC to be a distinct entity that is not used simultaneously as a private physician office or the private office of any other health care professional. As a result, private physicians or other practitioners who have used this approach under the Medicare program may experience some change in the operation of their practices from an administrative standpoint.

Effects on the Medicare and Medicaid Programs

As a result of this final rule, most provider-based RHCs are subject to payment limits and some RHCs will lose their RHC status and cost-based payment rates. Although these changes will likely result in program savings, we believe the aggregate amount is negligible for both programs. We cannot accurately estimate the payment differential between the new payment system for provider-based RHCs and the previous payments because the old system made payments without considering the number of patient visits. Without these data, we cannot precisely determine the fiscal impact.

However, in light of the fact that total expenditures for this program represent a small fraction of the Medicare and Medicaid total budget and that less than half of all RHCs will experience changes to their payment rates, we believe any aggregate savings will be insignificant. We also believe an insignificant amount of Medicare and Medicaid program savings will result from the provision that will terminate RHC status for certain providers. Less than 5 percent of all participating RHCs could lose their status, and these affected clinics will continue to participate under Medicare and Medicaid and receive payment for their services on a fee-for-service basis.

Alternatives Considered

Section 4205 of the BBA imposes new requirements that an RHC program must meet. We considered some of the following alternatives to implement these provisions:

- *''Essential'' RHCs.* Since the statute mandates an exception process for essential clinics, we considered using a national utilization test to recognize clinics that are accepting and treating a disproportionately greater number of Medicare, Medicaid, and uninsured patients, compared to other participating RHCs, for the purpose of addressing the situation of RHC clusters. For example, using an aggregate threshold based on the average Medicare, Medicaid, and uninsured utilization rates of participating RHCs, applicants will have to demonstrate that their utilization rates exceed the threshold.

Although this test would be administratively feasible, we concluded, based on our analysis of available Medicare and Medicaid RHC data, that it would not accurately determine ''essential'' clinics at the community level because of the wide variability in the percentage of services furnished to Medicare and Medicaid patients by RHCs. Despite our rejection of a national utilization test, we are open to suggestions on developing a minimum national percentage, which could be integrated with our major community provider test. We also considered the option of establishing less generous tests for identifying RHCs as essential clinics to the delivery of primary care. That is, the establishment of tests narrowly focused on a few extreme cases, such as an exception test for only sole community providers for a very rural community. We rejected this option because of concern that the disqualification of a clinic from the RHC program could harm access to primary care for the entire community. We believe a comprehensive set of tests is needed to avoid harming access to care for rural areas.

- *QAPI Program.* Because the statute mandates that an RHC have a QAPI program, and appropriate procedures for review of utilization of clinic services, no alternatives for the requirement were considered. However, in the preamble of the February 28, 2002 proposed rule, we described alternative ways of satisfying the ''minimum level requirement'' for the QAPI program and asked for comments. Among the alternatives that we considered were the following:
- Require RHCs to engage in an improvement project in each domain annually.
- Require a minimum number of improvement projects in any combination of the domains annually.
- Require a minimum number of projects annually based on patient population.
- Rather than requiring a minimum number of projects, require RHCs to demonstrate to the survey agency what projects they are doing and what progress is being achieved. After considering the public comments, which were not conclusive, we decided not to establish a minimum requirement. We did consider alternatives for the final rule. One alternative was to take a more rigid approach to QAPI whereby the final rule would be more prescriptive in the process RHCs must follow to develop the QAPI program including setting forth specific performance measures to be utilized, the frequency and number of QAPI ''interventions'' that must be done, as well as the type and frequency of data to be collected. While a more rigid approach would increase RHC burden, we realize there would be no assurance that it would result in better or more predictable outcomes.

We decided to promote a more flexible and less prescriptive approach to the QAPI condition. We are more concerned with an RHC identifying its own best practices and the outcomes of an agency individualized QAPI program than in specific steps one takes to achieve the improvement. A more moderate QAPI requirement will allow an RHC the flexibility to utilize staff and other resources in ways that more directly supports its needs. An RHC can design a program to analyze its own

organizational processes, functions and services, while still being held accountable for results. This decision allows clinics the flexibility to fulfill this requirement based on their resources.

Conclusion

We do not expect a significant change in the operations of RHCs generally, nor do we believe a substantial number of small entities in the community, including RHCs and a substantial number of small rural hospitals, will be adversely affected by these changes. The commingling provision of this regulation adds little savings. One reason for this conclusion is that the outpatient visit rate for HCPCS code 99214 was about $59.00 and the RHC visit was also about $59.00. If an adjustment is made for lower physician overhead than that of the RHC, the savings will probably be marginal.

Therefore, we are not preparing analyses for either the regulatory impact analysis or section 1102(b) of the Act since we believe that this rule will not result in a significant economic impact on a substantial number of small entities and will not have a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the OMB.

VI. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment when a collection of information requirement is submitted to the OMB for review and approval. In order to fairly evaluate whether OMB should approve an information collection, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting public comment on each of these issues for the information collection requirements discussed below.

Section 491.3 Rural Health Clinic (RHC) Procedures

Section 491.3(c)(2) states that an existing RHC located in an area no longer considered a shortage area may apply for an exception from disqualification by submitting a written request to our regional offices within 180 days from the date we notify it that it is no longer located in a shortage area. We believe that this information collection requirement is exempt in accordance with 5 CFR 1320.4(a)(2) since this activity is in accordance with the conduct of an investigation or audit against specific individuals or entities.

Section 491.3(c)(4) states that clinics can renew their essential provider status by submitting written assurances to our regional office that they continue to meet the conditions at § 491.5.

The burden associated with this requirement is the time and effort for the clinic to prepare and submit written assurances that they continue to meet the conditions. It is estimated that this requirement will take each clinic 30 minutes. There are approximately 400 clinics that may be affected by this requirement for a total of 200 burden hours.

Section 491.8 Staffing and Staff Responsibilities

Section 491.8(d)(1) states that we may grant a temporary waiver if the RHC requests a waiver and demonstrates that it has been unable, despite reasonable efforts in the previous 90-day period, to hire a nurse midwife, nurse practitioner, or physician assistant to furnish services at least 50 percent of the time the RHC operates.

The burden associated with this requirement is the time and effort for the RHC to request a waiver and demonstrate that it has been unable to hire a nurse midwife, nurse practitioner, or physician assistant to furnish services at least 50 percent of the time the RHC operates. It is estimated that this requirement will take each RHC 3 hours. There are approximately 45 RHCs that will be affected by this requirement for a total of 135 burden hours.

Section 491.11 Quality Assessment and Performance Improvement

Section 491.11 states that the RHC must develop, implement, evaluate, and maintain an effective, ongoing, data-driven quality assessment and performance improvement program. The self-assessment and performance improvement program must be appropriate for the complexity of the RHC's organization and services and focus on maximizing outcomes by improving patient safety, quality of care, and patient satisfaction.

Most of the burden of this section is covered by the paperwork requirements of § 491.9(b)(3), patient care policies, which requires the RHCs to have in place a description of services the clinic furnishes, guidelines for management of health problems, and procedures for periodic review and evaluation of clinic services. This burden is approved under 0938–0334 and expires in April, 2003.

This QAPI CoP will replace the existing program evaluation CoP found at § 491.11. RHCs are currently required to perform an annual program evaluation and the burden reported for the annual evaluation will be used in the new QAPI requirement. We agree that the PRA collection (0938–0334) should be updated to increase burden for RHCs to develop a QAPI program and train staff. The estimation of 70 to 80 hours to maintain a QAPI program may be realistic for the clinic that commented. However, it is difficult to accurately state the impact of the QAPI requirement on RHCs without knowing the size and scope of the clinics and how complex the QAPI program will be for each clinic. We have developed this requirement with the flexibility that allows both large and small clinics to develop a program that reflects the resources and complexity of each clinic's organization and services.

We estimate that on average it will take a clinic approximately 40 hours to develop a QAPI program. For those clinics that are provider based and have experience with the QAPI process, this time will be reduced. This time will also vary based on how simplicity or complexity of the program that a clinic develops. The QAPI CfC will replace the existing annual program evaluation CfC (42 CFR 491.11). The activities that are currently covered by the existing PRA on file with OMB are found in § 491.9—''Provisions of Services.'' These activities include: Patient care policies, guidelines for medical management of health care problems, and procedures to review and evaluate services furnished by the RHC. In the existing PRA for the current regulations, the burden hours for provisions of services include 10 hours (one time) for initial development, and 2 hours annually for review and revision. The next time we updates its PRA submission for Part 491, we will add the 10 hours and 2 hours with the 40 hr initial burden for the QAPI program. We used the previous burden estimate for the annual evaluation, in part, to estimate the new QAPI requirement. It is difficult to accurately state the impact of the QAPI requirement on RHCs without knowing

the size and scope of the clinics and how complex the QAPI program will be for each clinic. In developing the requirement, we wanted to assure flexibility for RHCs so that both large and small clinics can develop a program that reflects the resources and complexity of each clinic's organization and services. We estimate it will take a clinic approximately 40 hours to develop a QAPI program from a variety of assumptions. First, the hospital QAPI condition of participation estimates 80 hours for a hospital to develop the program. We expect that at the level-of-effort for a RHC would be less than that for a hospital QAPI program as hospitals provide more services than RHCs. For hospital provider-based clinics, we expect that they would already have experience with the QAPI process. Therefore, their level-of-effort would be reduced. The 40-hour time estimate also recognizes that the time will vary based on the simplicity or complexity of the program that a clinic develops. We also estimate that the RHC will spend an additional 4 hours a year collecting and analyzing data. In addition, we estimate that clinics will spend 3 hours a year training and or updating staff on their QAPI program. Since the QAPI program will replace the current annual evaluation requirement, the administrative burden and annual review of policies and procedures are currently covered by 0938–0334.

Requirement	Annual burden hours	One-time burden hours
Program Development	.....	40 hrs × 3,300 = 132,000
Data Collection and Analysis	13,200	
Training	.....	3 hrs × 3,300 = 9,000
Total	13,200	141,000

These are preliminary projections that may change slightly as we update the PRA submission.

To maintain the data required by § 491.11, we estimate it will take each clinic 1 hour per year to meet this requirement. Since there are an estimated 3,341 facilities, the total burden associated with this requirement is 3,341 annual hours.

We have submitted a copy of this final rule to OMB for its review of the information collection requirements described above. These requirements are not effective until they have been approved by OMB.

If you comment on these information collection and recordkeeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Information Services, Information Technology Investment Management Group, Attn.: Dawn Willinghan (Attn: CMS–1910–F), Room N2–14–26, 7500 Security Boulevard, Baltimore, MD 21244–1850; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Allison Herron Eydt, CMS Desk Officer.

List of Subjects

42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 491

Grant programs—health, Health facilities, Medicaid, Medicare, Reporting and recordkeeping requirements, Rural areas.

■ For the reasons set forth in the preamble, The Centers for Medicare & Medicaid services amends 42 CFR chapter IV as set forth below:

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

Subpart X—Rural Health Clinic and Federally Qualified Health Center Services

■ 1. The authority citation for part 405 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. In § 405.2401(b), revise the definition of ''rural health clinic'' to read as follows:

§ 405.2401 Scope and definitions.

* * * * *

(b) *Definitions.*

* * * * *

Rural health clinic (RHC) means an entity that:

(1) Meets the requirements of section 1861(aa)(2) of the Act and part 491 of this chapter concerning RHC services and conditions for approval.

(2) Has filed an agreement with CMS that meets the basic requirements described in § 405.2402 to provide RHC services under Medicare.

(3) Does not share space, staff, supplies, records, and other resources during RHC hours of operation with a private Medicare or Medicaid practice operated by the same physicians and nonphysician practitioners working for the RHC. Operation of a multipurpose clinic with other types of health providers or suppliers is permissible subject to the provisions in paragraph (4) of this definition.

(4) Appropriately allocates and excludes from the RHC cost report the net non-RHC costs if it operates at a multipurpose location that involves the sharing of common space, medical support staff, or other physical resources with other health care providers or suppliers.

* * * * *

■ 3. Revise § 405.2410 to read as follows:

§ 405.2410 Application of Part B deductible and coinsurance.

(a) *Application of deductible.* (1) Medicare payment for RHC services begins only after the beneficiary has incurred the deductible. Medicare applies the Medicare Part B deductible as follows:

(i) If the deductible is fully met by the beneficiary before the RHC visit, Medicare pays 80 percent of the all-inclusive rate.

(ii) If the deductible is not fully met by the beneficiary before the visit and the amount of the RHC's reasonable customary charge for the service that is applied to the deductible is—

(A) Less than the all-inclusive rate, the amount applied to the deductible is subtracted from the all-inclusive rate and 80 percent of the remainder, if any, is paid to the RHC; or

(B) Equal to or exceeds the all-inclusive rate, no payment is made to the RHC.

(2) Medicare payment for FQHC services is not subject to the usual Part B deductible.

(b) *Application of coinsurance.* (1) The beneficiary is responsible for the coinsurance amount that cannot exceed 20 percent of the clinic's reasonable customary charge for the covered service.

(2) The beneficiary's deductible and coinsurance liability for any one service furnished by the RHC may not exceed a reasonable amount customarily charged by the RHC for that particular service.

(3) For any one service furnished by an FQHC, the coinsurance liability may not exceed 20 percent of reasonable amount customarily charged by the FQHC for that particular service.

■ 4. Revise § 405.2462 to read as follows:

§ 405.2462 Payment for rural health clinic services and Federally qualified health clinic services.

(a) *General rules.* (1) RHCs and FQHCs are paid on the basis of 80 percent of an all-inclusive rate per visit determined by the fiscal intermediary for each beneficiary visit for covered services, subject to an annual payment limit.

(2) The fiscal intermediary determines the all-inclusive rate in accordance with this subpart and instructions issued by CMS.

(3) If an RHC is an integral and subordinate part of a hospital, it can receive an exception to the per-visit payment limit if the hospital has fewer than 50 beds as determined by using one of the following methods:

(i) The determination of the number of beds at § 412.105(b) of this chapter.

(ii) The hospital's average daily patient census count of those beds described in § 412.105(b) of this chapter, and the hospital meets all of the following conditions:

(A) It is a sole community hospital as determined in accordance with § 412.92 or 412.109(a) of this chapter.

(B) It is located in a level 8 or level 9 nonmetropolitan county using urban influence codes as defined by the U.S. Department of Agriculture.

(C) It has an average daily patient census that does not exceed 40.

(b) *Payment procedures.* To receive payment, an RHC or FQHC must follow the payment procedures specified in § 410.165 of this chapter.

(c) *Mental health limitation.* Payment for the outpatient treatment of mental, psychoneurotic, or personality disorders is subject to the limitations on payment in § 410.155(c) of this chapter.

PART 491—CERTIFICATION OF CERTAIN HEALTH FACILITIES

■ 1. The authority citation for part 491 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302); and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

■ 2. Revise § 491.2 to read as follows:

§ 491.2 Definition of shortage area for RHC purposes.

Shortage area means a geographic area that meets one of the following criteria. It is—

(a) Designated by the Secretary as an area with shortage of personal health services under section 330(b)(3) of the Public Health Service Act;

(b) Designated by the Secretary as a health professional shortage area under section 332(a)(1)(A) of the public Health Service Act because of its shortage of primary medical care professionals;

(c) Determined by the Secretary to contain a population group that has a health professional shortage under section 332(a)(1)(B) of that Act; or

(d) Designated by the chief executive officer of the State and certified by the Secretary as an area with a shortage of personal health services.

■ 3. Revise § 491.3 to read as follows:

§ 491.3 RHC procedures.

(a) *General.* (1) CMS processes Medicare participation matters for RHCs as specified in §§ 405.2402 through 405.2404 of this chapter, and with the applicable procedures in part 486 of this chapter.

(2) If CMS approves or disapproves the participation request of a prospective RHC, CMS notifies the State agency for that RHC.

(3) CMS deems an RHC that is approved for Medicare participation to meet the standards for certification under Medicaid.

(b) *Current designation.* (1) Participating RHCs and an applicant requesting entrance into the Medicare program as an RHC must be located in a current shortage area for which a designation is made or updated within the current year or within the previous 3 years.

(2) RHCs with outdated shortage area designations will have 120 days, from the date CMS notifies the facility that its designation is no longer current, to submit an application to update its medically underserved designation.

(3) RHCs located in service areas with outdated shortage area designations will be protected, for 120 days, from RHC disqualification while their applications for updating the medically underserved designations are under review by HRSA.

(c) *Exception process.* (1) An RHC's location fails to satisfy the definition of a shortage area if it is no longer designated by the Secretary or by the chief executive officer of the State as medically underserved, or if it is no longer designated as nonurbanized by the Census Bureau.

(2) An existing RHC may apply for an exception from disqualification by submitting a written request to a CMS regional office within 180 days from the date CMS notifies the RHC that it is no longer located in a shortage area. The request must contain all information necessary to establish whether an exception is warranted.

(3) The CMS regional office may grant a 3-year exception based on its review of an RHC request and other relevant information, if the CMS regional office determines that the RHC is essential to the delivery of primary care services that otherwise are not available in the geographic area served by the RHC as specified in § 491.5(b).

(4) Clinics can renew their essential provider status by submitting written assurances to the CMS regional office that they continue to meet the conditions at § 491.5.

(5) CMS terminates an ineligible clinic from participation in the Medicare program as an RHC, effective the final day of the 6th month from the date CMS notifies the clinic of a final determination of ineligibility (including denial of any exception request submitted). CMS may terminate RHC status earlier based on noncompliance with other certification requirements.

■ 4. In § 491.5, remove paragraphs (d) and (e), redesignate paragraph (f) as paragraph (d), and revise paragraph (b) to read as follows:

§ 491.5 Location of clinic.

* * * * *

(b) *Exceptions.* CMS will not disqualify an RHC approved for Medicare participation located in an area that no longer meets the definition of a shortage or rural area, if it determines that the RHC has established that it is essential to the delivery of primary care services that otherwise are not available in the geographic area served by the RHC. An RHC no longer located in a rural area must have a valid shortage area designation (underserved area or population) and meet the criteria set forth in paragraphs (b)(2)(i), (b)(2)(ii), or (b)(2)(iii) of this setion. The RHC that is no longer located in a rural area must also establish that it is essential to the delivery of primary care for patients residing in a rural area by demonstrating that at least 51 percent of the clinic's patients reside in an adjacent nonurbanized area.

(1) *Essential provider exception criteria.* In order to make the final decision to grant an exception as an

essential provider under this section, CMS will:

(i) Grant an exception to one or more RHCs in a given service area if CMS determines the clinics each meet the criteria set forth in paragraphs (b)(2)(ii) or (b)(2)(iii) of this section.

(ii) Use the following criteria in determining distances corresponding to 30 minutes travel time:

(A) Under normal conditions with primary roads available within 20 miles.

(B) In areas with only secondary roads available within 15 miles.

(C) In flat terrain or in areas connected by interstate highways within 25 miles.

(2) *Conditions for exception.* To receive an exception, the RHC must meet one of the following conditions:

(i) *Sole community provider.* The RHC is the only participating primary care provider within 30 minutes travel time. For purposes of this exception, a participating primary care provider means an RHC, an FQHC, or a physician practicing in either general practice, family practice, or general internal medicine that is actively accepting and treating Medicare beneficiaries and low-income patients (Medicaid beneficiaries and the uninsured, regardless of their ability to pay).

(ii) *Major community provider.* The RHC has Medicare and low-income patient (Medicaid and uninsured) utilization rates equal to or above 51 percent or low-income patient utilization rates equal to or above 31 percent. The RHC is also actively accepting and treating a major share of Medicare, Medicaid, and uninsured patients (regardless of their ability to pay) compared to other participating RHCs that are within 30 minutes travel time; or, if the clinic is the only participating RHC within 30 minutes travel, the RHC is actively accepting and treating a major share of Medicare, Medicaid, and uninsured patients (regardless of their ability to pay) compared to other participating primary care providers.

(iii) *Specialty clinic.* The RHC (located within 30 minutes travel time) is the sole or major source of pediatric or OB/GYN services for Medicare (where applicable), Medicaid, and uninsured patients (regardless of their ability to pay) and is actively accepting and treating these patients. Only clinics that exclusively provide pediatric or OB/GYN services can receive an exception under this test. A specialty clinic is also an RHC that is the sole source of mental health services, as defined in § 405.2450. For purposes of meeting this test, mental health services must be furnished onsite to clinic patients. Clinics applying as a major source of pediatric or OB/GYN services must have low-income patient (Medicaid and uninsured) utilization rates equal to or above 31 percent.

(iv) *Extremely rural community provider.* The RHC is actively accepting and treating Medicare, Medicaid, and uninsured patients (regardless of their ability to pay) and is located in a frontier county (less than six persons per square mile) or in a level 8 or level 9 nonmetropolitan county using urban influence codes as defined by the U.S. Department of Agriculture.

* * * * *

■ 5. In § 491.8, revise paragraph (a)(6) and add a new paragraph (d) to read as follows:

§ 491.8 Staffing and staff responsibilities.

(a) * * *

(6) A physician, nurse practitioner, physician assistant, nurse-midwife, clinical social worker, or clinical psychologist is available to furnish patient care services at all times the clinic or center operates. In addition, for RHCs, a nurse practitioner, physician assistant, or certified nurse midwife is available to furnish patient care services at least 50 percent of the time the RHC operates.

* * * * *

(d) *Temporary staffing waiver.* (1) CMS may grant a temporary waiver of the RHC staffing requirements in paragraphs (a)(1) and (a)(6) of this section for a 1-year period to a qualified RHC, if the RHC requests a waiver and demonstrates that it has been unable, despite reasonable efforts in the previous 90-day period, to hire a nurse midwife, nurse practitioner, or physician assistant to furnish services at least 50 percent of the time the RHC operates.

(2) CMS terminates the RHC from participation in the Medicare program, if the RHC is not in compliance with the provisions waived under paragraphs (a)(1) and (a)(6) of this section at the expiration of the waiver.

(3) The RHC may submit its request for an additional waiver of staffing requirements under this paragraph no earlier than 6 months after the expiration of the previous waiver.

■ 6. Revise § 491.11 to read as follows:

§ 491.11 Quality assessment and performance improvement.

The RHC must develop, implement, evaluate, and maintain an effective, ongoing, data-driven quality assessment and performance improvement (QAPI) program. The self-assessment and performance improvement program must be appropriate for the complexity of the RHC's organization and services and focus on maximizing outcomes by improving patient safety, quality of care, and patient satisfaction.

(a) *Standard: Components of a QAPI program.* The RHC's QAPI program must include, but not be limited to, the use of objective measures to evaluate the following:

(1) Organizational processes, functions, and services.

(2) Utilization of clinic services, including at least the number of patients served and the volume of services.

(b) *Standard: Program activities.* (1) For each of the areas listed in paragraph (a)(1) of this section, the RHC must do the following:

(i) Adopt or develop performance measures that reflect processes of care and RHC operation and is shown to be predictive of desired patient outcomes or be the outcomes themselves.

(ii) Use the measures to analyze and track its performance.

(2) The RHC must set priorities for performance improvement, considering either high-volume, high-risk services, the care of acute and chronic conditions, patient safety, coordination of care, convenience and timeliness of available services, or grievances and complaints.

(3) The RHC must conduct distinct improvement projects; the number and frequency of distinct improvement projects conducted by the RHC must reflect the scope and complexity of the clinic's services and available resources.

(4) The RHC must maintain records on its QAPI program and quality improvement projects.

(5) An RHC may undertake a program to develop and implement an information technology system explicitly designed to improve patient safety and quality of care. This activity will be considered to fulfill the requirement for a project under this section.

(c) *Standard: Program responsibilities.* The RHC's professional staff, administrative officials, and governing body (if applicable) are responsible for the following:

(1) Ensuring that quality assessment and performance improvement efforts effectively address identified priorities.

(2) Identifying or approving those priorities and for the development, implementation, and evaluation of improvement actions.

Dated: February 28, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: February 28, 2003.

Tommy G. Thompson,

Secretary.

Editorial note: This document was received at the Office of the Federal Register on December 18, 2003.

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Part VI

Securities and Exchange Commission

17 CFR Part 270

Request for Comments on Measures To Improve Disclosure of Mutual Fund Transaction Costs; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release Nos. 33–8349; 34–48952; IC–26313; File No. S7–29–03]

RIN 3235–AI94

Request for Comments on Measures To Improve Disclosure of Mutual Fund Transaction Costs

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments.

SUMMARY: The Securities and Exchange Commission is seeking public comment on a number of issues related to the disclosure of mutual fund transaction costs. We seek comment on, among other things, whether mutual funds should be required to quantify and disclose to investors the amount of transaction costs they incur, include transaction costs in their expense ratios and fee tables, or provide additional quantitative or narrative disclosure about their transaction costs. We also seek comment on whether mutual funds should be required to record some or all of their transaction costs as an expense in their financial statements. The Commission requests comment from investors, investment companies, investment advisers, the financial services industry, academics, regulators, and the public generally on the issues summarized in this release, the specific questions located in Sections III (Alternatives for Quantifying Transaction Costs), IV (Accounting Issues), V (Alternatives that Provide Additional Information About the Level of Transaction Costs), and VI (Review of Transaction Costs by Fund Directors) of the release, and on any other issues that commenters believe relevant.

DATES: Comments must be received by February 23, 2004.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by hard copy or electronic mail, but not by both methods.

Comments sent by hard copy should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following E-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–29–03; this file number should be included in the subject line if electronic mail is used. All comments received will be posted on the Commission's Internet Web site (*http://www.sec.gov*) and made available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.[1]

FOR FURTHER INFORMATION CONTACT: Paul Goldman, Assistant Director, or Jacquelyn Rivas, Staff Accountant, Office of Financial Analysis, Division of Investment Management, (202) 942–0510, at the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

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I. Introduction

The Securities and Exchange Commission (''Commission'') is considering various alternatives designed to improve the information that mutual funds disclose about their portfolio transaction costs. Mutual funds incur transaction costs when they buy or sell portfolio securities. Transaction costs are significant for two reasons. First, for many funds, the amount of transaction costs incurred during a typical year is substantial. One study estimates that commissions and spreads alone cost the average equity fund as much as 75 basis points.[2] Second, fund managers are subject to a number of conflicts. Commissions, which are paid out of fund assets, may, for example, be used to pay for research or trading support functions (brokerage services) that might otherwise be paid for by the fund's investment adviser (soft dollar commissions).[3]

Fund directors play a pivotal role in monitoring these conflicts. As explained in further detail below, transaction costs are not readily apparent to investors. These costs, however, must be disclosed to a fund's board of directors where such costs bear on the reasonableness of the fund's payments to the fund manager or its affiliates. Thus, it is imperative that the fund's directors both understand and heavily scrutinize the payment of such costs by the fund. The fund's board should demand, and the fund's adviser should provide, all information needed to undergo this review process. In the absence of vigilant oversight by the fund's boards, transaction costs may include payment for services that benefit the fund's adviser at the expense of the fund.

Although transaction costs are taken into account in computing a fund's total return, they are not included in a fund's expense ratio because under generally accepted accounting principles they are either included as part of the cost basis of securities purchased or subtracted from the net proceeds of securities sold and ultimately are reflected as changes in the realized and unrealized gain or loss on portfolio securities in the fund's financial statements. As a result, current disclosure requirements focus on providing fund investors with information about two items that are related to transaction costs—portfolio turnover rate and dollar amount of brokerage commissions. All mutual funds (except money market funds) are required to disclose in their prospectuses the annual rate of portfolio turnover that they have incurred during the last five fiscal years. Investors can compare turnover rates to obtain an indication of how transaction costs are likely to vary among different funds. Funds (with the exception of money market funds) also must disclose in the Statement of Additional Information (''SAI'') the actual dollar amount of

[1] We do not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

[2] John M.R. Chalmers, Roger M. Edelen, Gregory B. Kadlec, *Fund Returns and Trading Expenses: Evidence on the Value of Active Fund Management*, Aug. 30, 2001, at 10 (available at *http://finance.wharton.upenn.edu/edelen/PDFs/MF_tradexpenses.pdf*). These estimates omit the effect of market impact and opportunity costs, the magnitude of which may exceed commissions and spreads.

[3] *But see* NASD Rule 2839 (K).

brokerage commissions that they have paid during their three most recent fiscal years.[4] The Commission is concerned that the current disclosure requirements do not directly address a fund's overall transaction costs or elicit sufficient information about these costs.

Some investors and financial industry observers have expressed similar concerns. For example, at hearings held on March 12 and November 4, 2003 by the U.S. House of Representatives Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, and on November 3, 2003 by the Senate Subcommittee on Financial Management, the Budget and International Security, a number of witnesses testified that inadequate information about portfolio transaction costs makes it difficult for mutual fund shareholders to know the overall cost of their investment.[5]

The Commission is aware of the need for transparency of mutual fund fees and expenses and committed to improving disclosure of the costs that are borne by mutual fund investors; but it is mindful of the complexities associated with identifying, measuring, and accounting for transaction costs. Thus, the Commission is considering how mutual fund transaction cost disclosure requirements should be revised to provide more meaningful information to fund investors. In particular, the Commission is considering whether mutual funds should be required among other things to (1) quantify in some meaningful way and disclose some or all of their portfolio transaction costs without including these costs in their expense ratios and fee tables; (2) quantify some or all transaction costs and include them in expense ratios and fee tables; (3) provide other quantitative information about the level of transaction costs, or (4) some combination of the above. The Commission also seeks comment on whether mutual funds should be required to treat transaction costs, or a portion thereof, as an expense in their financial statements.

This release invites comment on both the general topic of how to improve the disclosure of mutual fund transaction costs and a number of specific questions. For ''yes or no'' questions, please explain the reasons for your response. For questions with respect to alternatives for disclosing some or all transaction costs in fund expense ratios, fee tables or in other numerical formats, please be as specific as possible about how these alternatives may be accomplished, or why these alternatives are not feasible. Discussion is encouraged with respect to specific formulas that should be used, and specific recordkeeping and operational procedures that should be required in order to implement numerical disclosures.

The remainder of this release examines a number of major issues with respect to disclosure of portfolio transaction costs. Section II describes the different types of portfolio transaction costs and estimates their magnitude. Section III identifies and discusses various proposals for additional quantitative disclosures. Section IV discusses issues related to how funds account for transaction costs and report them in their financial statements. Section V explains the current requirements with respect to disclosure and identifies and requests comment on possible new disclosures related to the level of transaction costs. Section VI discusses the review of transaction costs by fund directors.

II. Background

A. Types of Transaction Costs

Broadly defined, a mutual fund's transaction costs include all of its costs that are associated with trading portfolio securities.[6] Transaction costs include commissions, spreads, market impact costs and opportunity costs.

1. Commissions

Commissions generally refer to charges that a broker collects to act as agent for a customer in the process of executing and clearing a trade. Commissions are the only type of transaction cost that can be measured directly. Measurement is easy because the commission is separately stated on the transaction confirmation and is paid directly from fund assets.[7] Trades for which commissions are paid generally involve equity securities traded on the exchanges. Equity securities are also traded on NASDAQ and through dealers. Although historically NASDAQ trading has been effected primarily on a spread basis, more and more equity trades are being done as single price riskless principal trades,[8] and the cost of these trades is now more frequently charged and identified as a commission equivalent.[9] Consequently, it appears that quantification of commission-type fees on equities has become easier. In fact, the commission on the average NASDAQ trade (almost 16 basis points) now approaches the commission on the average NYSE trade (18 basis points).[10]

2. Spread Costs

Spread costs are incurred indirectly when a fund buys a security from a dealer at the ''asked'' price (slightly above current value) or sells a security to a dealer at the ''bid'' price (slightly below current value). The difference between the bid price and the asked price is known as the ''spread.'' Spread costs include both an imputed commission on the trade and any market impact cost associated with the trade as discussed below.[11]

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[4] All funds are required to provide their SAI to investors upon request. In addition, the SAI of any fund may also be accessed via the Commission's Web site (*http://www.sec.gov*) and frequently on a fund's or a fund sponsor's Web site.

[5] The House of Representatives recently passed legislation entitled the ''Mutual Funds Integrity and Fee Transparency Act of 2003'' (HR 2420) that would, among other things, mandate a new document in which mutual funds would disclose their fees to investors and directed the Commission to issue a concept release on issues related to mutual fund transaction cost disclosure. H.R. 2420, 108th Cong. (2003). HR 2420 would also require funds to disclose their portfolio turnover rate in the new fee disclosure document and provide a textual explanation of the impact of high portfolio turnover rates on fund expenses and performance. Additionally, the Commission has proposed that fund shareholder reports be required to include, among other things, the costs in dollars associated with an investment of $10,000, based on a fund's actual expenses and return for the period. Investment Company Act Release No. 25870 (Dec. 18, 2002). The Commission is also today proposing to enhance disclosure regarding breakpoint discounts on front-end sales loads.

[6] *See* Larry Harris, *Trading and Exchanges: Market Microstructure for Practitioners* (2003) at 420–441 (discussing the components of transaction costs, including explicit and implicit costs, as well as alternative methods for estimating the magnitude of transaction costs).

[7] Stephen A Berkowitz and Dennis E. Logue, *Transaction Costs: Much ado about everything*, Journal of Portfolio Management (Winter 2001) at 68.

[8] *See* Harold Bradley, Senior Vice President, American Century Investment Management, Statement Before the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (Mar. 12, 2003).

[9] The Commission has recognized that money managers opting for certain riskless principal transactions would now be informed of the entire amount of the market maker's charge for effecting the trade. *See* Exchange Act Release No. 45194 (Dec. 27, 2001).

[10] Justin Schack, *Trading Places*, Institutional Investor (Nov. 2003) at 32.

[11] Funds incur spread costs on trades that are made on a principal basis (*e.g.*, NASDAQ trades executed from dealer inventory). Dealer spreads compensate brokers and broker-dealers for maintaining a market's trading infrastructure (*i.e.*, price discovery and execution services) and may also reflect the impact of large orders on the prices of securities. The proportion of these two components varies among different trades. The market impact cost component of dealer spreads reflects dealers' inventory management costs. These costs have a significant impact on the spread between the dealer's bid (buy price) and ask (sell price). Although spread costs cannot be directly calculated, they can be estimated with data collected some time after the trade is executed. See Berkowitz and Logue, *supra* note at 65–68.

3. Market Impact Costs

Market impact costs are incurred when the price of a security changes as a result of the effort to purchase or sell the security.[12] Stated formally, market impacts are the price concessions (amounts added to the purchase price or subtracted from the selling price) that are required to find the opposite side of the trade and complete the transaction.[13]

Market impact cost cannot be calculated directly. It can be roughly estimated by comparing the actual price at which a trade was executed to prices that were present in the market at or near the time of the trade.[14] Impact cost may be reduced by stretching out a trade over a long time period. The benefit of reduced impact cost may be reduced or eliminated by an increase in opportunity cost.

4. Opportunity Costs

Opportunity cost is the cost of missed trades.[15] The longer it takes to complete a trade, the greater the likelihood that someone else will decide to buy (or sell) the security and, by doing so, drive up (or down) the price.[16]

Opportunity cost cannot be measured directly. The joint effect of market impact and opportunity cost can be estimated by comparing market prices at the time that the transaction was conceived to the price at which the transaction was actually executed. Consulting firms have developed quantitative tools that attempt to estimate these costs for their clients.[17]

5. Magnitude of Transaction Costs

Although estimates of the magnitude of transaction cost and its components vary, the following estimates are representative. For the average stock fund, commission costs have been estimated at almost .30% of net assets[18] (an amount equal to approximately 20% of the 1.42% expense ratio of the average long-term mutual fund in 2002); and spread costs have been estimated at approximately .45% of net assets[19] (approximately 30% of the average expense ratio.)[20] Market impact cost and opportunity cost are more difficult to measure. One study estimates that total transactions costs (including market impact and opportunity costs) for large capitalization equity transactions range from 0.18% to as much as 1% of the principal amount of the transaction.[21] Another study estimates that for institutional investors, under relatively stable market conditions, opportunity costs may amount to 0.20% of value.[22]

To summarize, commissions are explicit costs, readily identifiable and quantifiable. Spread, impact, and opportunity costs are implicit costs. Because the implicit costs, which are difficult to identify and quantify, can greatly exceed the explicit costs, there is no generally agreed-upon method to calculate securities transaction costs.[23]

III. Proposals To Quantify Transaction Costs

During recent years, a number of commentators have argued that although transaction costs represent a significant portion of the overall expenses incurred by a mutual fund, current disclosure requirements fail to provide investors with adequate information about these costs. Most recently, during hearings held on March 12, 2003 by the House Committee on Financial Services, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, and on November 3, 2003 by the Senate Committee on Governmental Affairs, Subcommittee on Financial Management, the Budget, and International Security, several witnesses testified about the opacity of portfolio trading costs and made suggestions for additional narrative and quantitative disclosure. Suggested improvements tend to fall into three broad alternatives that would require funds to: (1) Quantify and disclose their commission costs; (2) quantify and disclose all of their transaction costs; or (3) provide other information related to the level of transaction costs. In this section of the release, we describe in more detail the alternatives for quantifying transaction costs and request comment on the alternatives. Alternatives for providing additional information about the level of transaction costs are described and comment is requested in Section V of this release.

A. Quantify Commission Costs Only

The dollar amount of commissions paid is easily determined. As previously indicated, the commission appears on the confirmation of each transaction and funds already report in their SAIs the aggregate dollar amounts of commissions paid.

Some commentators have proposed that mutual funds be required to disclose the commissions they pay to effect securities transactions and include the result in their expense ratios and fee tables.[24] They argue that disclosing portfolio commissions would provide additional information about the amount of transaction costs that funds incur, thus permitting investors to make better informed investment decisions. The average commission paid by institutional investors is about 5 to 6 cents per share, but can range from 1 cent to 12 cents per share.[25] A portion

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[12] *See* Harris, *supra* note 6 at 421. The average trade on the New York Stock Exchange and on NASDAQ is approximately 1,700 shares. The average order placed by institutions (including mutual funds) is 44,600 shares, according to an estimate from Plexus, Inc. *See* Wayne H. Wagner, Chairman, Plexus Group and Senior Vice President, Chase JPMorgan Chase Co., Statement Before the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the Committee on Financial Services (Mar. 12, 2003). Basic economics dictate that, if the supply of a good or service is held steady, increased demand drives up the price. Large trades have an impact on price. They ''move the market'' (drive the price up if the fund is buying; down if the fund is selling.)

[13] *See* Berkowitz and Logue, *supra* note 7 at 67.

[14] *See* Harris *supra* note 6 at 422–423. Theory suggests comparing the actual price paid or received to what would have prevailed had the order never been placed. In practice, however, only the market prices and bids and offers near the time of the trade can be observed.

[15] *See* Harris, *supra* note 6 at 421.

[16] An opportunity cost is incurred when three conditions hold: (1) The price of a stock rises (falls) after an investor decides to buy (sell) it, but before he or she is actually able to do so; (2) the price change is independent of the investor's decision; and (3) the price change is ''permanent''—*i.e.*, it is caused by the dissemination of information relevant to the valuation of the asset. Other factors may influence the price of an asset, such as temporary liquidity imbalances, but they do not generate opportunity costs. *See* Robert A. Schwartz and Benn Steil, *Controlling Institutional Transactions Costs*, The Journal of Portfolio Management (Spring 2002) at 43.

[17] *See* Berkowitz and Logue, *supra* note 7 at 70.

[18] Miles Livingston and Edward O'Neal, *Mutual Fund Brokerage Commissions*, Journal of Financial Research, Vol. XIX, No. 2 (Summer 1996) at 280. *See also*, Chalmers, Edelin, and Kadlec, *supra* note 2 at 2; Rich Fortin and Stuart Michelson, *Mutual Fund Trading Costs*, Journal of Investing, Vol. 7, No. 1 (Spring 1998) at 67.

[19] *See* Chalmers, Edelen, and Kadlec, *supra* note 2 at 10.

[20] Morningstar Principia Pro Database, Apr. 2003 edition.

[21] *See* Berkowitz and Logue, *supra* note 7 at 67.

[22] *See* Schwartz and Steil, *supra* note 16 at 43–44.

[23] ''Transaction cost measurement is as much an art as a science. It's very difficult to accurately measure implicit trading costs. Not all companies use the same methodology, and there's no commonly accepted standards as to how to measure price impact.'' *See* Alison Sahoo, *SEC Weighs Trading Cost Rule, Seeks Industry Input, Ignites.com* (July 22, 2003) (quoting Ananth Madhavan, managing director of ITG, a provider of equity-trading services and transaction research to institutional investors and brokers).

[24] *See* John Montgomery, President, Bridgeway Funds, and Gary Gensler, Former Undersecretary of the Treasury for Domestic Finance and Author of *The Great Mutual Fund Trap*, Statements Before the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (Mar. 12, 2003).

[25] *See* Harris, *supra* note 6 at 151. In 1998, the Commission's Office of Compliance Inspections and Examinations (OCIE) conducted limited scope on-site inspections of the soft dollar activities of 75 broker dealers and 280 investment advisers and investment companies. OCIE found the average cost

of these commissions may be used to obtain soft dollar benefits (*i.e.*, research and other services as permitted by section 28(e) of the Securities Exchange Act of 1934) that may benefit the manager. The limited transparency of soft dollar commissions may provide incentives for managers to misuse soft dollar services.

B. Quantify All Transaction Costs

Some commentators have suggested that mutual funds be required to quantify and disclose all of the transaction costs that they incur.[26] This alternative would provide the advantages associated with the previous alternative (including commissions in the expense ratio) while eliminating any disadvantages associated with quantifying some, but not all transaction costs.[27]

This alternative raises the issue of the difficulty of quantifying spreads, market impacts, and opportunity costs. Consultants and academics derive transaction cost estimates that include spreads and market impact costs by using a variety of algorithms to compare the actual price that was paid in each transaction with the market price that prevailed at some time before [28] or after [29] the transaction was completed. Perhaps the most all-inclusive way to measure transaction cost is another method called ''implementation shortfall.'' Implementation shortfall measures the transaction cost of each trade as the difference between the price of all trades you intend to make (trades actually made plus intended trades that fail to execute) and the price that prevailed in the market *when each decision to trade was made.*[30]

With respect to the before trade and after trade methods, a common standard would need to be chosen from among the wide variety of estimation techniques that are used, opportunity costs would remain unaccounted for, and some measures in this category may be vulnerable to being ''gamed.''[31]

The advantages of the implementation shortfall method are that it includes all trading costs and is not vulnerable to being gamed. However, there is no generally accepted manner to calculate a portfolio's implementation shortfall. To monitor performance and comply with their best execution responsibilities, many fund advisers already gather a substantial amount of data about transaction costs and execution quality.[32] Of course, there may be substantial differences in the types of data that fund advisers currently gather that would require changes to their systems. However, there may be a fair amount of uniformity, at least on the general types of information (*e.g.*, trade decision time, time orders are given to brokers, trade execution time and price, *etc.*) that fund advisers maintain.

C. Quantify the Effect of Daily Decisions to Trade

Another, more inclusive alternative for measuring transaction costs would capture the combined effect of transaction costs and gains and losses from short term trading. This ''trade effect'' measure would reflect the annual average daily difference between the actual value of the portfolio as of the close of each trading day and the hypothetical value of the portfolio if no trades had been made that day.

Trade effect is easy to measure in practice. It is equal to the total mark-to-market profits or losses on the security purchases and sales made by the fund. For a purchase, the mark-to-market profits or losses are computed by multiplying the total quantity traded in the security times the difference between the volume-weighted average fill price and the price at the end of the period over which the profits or losses are measured. For a sale, it is the negative of this quantity.[33]

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of soft dollar executions was 6 cents per share. *See* Office of Compliance Inspections and Examination, SEC, Inspection Report on the Soft Dollar Practices of Broker-Dealers, Investment Advisers and Mutual Funds (Sept. 22, 1998) (available at *http://www.sec.gov/news/studies/softdolr.htm) (''Inspection Report'').*

[26] *See* John C. Bogle, Founder and Former Chief Executive, Vanguard Group and President, Bogle Financial Markets Research Center, Statement Before the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (Mar. 12, 2003); and Mercer Bullard, Founder and President, Fund Democracy, Inc., Statement Before the Senate Subcommittee on Financial Management, the Budget, and International Security (Nov. 3, 2003).

[27] ''The ability to figure out trading costs is there. When these companies want internal efficiencies to reduce expenses or improve sales there's no shortage of money to do that. But as soon as someone asks them to spend money on what they are charging shareholders, they bellyache. Trading costs are paid out of shareholders' money. They should decide what they pay.'' *See* Sahoo, *supra* note 23 (quoting Max Rottersman of fundexpenses.com, a website that monitors mutual fund costs and expenses).

[28] A ''before trade'' measure compares the actual price of each trade with the price that prevailed in the market before the transaction was completed. *See* Andre F. Perold, *The Implementation Shortfall: Paper vs. Reality,* Journal of Portfolio Management (Spring 1988) at 8.

[29] In an ''after trade'' measure, the market price might be today's closing price, tomorrow's closing price, some other price in effect after the fund completed the trade, the average of the high and the low for the day, or a weighted average of all prices at which market participants transacted on that day. *See* Perold, *supra* note 28 at 7.

[30] The concept of ''implementation shortfall'' was introduced by Treynor in 1981. *See* Jack L. Treynor, *What Does it Take to Win the Trading Game?*, Financial Analysts Journal (Jan.–Feb. 1981). at 55–60; *see also* Perold, *supra* note 28 at 8. Implementation shortfall is defined as a measure of the degree to which execution, market impact and opportunity costs prevent the investor from taking advantage of his or her stock selection skills. *See* Perold, *supra* note 28 at 5–6. Implementation shortfall can be interpreted as the difference in value between an actual portfolio and a corresponding paper portfolio. A paper portfolio is an imaginary portfolio that is constructed on paper to see what would happen if certain trades were actually made. To measure transaction costs, a trader must specify a benchmark price at which he buys or sells securities for his paper portfolio. The difference in value between the actual portfolio and the corresponding paper portfolio measures the trader's cost of implementing trading decisions relative to this benchmark. Since implementation is generally accomplished at a cost, paper portfolios typically earn better returns than the corresponding actual portfolios. Harris, *supra* note 6 at 426. Leinweber illustrates the implementation shortfall concept by noting that from 1979 to 1991 stocks classified as ''Group 1'' by Value Line had an annualized return of 26.3% while the Value Line mutual fund that contained the same stocks returned only 16.1%. The difference between the paper return and the actual portfolio return is the cost of trading. David J. Leinweber, *Using Information from Trading in Trading and Portfolio Management,* 4 Journal of Investing, No. 1 (1995) at 40.

[31] For example, because a before trade measure compares the actual price of each trade with the market price in effect before the transaction was completed, the market price is known in advance. A trader working on behalf of a fund could ''manufacture'' low transaction costs if, after each decision to trade is made, the trader would wait to take action on the order list, implement only the buy orders for which prices have fallen since the receipt of the order, implement only the sell orders for which the prices have risen, and dismiss the rest of the orders as ''too expensive'' to execute. *See* Perold, *supra* note 28 at 7–8.

[32] ''Virtually all the major institutions have a transaction-cost measuring system in place. They compare their actual execution costs to pre-trade benchmarks from models or peer comparisons from different firms. That puts pressure on the trading desks to control costs. So the guys who aren't doing it are being left behind.'' Sahoo, *supra* note 23 (quoting Ananth Madhavan). ''* * * [M]ore pension funds and investment managers are measuring transaction costs—either by using proprietary systems or third party services * * *. Since the wrenching bear market of 2000–'02, institutions have learned that transaction costs can be a significant drag on performance, and they have begun managing them as intently as they research stocks.'' Schack, *supra* note 10, at 32.

[33] For example, a mutual fund purchases 500 shares of ABC Company at a volume-weighted average fill price of $19. The price of the security at the end of the measurement period is $20. The mark-to-market profit or loss associated with this trade would be the difference between the fill price and the measurement price (−$1) times the number of shares transacted (500), or −$500. Alternatively, a mutual fund sells 500 shares of XYZ Company at a volume-weighted average fill price of $15. The price of the security at the end of the measurement period is $17. The mark-to-market profit or loss associated with this trade would be the negative of the difference between the fill price and the measurement price (+$2) times the number of shares transacted (500), or $1,000. In this example, the cost of trading—the trade effect—would be $500 (−$500 + $1,000), indicating that the trading was

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For disclosure purposes, each fund could be asked to sum these mark-to-market profits and losses across all trades on a given day. Funds would divide this sum by total assets for that day and report on an annual basis the average of this ratio across all trading days.

Trade effect includes all realized costs of trading—commission, spread and price impacts—plus any short-term trading profits or losses incurred as a result of the timing of the trade. Funds produce short-term trading profits if they can successfully capitalize on short-term price changes, for example, when they buy before prices rise. They incur short-term trading losses when they poorly time their trades, for example, when they buy before prices fall.

Investors may benefit from disclosure of short-term trading impact information because it would allow them to better understand the benefits and costs associated with fund portfolio trading. This information may particularly help investors interpret fund turnover. Although high turnover generally is correlated with poor performance due to excessive transaction costs and poor timing, high turnover may be desirable for funds that can implement profitable short-term trading strategies. Presently, investors lack the information necessary to meaningfully discriminate among funds on this basis. Trade effect disclosure may allow investors to determine the extent to which fund performance—for better or worse—is due to its trading activities.

If the Commission were to mandate trade effect disclosure, it would have to determine the period over which funds would measure their trade effect mark-to-market profits and losses. It might seem most natural to measure trade effect over the trading day on which each trade occurred by comparing trade prices to trade day closing prices. However, this comparison could cause some managers to shift their trading towards the end of the trading day to minimize their reported trade effect. To reduce such incentives, trade effect could be measured by comparing trade prices to closing prices on the next trading day.[34]

D. Sell-Side Alternatives

Thus far, the discussion in this release has focused primarily on the disclosure by mutual funds of their transaction costs and execution quality. The Commission also wishes to request comment on whether disclosure by markets or broker-dealers of their execution quality for large, institutional orders would be helpful to funds in evaluating execution costs. For example, broker-dealers handling large orders potentially could be required to disclose statistics that compare the prices at which their orders are executed with the quotes for a security at the time they received the order. To enhance their comparability, the statistics could be divided into categories based on the size of the order compared to the average daily trading volume in the security. Similar disclosure could be required of other venues that directly receive and execute institutional orders, such as floor brokers, specialists, and electronic trading venues. Such sell-side disclosure could represent one part of a comprehensive approach that attempted to measure transaction costs throughout the trading cycle. Standardized market statistics, which would encompass orders from many different institutions, potentially could provide benchmarks for execution quality that might assist fund managers and their boards in evaluating the execution quality obtained from different broker-dealers. For example, such statistics might be helpful in evaluating the execution quality obtained from affiliated or related broker-dealers compared to that obtained from those that are independent of the fund.[35]

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General Questions About Quantifying Transaction Costs

1. Is investor decision-making harmed because investors lack numerical information about mutual fund transaction costs?

2. What would be the best way to provide investors with additional numerical information about the amount of transaction costs that mutual funds incur? Would the information most appropriately be located in the prospectus, the SAI, or in another disclosure document?

Questions About Quantifying Commissions and Spreads

3. Would a requirement to quantify (express as a percentage) and disclose brokerage commissions, but not other transaction costs provide useful information to fund investors? If funds are required to quantify and disclose their brokerage commissions, should the number be included in fund expense ratios and fee tables?

4. Does the increased use of riskless principal trades on NASDAQ make it easier to quantify the cost of NASDAQ trades? What proportion of NASDAQ trades are subject to commission-equivalent fees?

5. Would quantifying commissions mislead investors because it would result in a number that includes some transaction costs and excludes others? Please explain the reasons for your answer.

6. If the answer to question 5 is yes, would the concern be alleviated if funds were required to quantify commissions and provide investors with disclosure that details the portion of trades that are performed on a commission basis; spread basis; or some other basis (*e.g.*, directly from an issuer)?

7. What effect, if any, would a requirement to quantify commissions have on the incentives of fund managers with respect to (1) use of principal versus agency transactions; and (2) use of soft dollar transactions?

8. Could any possible adverse effects identified in questions 5 and 6 be mitigated or eliminated by requiring funds, in addition to reporting their commission costs, to estimate the spread cost of their principal trades (for example, by imputing to principal trades the fund's average commission rate on agency trades)? If yes, should this number be included in fund expense ratios and fee tables?

9. Alternatively, can the portion of spread cost that represents payment for executing a trade be measured separately from the portion of the spread that represents the market impact cost associated with that trade? If yes, should this number be included in fund expense ratios and fee tables?

Questions About Quantifying All Transaction Costs

10. Would a requirement to quantify *all* transaction costs provide useful information to fund investors? Would a requirement to quantify *all transaction costs, except opportunity costs* be a better alternative? If you advocate that we mandate either of these alternatives, please explain as specifically as possible, how the alternative should be

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not beneficial. If assets for the measurement period were $100,000, the trade effect would be 0.5%.

[34] As noted above, trade effect measures the combined effect of transaction costs and short-term trading profits (or losses). The use of next day closing prices instead of same day closing prices would increase the importance of the short-term trading profits in the determination of the trade effect measure. Although variation in trade effect due to unpredictable market fluctuations would increase, averaging over many securities and over all days in the year would largely eliminate the impact of such fluctuations. Moreover, since most funds simultaneously buy and sell when effecting portfolio adjustments, the effects of unpredictable market fluctuations on the mark-to-market profits for buy and sell trades often would offset each other.

[35] For a fuller discussion of fund director's review of transaction costs, see Section VI of this Release, ''Review of Transaction Costs by Fund Directors.''

implemented. Please discuss the specific algorithms, formulas, definitions, recordkeeping requirements, and internal control requirements that should be used. Commenters are encouraged to address the following specific topics:

A. How should funds measure their spread costs?

B. How should funds measure their market impact costs?

C. How should funds measure their opportunity costs?

D. Should spread, market impact and opportunity costs be measured trade-by-trade or for all transactions?

E. Should spread, market impact and opportunity costs be measured absolutely or relative to a benchmark?

F. Should this number be included in fund expense ratios and fee tables?

11. Would the trade effect measure provide useful information to investors, and if so, should we require its disclosure? If the Commission mandated trade effect disclosure, should trade effect be measured with respect to same day closing prices or next day closing prices?

12. More generally, if the Commission were to choose to require disclosure of only one transaction cost measure, which measure should it be?

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IV. Accounting Issues

Under generally accepted accounting principals, most portfolio transaction costs are either included as part of the cost basis of securities purchased or subtracted from the net proceeds of securities sold and ultimately are reflected as changes in the realized and unrealized gain or loss on portfolio securities in the fund's financial statements.[36] Unfortunately, this accounting treatment provides a mutual fund shareholder with an opaque view of portfolio transaction costs in a fund's financial statements.[37] One effect of this lack of transparency is that it has impaired the ability of investors to evaluate the use of fund assets to obtain research services (as that term is defined in section 28(e) of the Securities Exchange Act of 1934) that are paid for through commissions or spreads.

The component of commissions that represent execution and clearing costs are the equivalent of acquisition or disposition costs incurred on physical assets and current accounting principles dictate that they be included in the cost basis of securities purchased or in the net proceeds from securities sold.[38] However, the component of commissions that represent the costs of services is conceptually an operating expense of a fund and should not be included in the cost basis of securities purchased or in the net proceeds from securities sold.[39]

We have attempted to improve the transparency of financial reporting when reliable information is available. For example, the aggregate value of all fund operating expenses paid for by brokers in brokerage offset arrangements are identifiable and measurable, even if the brokerage offset credits cannot be allocated to individual trades. Accordingly, we adopted a rule under Regulation S–X in 1995 that requires a mutual fund to record the value of services received under brokerage-offset arrangements as an expense.[40] The practical result is that the portion of commission or spread cost that can be reliably identified and measured and that also represents operating expenses of the fund is reflected in the expense ratio and in fund expenses.[41]

We are considering whether all transaction costs can be and should be captured in fund expense ratios and fee tables contained in a fund's prospectus. We also are considering whether the cost information obtained would be reliable and relevant for financial reporting purposes or whether alternatively, some subset of transaction costs (*e.g.*, all non-execution and clearing costs) can be reliably measured and expensed for financial reporting purposes. We may conclude that the standard for including these costs in the fee table is different than the standard for including these costs in the fund financial statements thereby creating a discrepancy between the two measures. If we conclude transaction costs or some subset of transaction costs should be included in fund financial statements, those statements would not be comparable to other similar entities, such as pension funds, hedge funds, and other investment vehicles. We are interested in the perspectives of fund investors and fund financial statement preparers on the desire for and feasibility of including some or all of this information in the prospectus and the fund financial statements.

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Questions About Accounting Issues

13. Would it be appropriate to include some or all transaction costs in fund expense ratios and fee tables without accounting for these items as an expense in fund financial statements?

14. Would it be feasible to account for some or all transaction costs as an expense in fund financial statements? If it is not feasible to reliably measure market impact and opportunity costs, should we still require that commission costs be expensed? If yes, should the requirement apply to all commission costs or only those commission and spread costs that do not relate to the execution and clearing of a portfolio transaction (*i.e.*, soft dollars)? If it is not feasible to reliably measure all research costs, should we still expense those costs that can be reliably measured (*i.e.*, payments to third parties for research)?

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[36] For example, if a mutual fund purchases 1 share of XYZ Company at a price of $10 with a commission of 5 cents, the mutual fund will record the cost of that security as $10.05. However, the mutual fund will record the security on its statement of assets and liabilities at its market value, for example, $10.03. The fund will then record the difference between the cost basis ($10.05) and the market value ($10.03) as unrealized gain or loss, in this case, an unrealized loss of 2 cents. Therefore, the portfolio transaction costs are not reflected directly as expenses of the fund, but are reflected in the statement of operations as changes in the realized or unrealized gain or loss on portfolio securities. *See* AICPA Audit and Accounting Guide for Investment Companies, paragraph 2.40 (May 1, 2002).

[37] Regardless of whether transaction costs are included in the costs basis/settlement proceeds of securities transactions or separately identified as operating expenses of the fund, the total return of the fund remains the same. Total return is calculated based on the net asset value of the fund, which would not be impacted by the alternatives in recognizing transaction costs. *See* Item 9 of Form N–1A. Form N–1A is the registration form used by open-end investment companies to register under the Investment Company Act of 1940 and to offer their shares under the Securities Act of 1933 [15 U.S.C. 77a].

[38] *See* Financial Accounting Standards Board Statement of Financial Accounting Concepts No. 2, *Qualitative Characteristics of Accounting Information.*

[39] *See* Financial Accounting Standards Board Statement of Financial Accounting Concepts No. 5, *Recognition and Measurement in Financial Statements of Business Enterprises.*

[40] *See* Rule 6–07(2)(g) of Regulation S–X [17 C.F.R. 210.6–07(2)(g)]. Prior to adoption of this rule, funds would report fund expenses, such as expenses for transfer agency, custody, and other services net of direct payments made by brokerage firms on behalf of funds under brokerage offset arrangements. Rule 6–07(2)(g) requires these fund expenses reflect the total amounts paid to fund service providers whether directly paid by the fund or by another entity on its behalf. The fund is allowed to show after total fund expenses the amount of those expenses paid by the brokerage firms. This presentation results in a gross-up of income and expenses in the statement of operations; however, it provides transparency to shareholders on the impact of these arrangements on the fund's financial statements. Additionally, this presentation allows the expense ratio to properly reflect a component of commission/spread costs as an expense.

[41] When we adopted this requirement, we also requested comment on whether the cost of research services provided by broker-dealers should be expensed. Many commentators pointed out the difficulty of allocating research received by an adviser among accounts when the brokerage of those accounts is used to acquire the research. Some commentators, however, supported the additional disclosure of research soft dollar practices. *See* Investment Company Act Release No. 21221 (July 21, 1995).

15. Are mutual funds and their managers better able than they were in the past to track the portion of commission costs that purchase research services from brokers? Has the improvement been sufficient to make it feasible for us to require funds to expense these items in their financial statements? Since soft dollars are earned based on complex-wide trading activity, how should research and other non-execution costs be allocated among funds? Can soft dollars be traced to individual portfolio transactions? (This would entail adjusting the basis of the securities purchased in those transactions for the portion of the commission cost that was used to purchase research services.) Alternatively, should an aggregate adjustment (not specified to a particular portfolio transaction) be made to realized and unrealized gain or loss? If funds and their managers are not yet capable of tracking the portion of commission costs that purchase research services from brokers, what factors continue to prevent funds and managers from developing this capability?

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V. Alternatives That Provide Additional Information About the Level of Transaction Costs

A. Existing Disclosure Requirements

1. Portfolio Turnover

All mutual funds (except money market funds) provide investors with information about two items that are related to transaction costs ''portfolio turnover rate and dollar amount of brokerage commissions.[42] Funds disclose in their prospectuses the annual rate of portfolio turnover that they have incurred during the last five fiscal years.[43] Portfolio turnover rate measures the average length of time that a security remains in a fund's portfolio.[44] The requirement to disclose portfolio turnover rate is premised on the observation that a fund's transaction costs tend to be highly correlated with its turnover rate, other factors held equal.[45] Thus, by comparing turnover rates, investors can obtain an indication of how transaction costs are likely to vary among different funds. The advantage that turnover rate (an indirect indicator of fund transaction costs) has over the dollar amount of brokerage costs (a more direct measure) is that turnover rate is less affected by the asset size of a fund. For example, a fund with assets of $1 billion is likely to pay many more dollars of brokerage commissions than a fund with assets of $100 million, even if their turnover rates are identical.

2. Dollar Amount of Commissions Paid

In addition to providing their portfolio turnover rates, funds are required to disclose in their prospectus whether they may engage in active and frequent trading of portfolio securities to achieve their investment strategies. If so, funds must explain the tax consequences to shareholders of the increased portfolio turnover, and how the trading costs and tax consequences may affect investment performance.[46]

Funds (with the exception of money market funds) also must disclose in their SAIs the dollar amount of brokerage commissions that they have paid during their three most recent fiscal years.[47] Brokerage commission amounts, although they must be interpreted carefully, can nevertheless provide useful information to fund investors. This disclosure informs investors of the magnitude of the fund's overall assets that are expended on commissions.

B. Improving Disclosure Related to the Level of Transaction Costs

Another set of alternatives for improving mutual fund transaction cost disclosure consists of approaches aimed at improving current transaction cost related disclosures or adding new types of disclosure that would provide information that is more meaningful and understandable to the average investor.

1. Disclose Transaction Costs in Terms of Rated Categories

One commentator has suggested transaction costs (including commissions, spreads, and market impact costs) could be disclosed in terms of rated categories, instead of as part of the expense ratio or as a stand-alone ratio. The commentator suggested funds would categorize their trading costs as either very high, high, average, low or very low. The commentator acknowledged this disclosure might be a rough estimate, but a ''rough estimate was better than no estimate at all.''[48]

Each fund would be compared to an industry standard. In order for such a comparison to be made, a transaction cost measure would have to be developed. In addition, we would have to determine whether any comparison should be against other funds generally or only against similar funds. For example, the transaction costs of an equity fund are likely not comparable to transaction costs of a fixed-income or money market fund.

2. Portfolio Turnover

Another possible approach would be to require funds to give greater prominence to the portfolio turnover ratio.[49] Portfolio turnover can be calculated easily by all funds. The ratio is simple and easy to understand and readily comparable among funds. If portfolio turnover is highly correlated with transaction costs, then the portfolio turnover ratio may be a good proxy for these costs.[50] The advantages of being able to easily calculate, understand, and compare portfolio turnover rates may justify any imprecision in their correlation to transaction costs.

3. Information About Average Net Flows

Another approach to providing information about transaction costs is to provide additional information about the sale and redemption of fund shares. The sale and redemption of fund shares often generates portfolio transaction costs that all fund investors must bear. Sales of fund shares often lead to security purchases as new monies are invested in the fund's portfolio. Redemptions often lead to security sales to raise money to pay for redemptions. To the extent that sales and redemptions do not offset each other, the net difference ultimately will generate portfolio transactions. These transactions usually incur transaction costs that all investors (in the case of net sales) or all remaining investors (in the case of net redemptions) must bear.

Investors therefore may be interested in the average level of net flows into and out of funds. The disclosure of average daily net flow, measured as a fraction of total assets, therefore might help investors predict the losses that they

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[42] Money market funds purchase and sell securities on a principal basis. Transaction costs for these securities are embedded in the purchase price or sale proceeds and are not separately stated.

[43] *See* Item 9 of Form N–1A.

[44] For example, a fund that has a portfolio turnover rate of 100% holds its securities for one year, on average. A fund with a portfolio turnover rate of 200% holds its securities for six months, on average.

[45] *See, e.g.*, Livingston and O'Neal, *supra* note 18 at 283; Fortin and Michelson, *supra* note at 67. *But see*, Chalmers, Edelen, and Kadlec, *supra* note 2 at 2 (''Turnover is likely to be an unreliable proxy for funds trading expenses because it does not account for heterogeneity in the per-unit costs of trading an asset. For example, an uninformed manager that frequently trades assets with a low cost-per-trade may incur lower trading expenses than an uninformed manager who infrequently trades assets with high cost-per-trade.'')

[46] *See* Instruction 7 to Item 4(b) of Form N–1A.

[47] *See* Item 16(a) of Form N–1A.

[48] *See* Statement of Wayne H. Wagner, *supra* note 12.

[49] HR 2420 would require funds to disclose their portfolio turnover rate in a new document in which mutual funds would disclose their fees to investors.

[50] *See supra* note 45.

will bear when holding funds that other traders trade. This measure may provide investors with information about whether the other shareholders in the fund tend to be long-term or short-term investors, and may allow them to gauge the portfolio transaction costs generated by short-term investors. This measure also would help investors understand the extent to which a fund is used by other investors for short-term trading—*i.e.*, market timing.

4. Other Narrative Disclosures

Another possible approach is to require a discussion of transaction costs and portfolio turnover in the prospectus, the report to shareholders, or in another disclosure document. Currently, funds are required to discuss the impact of active and frequent portfolio trading, which results in a higher portfolio turnover ratio, if it is a principal investment strategy. The Commission could require that all funds discuss the impact that their management style would have on portfolio turnover. Funds also could be required to discuss the impact on portfolio transaction costs by: trading in various types of securities in which the fund will invest; markets in which they will invest (*e.g.*, on an exchange or through over-the-counter transactions, or in foreign or domestic markets); and the portfolio management strategies that a fund's adviser will employ. In addition, the Commission could require a fund to disclose the portfolio turnover rate that the fund would not expect to exceed.

5. Brokerage Costs and Average Commission Rate per Share

The Commission could require that the information on brokerage costs that is currently included in the SAI be moved to the fund prospectus and prominently displayed with the portfolio turnover information to give shareholders a more complete understanding of the underlying transaction costs of the fund. Another possibility would be to reinstate some form of average commission rate per share disclosure,[51] with appropriate revisions to make it more meaningful than the previously eliminated disclosures of such information in the fund's financial highlights table.

6. Disclosure of Gross Returns

Up to this point in the release, we have described the many sources of costs incurred by fund investors. We could require an alternative disclosure that captures indirectly the total cost of investing in funds. Funds could report the return on their investments prior to all identifiable costs along with the investment return after such costs have been deducted. By reporting both measures side by side, investors could get a reasonable idea of how much they are paying for the return they receive.

Current Commission regulations mandate the disclosure of the returns that funds generate after fees and expenses (standardized returns).[52] These standardized returns differ from the gross returns generated by the fund's portfolio manager.[53] Gross returns are the returns that investment managers produce while standardized returns are the returns that are available to shareholders.

Gross returns are generally higher than standardized returns because the standardized returns reflect the loads, fees, expenses, and other charges that shareholders pay to obtain and maintain their investments. Dilution due to market timing may also cause standardized returns to be lower than the associated gross returns.

If gross returns were disclosed to investors, they could compare the returns produced by their managers with the standardized returns. Investors would be able to evaluate the efficiency of fund management by examining the difference between these two returns. In particular, they would be able to determine how much of the portfolio return they will actually receive on a net basis.

The disclosure of gross returns would also allow investors to compare the performance of investment managers on an equivalent basis. Such comparisons now require that investors take into account differences across funds, such as loads, fees, expenses, and dilution. Although loads, fees, and expenses are now disclosed, dilution caused by portfolio trading is not. Accordingly, investors cannot now compare investment managers on a completely equivalent basis.

* * * * *

Questions About Improving Disclosure Related to the Level of Transaction Costs

16. Are there ways to provide a rough estimate of transaction costs, or develop a scheme to categorize these costs (for example, ''very high,'' ''high,'' ''average,'' ''low,'' or ''very low'') under general guidelines set by the Commission that would mitigate the difficulties involved in coming up with a more precise measure, and yet still provide useful information to investors? Could such an approach produce results that are consistent enough to permit meaningful comparison among funds? If yes, please provide specific suggestions.

17. In general, do the current disclosure requirements relating to transaction costs described in this section of the release provide investors with adequate information? If not, what additional information should funds provide? Would one or more of the alternatives described in this section provide useful information to investors, or would the alternatives lengthen the prospectus while providing no real benefit? If one or more of these alternatives would provide meaningful information, would the information most appropriately be located in the prospectus, the SAI, the report to shareholders, or in another disclosure document?

18. Does existing portfolio turnover disclosure provide useful information about transaction costs? If additional narrative disclosure concerning portfolio turnover and its relationship to transaction cost is needed, what information should be required?

19. Does the existing requirement to disclose the dollar amount of commissions paid provide investors with meaningful information about transaction costs? How can the existing requirement be improved?

20. Would an average daily net flow measure provide useful information to investors?

21. Should the Commission consider policies to encourage funds to charge purchasers and redeemers of fund shares a fee payable to the funds to compensate existing and remaining investors for the costs they bear when their funds accommodate the purchases and redemptions of other investors? If yes, should the Commission consider requiring funds to disclose how they compute these fees, if they require them; and why they do not require these fees, if they do not?

[51] In 1995 the Commission amended Form N–1A to require funds to disclose in the financial highlights table their average commission rate per share. *See* Investment Company Act Release No. 21221 (July 21, 1995). This amount was calculated by dividing the total dollar amount of commissions paid during the fiscal year by the total number of shares purchased and sold during the fiscal year for which commissions were charged. In 1998 the Commission eliminated this requirement in the belief that the fund prospectus is not the most appropriate document through which to make this information public. *See* Investment Company Act Release No. 23064, (Mar. 13, 1998). The Commission noted that industry analysts had informed the staff that average commission rate information is only of marginal benefit to them and to typical fund investors, and that the analysts support the view that these rates are technical information that typical investors are unable to understand.

[52] *See* Item 21(b)(1) of Form N–1A.

[53] Gross return refers to the aggregate performance of the holdings of a portfolio.

22. Should the requirement to disclose average commission rate per share be reinstated, in either its original form or in a revised form? If you advocate that it be reinstated in a revised form, please provide specific suggestions.

23. Is ''transaction costs'' as described in this release a useful concept, or would it be more useful for investors to see the effect of all costs combined, for example, by showing the following:

- Gross or ''pure'' portfolio return;
- Net return to shareholders; and
- The resulting difference?

24. If it would be useful for investors to see the effect of all costs combined, could funds calculate and report the gross or ''pure'' portfolio return, net return to shareholders and the resulting difference on an annual basis?

25. Should the Commission require disclosure of gross returns? If so, what definition would be most useful? Of what benefit would these returns be to investors? How expensive would it be for funds to compute these returns?

26. Would the disclosure of gross returns allow investors to better identify dilution due to market timers?

27. If portfolio returns are to be disclosed, how should the returns be adjusted for fund flows into and out of the portfolio? Should they be computed using internal rate of return methods; time-weighted average methods; or should other methods be used?

28. If portfolio returns are to be disclosed, should these returns only be disclosed, or should the differences between these returns and the shareholder returns be disclosed?

29. Where should these returns or return differences be disclosed, and how should they be described?

* * * * *

VI. Review of Transaction Costs by Fund Directors

Although a mutual fund's investment adviser has an obligation to seek the best execution of securities transactions arranged for or on behalf of the fund, the adviser is not necessarily obligated to obtain the lowest possible commission cost. The adviser's obligation is to seek to obtain the most favorable terms for a transaction reasonably available under the circumstances.[54] Given the fact that portfolio transactions costs can be substantial and that they involve the use of fund assets, portfolio transaction costs must be a significant issue for consideration by fund directors. The transaction costs incurred by a mutual fund are also generally reviewed by the fund's board of directors because section 15(c) of the Investment Company Act requires a fund's board to request and review such information as may reasonably be necessary to evaluate the terms of the advisory contract between the adviser and the fund. Even if the investment adviser obtains best execution, research, distribution, and other services purchased by the adviser with the fund's brokerage bear on the reasonableness of the fund's management fee because the research, distribution and other services may otherwise have to be purchased by the adviser itself, resulting in higher expenses and lower profitability for the adviser. Therefore, for example, mutual fund advisers that have soft dollar arrangements provide their funds' boards with information regarding their soft dollar practices.[55]

In evaluating the use of commissions, fund directors also consider the appropriateness of entering directed brokerage arrangements. Under a directed brokerage arrangement, the fund asks the investment adviser to direct securities transactions to a particular broker that has agreed to provide services, pay for services provided by others, or make cash rebates to the fund. Funds typically enter into directed brokerage arrangements to offset fund expenses, such as audit, legal, and custodial fees. Although directed brokerage does not involve the conflicts posed by soft dollars, it does raise issues related to how a fund's assets are being expended and other issues, including disclosure.[56]

* * * * *

Questions About Board Review of Transaction Costs

30. Are existing requirements for board review of transaction costs adequate? If they are not adequate, how can they be improved?

31. Should boards be required to receive reports with mandated information regarding soft dollars and directed brokerage payments? Should investors be provided periodically with a summary of these reports?

32. One problem in evaluating execution cost measurements is in identifying a standard of comparison. It may be difficult for fund directors to assess the fund's execution performance statistics in a vacuum, without comparison with other funds' statistics. Should the Commission or other independent body collect these statistics from similar funds and make available aggregate statistics for comparison purposes?

33. Should fund advisers be required to provide fund boards with an internal allocation of their uses of brokerage commissions, indicating the amounts and percentage used by the adviser to obtain execution services and soft dollar benefits, specifically detailing the types and amounts of the various kinds of benefits? Should there be separate allocations among types of research, such as research produced by underwriters, or other broker-dealer affiliates?

* * * * *

In conclusion, the Commission believes that shareholders need to better understand a fund's trading costs in order to evaluate the costs of operating a fund. As outlined above, the Commission intends to examine what steps can be taken to improve the disclosure of transaction costs in order to make the information more useful and understandable to the average investor.

By the Commission.

Dated: December 18, 2003.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–31695 Filed 12–23–03; 8:45 am]

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[54] *See* Securities Exchange Act Release No. 23170 (Apr. 23, 1986).

[55] *See* Section 15(c) of the 1940 Act. *See also,* Inspection Report, *supra* note 25.

[56] All advisers, including the investment advisers of mutual funds, have an obligation to act in the best interests of their clients and to place client interests before their own. They also have an affirmative duty of full and fair disclosure of all material facts to their clients. *See* 15 U.S.C. 80b–6 (2000) (Section 206 of the Investment Advisers Act of 1940); *S.E.C.* v. *Capital Gains Research Bureau,* 375 U.S. 180 (1963). Some of the funds that engage in directed brokerage disclose the practice in the prospectus, the SAI, and/or the annual report to shareholders. Others use the footnotes to the financial statements to make the disclosure. In 1995, the Commission adopted accounting rules which require funds to report all expenses gross of off-sets or reimbursements pursuant to a directed brokerage arrangement. *See supra* note 40. HR 2420 would create a specific fiduciary duty for fund boards to review soft dollar and directed brokerage arrangements, as well as require an annual report to the board on soft dollar and directed brokerage payments, as well as summary disclosure in annual reports to shareholders regarding the report to the board in these areas.

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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.

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