12–29–04 Wednesday
Vol. 69 No. 249 Dec. 29, 2004

Pages 77881–78294

Federal Register

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NE–62–AD; Amendment 39–13915; AD 2004–26–03]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc RB211 Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for Rolls-Royce plc (RR) models RB211–535E4–37, RB211–535E4–B–37, RB211–535C–37, RB211–535E4–B–75, and RB211–22B–02 turbofan engines. That AD currently requires inspecting certain high pressure (HP) turbine discs, manufactured between 1989 and 1999, for cracks in the rim cooling air holes, and, if necessary, replacing the disc's serviceable parts. This AD requires the same actions but at reduced compliance schedules and adds the RR model RB211–535E4–C turbofan engine to the applicability. This AD results from a report of cracks in a model RB211–524 HP turbine disc that had propagated further than expected. We are issuing this AD to prevent possible disc failure, which could result in an uncontained engine failure and damage to the airplane.

DATES: Effective January 13, 2005. The incorporation by reference of certain publications listed in the AD is approved by the Director of the Federal Register as of January 13, 2005.

We must receive any comments on this AD by February 28, 2005. On December 24, 2001 (66 FR 57859, November 19, 2001), the Director of the Federal Register approved the incorporation by reference of certain other publications, as listed in the regulations.

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

- By mail: Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2000–NE–62–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- By fax: (781) 238–7055.
- By e-mail:*9-ane-adcomment@faa.gov.*

You can get the service information referenced in this AD from Rolls-Royce plc, PO Box 31, Derby, England; telephone: 011 44 1332–249428, fax: 011 44 1332–249223.

You may examine the AD docket, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

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

SUPPLEMENTARY INFORMATION: On November 5, 2001, the FAA issued AD 2001–23–02, Amendment 39–12499 (66 FR 57859, November 19, 2001), for RR models RB211–535E4–37, RB211–535E4–B–37, RB211–535C–37, RB211–535E4–B–75, and RB211–22B–02 turbofan engines. That AD requires inspecting certain HP turbine discs, manufactured between 1989 and 1999, for cracks in the rim cooling air holes, and, if necessary, replacing the discs with serviceable parts. That AD resulted from reports of cracks in rim cooling air holes in two high-life RR Trent 800 discs. That condition, if not corrected, could result in possible disc failure, which could result in an uncontained engine failure and damage to the airplane.

Actions Since AD 2001–23–02 Was Issued

Since that AD was issued, the Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on Rolls-Royce plc models RB211–535E4–37, RB211–535E4–B–37, RB211–535C–37, RB211–535E4–B–75, and RB211–535E4–C series turbofan engines. The CAA advises that cracks in a model RB211–524 HP turbine disc had propagated further than expected based on recent inspection findings and a re-assessment of the disc lifing model used to define the inspection thresholds in AD 2001–23–02. This AD requires inspection of certain HP turbine discs, manufactured between 1989 and 1999, for cracks in the rim cooling air holes, and, if necessary, replacement with serviceable parts. We are reducing the inspection schedules required by AD 2001–23–02, for the high risk discs which includes all models except for model RB211–22B–02 engines and adds the RB211–535E4–C due to manufacture at the same facility as the Trent 800 discs using the same tooling. Discs used in the model RB211–535 engines have a significantly higher HP turbine life than those used in the RB211–524 and operate in a harsher environment. Therefore, although the cracking of the rim cooling air holes will not affect the safe operation of the RB211–524 discs, the 535 discs are at higher risk of failure and the inspection intervals must be reduced. This AD retains the same inspection schedules, currently required for the model RB211–22B–02 engine, that were in AD 2001–23–02. The actions specified in this AD are intended to prevent possible disc failure, which could result in an uncontained engine failure and damage to the airplane.

Bilateral Airworthiness Agreement

This engine 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. Under this bilateral airworthiness agreement, the CAA has kept the FAA 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.

FAA's Determination and Requirements of This AD

The unsafe condition described previously is likely to exist or develop on other RR models RB211–535E4–37,

RB211–535E4–B–37, RB211–535C–37, RB211–535E4–B–75, RB211–535E4–C, and RB211–22B–02 turbofan engines of the same type design. We are issuing this AD to prevent possible disc failure, which could result in an uncontained engine failure and damage to the airplane. This AD requires inspection of certain HP turbine discs, manufactured between 1989 and 1999, for cracks in the rim cooling air holes, and, if necessary, replacement with serviceable parts.

FAA's Determination of the Effective Date

Since an unsafe condition exists that requires the immediate adoption of this AD, we have found that notice and opportunity for public comment before issuing this AD are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to make any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include ''AD Docket No. 2000–NE–62–AD'' in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it. If a person contacts us verbally, and that contact relates to a substantive part of this AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the AD in light of those comments.

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. See **ADDRESSES** for the location.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include ''AD Docket No. 2000–NE–62–AD'' in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–12499 (66 FR 57859, November 19, 2001), and by adding a new airworthiness directive, Amendment 39–13915, to read as follows:

2004–26–03 Rolls-Royce plc: Amendment 39–13915. Docket No. 2000–NE–62–AD. Supersedes AD 2001–23–02, Amendment 39–12499.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 13, 2005.

Affected ADs

(b) This AD supersedes AD 2001–23–02, Amendment 39–12499.

Applicability

(c) This AD applies to Rolls-Royce plc (RR) models RB211–535E4–37, RB211–535E4–B–37, RB211–535C–37, RB211–535E4–B–75, RB211–535E4–C, and RB211–22B–02 turbofan engines with turbine discs having part numbers and serial numbers listed in the following Tables 1, 3, and 5 of this AD. These turbofan engines are installed on, but not limited to, Boeing 757, Tupolev Tu204, and Lockheed L–1011 series airplanes.

Unsafe Condition

(d) This AD results from a report of cracks, in an RB211 HP turbine disc, that had propagated further than expected. We are issuing this AD to prevent possible disc failure, which could result in an uncontained engine failure and damage to the airplane.

Compliance

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

Eddy Current Inspection for All Except Model RB211–22B–02

(f) For all except model RB211–22B–02 engines, do the following:

(1) Perform an eddy current inspection of the high pressure (HP) turbine discs listed in Table 1 of this AD, for cracks in the rim cooling air holes. Use paragraph 3. of the Accomplishment Instructions of RR Alert SB No. RB.211–72–AE651, dated November 22, 2004, to perform the eddy current inspection.

TABLE 1—AFFECTED HP TURBINE DISCS USING COMPLIANCE SCHEDULE IN TABLE 2

Part No.	Serial No.	Part No.	Serial No.
LK80623	CQDY6397	UL27681	LDRCZ12893
LK80623	CQDY6504	UL27681	LDRCZ12985
UL27680	CQDY6451	UL27681	LDRCZ13044
UL27680	CQDY6452	UL27681	LDRCZ13047
UL27680	CQDY6466	UL27681	LQDY6803
UL27680	CQDY6468	UL27681	LQDY6814
UL27680	CQDY6471	UL27681	LQDY6847
UL27680	CQDY6496	UL27681	LQDY6868
UL27680	CQDY6505	UL27681	LQDY6875
UL27680	CQDY6653	UL27681	LQDY6892
UL27680	CQDY6656	UL27681	LQDY6898
UL27680	CQDY6657	UL27681	LQDY6904
UL27680	CQDY6684	UL27681	LQDY6909
UL27680	CQDY6883	UL27681	LQDY6910
UL27681	CQDY6465	UL27681	LQDY9133
UL27681	LAQDY6002	UL27681	LQDY9574
UL27681	LAQDY6083	UL27681	LQDY9579
UL27681	LAQDY6087	UL27681	LQDY9672
UL27681	LDRCZ10247	UL27681	LQDY9770
UL27681	LDRCZ10277	UL27681	LQDY9783
UL27681	LDRCZ10318	UL27681	LQDY9786
UL27681	LDRCZ10335	UL27681	LQDY9900
UL27681	LDRCZ10430	UL27681	LQDY9902
UL27681	LDRCZ10531	UL27681	LQDY9929
UL27681	LDRCZ10750	UL27681	LQDY9957
UL27681	LDRCZ10899	UL27681	LQDY9982
UL27681	LDRCZ11616	UL27681	LQDY9992
UL27681	LDRCZ11720	UL27681	WGQDY90005
UL27681	LDRCZ11893	.	

(2) Use the compliance schedule in Table 2 of this AD.

TABLE 2.—COMPLIANCE SCHEDULE FOR HP TURBINE DISCS LISTED IN TABLE 1

If disc cycles-since-new (CSN) on October 8, 2004 are:	Then eddy current inspect:
(1) 12,750 CSN or more	Within 250 cycles-in-service (CIS) from October 8, 2004 or within 14,500 CSN, whichever occurs first.
(2) Fewer than 12,750 CSN but 10,500 CSN or more	Within 500 CIS from October 8, 2004.
(3) Fewer than 10,500 CSN	Before 11,000 CSN or at next shop visit after the effective date of this AD, whichever occurs first.

(3) On discs that pass inspection, use paragraph 3. of the Accomplishment Instructions of RR Alert SB No. RB.211–72–AE651, dated November 22, 2004, to permanently etch NMSB 72–AE651 onto the disc, adjacent to the part number.

(4) Perform an eddy current inspection of the HP turbine discs listed in Table 3 of this AD, for cracks in the rim cooling air holes. Use paragraph 3. of the Accomplishment Instructions of RR Alert SB No. RB.211–72–AE651, dated November 22, 2004, to perform the eddy current inspection.

TABLE 3.—AFFECTED HP TURBINE DISCS USING COMPLIANCE SCHEDULE IN TABLE 4

Part No.	Serial No.
UL10323	CQDY6070 and higher.
UL27680	All.
UL27681	All.
LK80622	LQDY6316 and higher.
LK80623	CQDY5945 and higher.

TABLE 3.—AFFECTED HP TURBINE DISCS USING COMPLIANCE SCHEDULE IN TABLE 4—Continued

Part No.	Serial No.
UL28267	All.

(5) Use the compliance schedule in Table 4 of this AD.

TABLE 4.—COMPLIANCE SCHEDULE FOR HP TURBINE DISCS LISTED IN TABLE 3

If disc cycles-since-new (CSN) on January 29, 2001 are:	Then eddy current inspect:
(1) Fewer than 13,700 CSN	Before reaching 14,500 CSN, or at the next shop visit after the effective date of this AD, whichever occurs first.
(2) 13,700 CSN or more	Before reaching one of the following, whichever occurs first after the effective date of this AD: (i) 15,300 CSN. (ii) Within 800 CIS since January 29, 2001. (iii) At next shop visit.

(6) For discs that pass inspection, use paragraph 3. of the Accomplishment Instructions of RR Alert SB No. RB.211–72–AE651, dated November 22, 2004, to permanently etch NMSB 72–AE651 onto the disc, adjacent to the part number.

Eddy Current Inspection for Model RB211–22B–02

(g) For model RB211–22B–02 engines, do the following:

(1) Perform an eddy current inspection of the HP turbine discs listed in Table 5 of this AD, for cracks in the rim cooling air holes. Use paragraph 3. of the Accomplishment Instructions of RR SB No. RB.211–72–C877, Revision 1, dated March 7, 2001, to perform the eddy current inspection.

TABLE 5.—AFFECTED HP TURBINE DISCS IN RR MODEL RB211–02 SERIES TURBOFAN ENGINES

Part No.	Serial No.
LK80622	LQDY6316 and higher.
LK80623	CQDY5945 and higher.
UL28267	All.

(2) Use the compliance schedule in Table 6 of this AD.

TABLE 6.—COMPLIANCE SCHEDULE FOR HP TURBINE DISCS LISTED IN TABLE 5

If disc cycles-since-new (CSN) on December 24, 2001 are:	Then eddy current inspect:
(1) 11,000 CSN or fewer	Before exceeding 11,000 CSN, or at the next shop visit after the effective date of this AD, whichever occurs first.
(2) More than 11,000 CSN	Within 300 CIS after December 24, 2001.

(3) For discs that pass inspection, use paragraph 3. of the Accomplishment Instructions of RR SB No. RB.211–72–C877, Revision 1, dated March 7, 2001, to permanently etch NMSB 72–C877 onto the disc, adjacent to the part number.

Other Conditions for All Engines

(h) Do not perform the actions of this AD to a disc until that disc has reached at least 1,500 CSN.

(i) Engines with an affected HP turbine disc at shop visit on the effective date of this AD and with the HPT rotor still removed from the combustor outer case, must have the disc eddy current inspected before assembling the engine.

(j) Engines with an affected HP turbine disc at shop visit on the effective date of this AD with the HPT rotor reinstalled in the combustor case need not have the disc eddy current inspected at this time.

(k) HP turbine discs previously eddy current inspected at fewer than 1,500 CSN must be inspected again using this AD.

(l) Replace cracked HP turbine discs with a serviceable disc.

Definition

(m) For the purpose of this AD, next shop visit is defined as the first shop visit opportunity when the HPT rotor is removed from the combustion case.

(n) For the purpose of this AD, a serviceable part is one with cyclic life remaining and either not listed in any of the preceding tables or one listed in a preceding table, but previously eddy current inspected and permanently etch marked with the Service Bulletin (SB) number NMSB 72–AE651 or NMSB 72–C877 on the disc.

Previous Credit

(o) Previous credit is allowed for the actions in this AD for HP turbine discs with 1,500 CSN or more that were eddy current inspected using applicable RR SB No. RB.211–72–C817, Revision 2, dated March 7, 2001, RR TSD 594–J, Overhaul Processes Manual, Task 70–00–00–200–223, or RR SB No. RB.211–72–C877, Revision 1, dated March 7, 2001.

Reporting Requirements

(p) For all except model RB211–22B–02 engines, report findings of the inspection using paragraph 3.E. of the Accomplishment Instructions of RR ASB RB.211–72–AE651, dated November 22, 2004. The Office of Management and Budget (OMB) has approved the reporting requirements specified in paragraph 3.E. of the Accomplishment Instructions of RR ASB RB.211–72–AE651, dated November 22, 2004, and assigned OMB control number 2120–0056.

(q) For model RB211–22B–02 engines, report findings of the inspection using paragraph 3.E. of the Accomplishment Instructions of RR SB RB.211–72–C877, Revision 1, dated March 7, 2001. The Office of Management and Budget (OMB) has approved the reporting requirements specified in paragraph 3.E. of the Accomplishment Instructions of RR SB RB.211–72–C877, Revision 1, dated March 7, 2001, and assigned OMB control number 2120–0056.

Alternative Methods of Compliance

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

Material Incorporated by Reference

(s) You must use the service information specified in Table 7 of this AD to perform the inspections required by this AD. The Director of the Federal Register approved the incorporation by reference of RR Alert SB No. RB.211–72–AE651, dated November 22, 2004, listed in Table 7 of this AD in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The incorporation by reference of RR MSB No. RB.211–72–C877, Revision 1, dated March 7, 2001, was approved previously by the Director of the Federal Register as of December 24, 2001 (66 FR 57859, November 19, 2001). You can get a copy from Rolls-Royce plc, PO Box 31, Derby, England; telephone: 011 44 1332–249428, fax: 011 44 1332–249223, for a copy of this service information. You may review copies at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. Table 7 follows:

TABLE 7.—INCORPORATION BY REFERENCE

Service bulletin	Page numbers	Revision	Date
RB.211–72–AE651 Total Pages—7	All	Original	November 22, 2004.
RB.211–72–C877 Total Pages—5	All	1	March 7, 2001.

Related Information

(t) CAA airworthiness directive G–2004–0027, dated November 19, 2004, also addresses the subject of this AD.

Issued in Burlington, Massachusetts, on December 15, 2004.

Francis A. Favara,

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

[FR Doc. 04–28144 Filed 12–28–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 382

[OST Docket No. 2003–11473]

RIN 2105–ADO4

Reporting Requirements for Disability-Related Complaints

AGENCY: Office of the Secretary, Department of Transportation (DOT).

ACTION: Guidance on final rule and notice of information collection approval.

SUMMARY: A July 8, 2003, final rule (68 FR 40488) requires, among other things, that certain certificated U.S. air carriers and foreign air carriers record disability-related complaints and submit a summary report of those complaints annually to the Department.

This document announces the Office of Management and Budget (OMB) approval of this information collection request (ICR) OMB No. 2105–0551, ''Reporting Requirements for Disability-Related Complaints,'' provides information on how covered carriers can submit a report summarizing the disability-related complaints that they receive during the prior calendar year to the Department through the World Wide Web, and addresses frequently asked questions about the applicability of the rule.

DATES: The final rule published July 8, 2003 (68 FR 40488) was effective August 7, 2003. The expiration date for the ICR is April 30, 2007.

FOR FURTHER INFORMATION CONTACT: Damon P. Whitehead or Blane A. Workie, Office of the General Counsel, 400 7th Street, SW., Room 4116, Washington, DC 20590, (202) 366–9342 (voice), (202) 366–7152 (Fax) or *damon.whitehead@ost.dot.gov* or *blane.workie@ost.dot.gov* (E-mail). Arrangements to obtain the notice in an alternative format may be made by contacting the above-named individuals.

SUPPLEMENTARY INFORMATION:

Background

On July 8, 2003, the Office of the Secretary published a final rule adding § 382.70 to 14 CFR Part 382, the Department's rule implementing the Air Carrier Access Act. Section 382.70 requires most certificated U.S. air carriers and foreign air carriers operating to and from the U.S. that conduct passenger-carrying service to do the following: (1) Record and categorize complaints that they receive alleging inadequate accessibility for the disabled or discrimination on the basis of disability according to the type of disability and nature of complaint; (2) prepare an annual summary report of the number of such complaints; (3) submit the report to the Department's Aviation Consumer Protection Division through the World Wide Web unless the carrier can demonstrate that it would suffer undue hardship if it were not permitted to submit the data via paper copies, computer disks, or e-mail; and (4) retain copies of the correspondence and records of action taken on the disability-related complaints for three years. 68 FR 40488. The effective date of this final rule was August 7, 2003. At that time, the Department had not obtained an OMB control number for its information collection request and had not established procedures for covered carriers to follow when submitting annual reports to the Department through the World Wide Web.

Approval of Information Collection Request

OMB regulations implementing provisions of the Paperwork Reduction Act of 1995 require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities and specify that no person is required to respond to an information collection unless it displays a valid OMB control number. In accordance with the Paperwork Reduction Act of 1995, OST has received OMB approval of the following ICR:

OMB Control Number: 2105–0551.

Title: Reporting Requirements for Disability-Related Complaints.

This information collection approval, which was granted by OMB on April 23, 2004, expires on April 30, 2007. Because OMB approved the information collection after publication of the July 8, 2003, final rule, we are now announcing the OMB approval and incorporating notice of this approval into the form that carriers will use through the World Wide Web to submit their annual report summarizing the disability-related complaints that they received during the prior calendar year. A copy of the form is included below and this notice will be sent to affected carriers for whom we have accurate contact information.

BILLING CODE 4910–62–P

Disability Complaint Reporting Form

Name of Carrier: _____ Submission Date: _____

Contact Person: Period of Data Collection: _____

Name: _____
Telephone # (include country code if outside the U.S.): _____
Email address: _____
Mailing address: _____

Total number of complaints (i.e., incidents): _____

REPORT OF DISABILITY-RELATED COMPLAINT DATA

	Vision Impaired	Hearing Impaired	Vision & Hearing Impaired	Paraplegic	Quadriplegic	Other wheelchair	Oxygen	Stretcher	Other Disability	Other Assistive Device	Mentally Impaired	Communicable Disease	Allergies
Refusal To Board Passenger													
Refusal to Board w/o Attendant													
Security Issues Regarding Disability													
Aircraft Not Accessible													
Airport Not Accessible													
Advance Notice Dispuite													

Seating Accom-modation													
Failure to Provide Assistance													
Damage to Assistive Device													
Storage/ Delay of Assistive Device													
Service Animal Problem													
Unsatis-factory Info													
Other													

According to the Paperwork Reduction Act of 1995, respondents are not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 2105-0551. The time required to complete this information is estimated to average 30 minutes per response. The expiration date for the information collection request is April 30, 2007.

Certification Statement: I, the undersigned, do certify that this report has been prepared under my direction in accordance with the regulations in 14 CFR Part 382. I affirm that, to the best of my knowledge and belief, this is a true, correct, and complete report.

Signature: _____

Procedures For Submission of Report Through the World Wide Web

DOT has established a Web site at *http://382reporting.ost.dot.gov* to enable covered carriers to submit from any Internet-connected computer anywhere in the world the required annual report summarizing the disability-related complaints that they received during the prior calendar year using the form specified in Appendix A of Part 382. Carriers will need to register on the Web site before they can gain access and complete the disability-related complaint form online. To register, carriers simply fill in and submit the required registration information: Carrier name; carrier class (foreign or U.S.); carrier address; and carrier representative name, title, and contact information. Each carrier representative will be assigned a unique user name and password after DOT has verified the authenticity of the registered carrier and representative, which may take a day or two. This step is necessary to ensure that only authorized users can submit information and view sensitive data. We encourage each covered carrier to register with the Web site as soon as possible so that the carrier representative can receive a user name and password well in advance of January 25, 2005, the date by which carriers must submit to the Department of Transportation the report covering disability-related complaints received during calendar year 2004.

Once a carrier representative receives a user name and password from DOT, that representative will be able to access and complete the disability-related complaint form online, modify his/her contact information and change his/her user name and/or password. To change a user name or password, the representative would simply login with the given user name and password and then click on the ''Change Password'' link on the left side of the menu. Similarly, a carrier representative could modify his/her contact information by clicking on ''Change Contact Information.'' Clicking on the ''Add Report to Current Year'' will take the carrier representative to a screen containing data fields that need to be completed on the DOT disability complaint reporting form. All the fields in the form must be completed, as failure to provide a number in any field would prevent the representative from continuing to the next screen. Carriers are to enter a numeral ''0'' where there are no complaints in a given category. When the carrier representative finishes inputting numbers in all the fields in the form, he/she should then read and acknowledge the legal certification statement prior to clicking the ''Submit'' button. After submission, the annual report will be forwarded to DOT and the carrier representative will not be able to make any changes to the report through the Internet.

Frequently Asked Questions

Since the final rule on reporting requirements for disability-related complaints was published on July 8, 2003, a number of carrier representatives have contacted the Department of Transportation to ask for clarification or interpretation regarding the text of § 382.70. These clarifications and interpretations have been disseminated primarily through informal conversations or e-mails between DOT staff and individual carrier representatives. The Department believes that the guidance provided to these carrier representatives may also be of interest to other members of the public. To ensure this guidance will be more accessible to the public and § 382.70 will be more readily understandable, we are including in this notice frequently asked questions and DOT responses regarding § 382.70.

1. *Question:* Did § 382.70 become effective on August 7, 2003? If so, what action(s) were covered carriers required to take beginning on that date?

Answer: Yes, § 382.70 became effective on August 7, 2003. See 68 FR 40488. Beginning on that date, covered carriers were required to record and categorize disability-related complaints that they receive according to the type of disability and nature of complaint. Covered foreign air carriers were also required to retain for three years copies of the correspondence and records of action taken on the disability-related complaints. Prior to August 7, 2003, 14 CFR 249.20 of the Department's regulations already required certificated U.S. air carriers to retain correspondence and records of action taken for all consumer complaints for three years.

The first report, which must cover complaints received during calendar year 2004, must be submitted to the Department by January 25, 2005. There was no requirement to submit a report in 2004 for complaints received during any portion of calendar year 2003, and carriers are not to include complaints received during 2003 in the report that they file in January 2005.

2. *Question:* Can one piece of correspondence (e.g., a letter, e-mail message) contain more than one disability-related complaint? If so, must each separate complaint be categorized and reported?

Answer: Yes, a single piece of correspondence might express more than one complaint. Each disability-related problem that an individual complains about in writing must be categorized and reported. For example, if a passenger in a wheelchair sends in a letter stating that he/she did not receive connecting assistance, and after his/her final flight he/she discovered that his/her wheelchair was damaged, that is two complaints.

3. *Question:* Is a carrier required to report disability-related complaints that it receives from government agencies (e.g. DOT)?

Answer: Yes, each carrier is required to record, categorize, and report disability-related complaints forwarded by a governmental agency with respect to difficulties encountered in connection with service the carrier provides. However, if a carrier receives a disability-related complaint from an agency and the carrier has already recorded, categorized, and reported that complaint based on prior correspondence received from, or submitted on behalf of, the involved individual with a disability then the carrier is not required to count the same complaint again (i.e. there is to be no double counting).

4. *Question:* Are the types of complaints covered by the final rule limited to complaints deemed by the carrier to be reasonable, complaints that the carrier is not able to resolve satisfactorily or complaints that relate to service required under Part 382?

Answer: The types of complaints required to be reported are not limited to those disability complaints that the carrier deems to be valid or to constitute a potential violation of Part 382. Carriers are required to report on all complaints that they receive alleging discrimination on the basis of disability or failure to accommodate a disability, even if the carrier believes that the complaint is unreasonable or invalid, there was a rational explanation for what happened, the carrier arrived at a subsequent resolution with the passenger that the passenger said was satisfactory, or the incident does not constitute a violation of Part 382.

5. *Question:* Are all complaints filed by passengers with disabilities to be reported, even if a problem had nothing to do with the disability?

Answer: No, only disability-related complaints are to be reported. For example, if a passenger who uses a wheelchair complains that his/her flight operated two hours late, but he/she expresses no dissatisfaction with the disability-related accommodations that he/she received, that complaint is not to

be reported as a disability-related complaint.

6. *Question:* Is the carrier required to report all disability-related complaints regardless of the passenger's nationality and/or citizenship?

Answer: Yes, a carrier is required to report disability-related complaints irrespective of the passenger's nationality and/or citizenship. As indicated in the rule, a disability-related complaint means a specific written expression of dissatisfaction received from, or submitted on behalf of, an individual with a disability concerning a difficulty associated with the person's disability, which the person experienced when using or attempting to use a U.S. or foreign air carrier's services. ''Individual with a disability'' is defined in § 382.5. These definitions are not limited in any manner by the nationality and/or citizenship of the individual with a disability.

7. *Question:* If a passenger has more than one disability, how should a carrier record and categorize the passenger's disabilities?

Answer: Carriers should settle on the primary disability that needed to be accommodated for each incident. For instance, consider the example provided in the notice of proposed rulemaking that led to § 382.70 of Jane, who is deaf and a wheelchair user. Jane sends a letter to ABC Airlines alleging that there was a failure to provide her with ground personnel to assist in pushing the wheelchair at three of the airports through which she traveled and she missed her flight at the fourth airport because the gate agent did not let her know when she should board the aircraft. In this hypothetical, the carrier should determine that the primary disability that needed to be accommodated for three of the incidents (failure to provide personnel to assist in pushing the wheelchair at three airports) is Jane's mobility impairment, and that the primary disability that needed to be accommodated for the other incident (failure to inform Jane about boarding for her flight) is Jane's deafness. It is also worth noting that the carrier should count these disability-related problems as four separate incidents (i.e. four complaints).

8. *Question:* In a flight involving a public charter where there are two entities involved (the charter operator and the airline) and in a wet lease situation where two airlines are involved, who is responsible for recording disability-related complaint data and submitting it to the Department in an annual report?

Answer: Section 382.70 applies to certificated U.S. carriers and foreign air carriers operating to, from, and in the United States, conducting passenger operations with at least one aircraft having a designed seating capacity of more than 60 passengers. In a flight involving a public charter, it is the airline that operates the flight and not the charter operator (the entity that sells individual seats on charter flights and assumes financial risk) that is responsible for recording and submitting disability-related complaint data. In a wet lease situation, the lessee (the carrier receiving the aircraft and crew and under whose name the flight is offered) and not the lessor (the carrier providing the aircraft and crew) must report disability-related complaints.

9. *Question:* If code-share partners receive copies of the same complaint, which carrier is required to report it?

Answer: The operating airline is required to report disability-related complaints involving the flight itself and services provided on that flight. The ticketing airline is required to report all other complaints, particularly complaints about the reservation system. In situations where there is disagreement between code-share partners as to which carrier is responsible for reporting a particular complaint and only one code-share partner receives the complaint, the carrier that receives the complaint must report it. If both the ticketing and operating carrier receive copies of the same complaint and there is no agreement between the two as to which one is ultimately responsible for reporting the complaint, then both carriers must report the complaint.

10. *Question:* Does § 382.70 apply to U.S. and foreign carrier code-share segments operated between two non-U.S. points?

Answer: Section 382.70 does not apply to foreign carriers operating aircraft between two foreign points even if the operation in question is a code-share flight with a U.S. air carrier. Foreign air carriers are covered by this section only with respect to disability-related complaints associated with any nonstop flight segment originating or terminating in the United States. However, U.S. carriers must report all written disability-related complaints if they operate the flight, even if the flight is between two foreign points.

11. *Question:* What does DOT mean by a flight segment originating or terminating in the United States?

Answer: By flight segment originating or terminating in the United States, the Department is referring to a nonstop flight operating to or from the United States where the last point of departure or the first point of arrival is in the United States. For example, suppose a foreign air carrier operates nonstop service between New York and London. That flight segment would be covered by § 382.70 because the last point of departure or first point of arrival (i.e. New York) is in the United States. On the other hand, suppose a foreign carrier operates service from Addis Ababa to London to New York. In such a circumstance, the flight segment from Addis Ababa to London would not be covered by § 382.70, as neither the last point of departure (i.e. Addis Ababa) nor the first point of arrival (i.e. London) is in the United States; but the flight segment from London to New York would be covered by § 382.70 as the first point of arrival of that flight segment (i.e. New York) is in the United States.

12. *Question:* Is the scope of the reporting requirements for disability-related complaints (§ 382.70) the same as the scope of the notice of proposed rulemaking (NPRM) issued on November 4, 2004 (69 FR 64364) addressing broad coverage of foreign air carriers under the Air Carrier Access Act?

Answer: No, the scope of the reporting requirements for disability-related complaints in § 382.70 is narrower than that proposed in the November 4 NPRM for other sections of 14 CFR Part 382. Foreign air carriers are covered by § 382.70 only with respect to disability-related complaints associated with any nonstop flight segment originating or terminating in the United States. The November 4 NPRM proposes to cover foreign air carriers with respect to flights that begin or end at a U.S. airport. In other words, the November 4 NPRM does not limit coverage to nonstop flight segments originating or terminating in the United States but proposes to cover all flights that involve a continuous journey beginning or ending at a U.S. airport using the same aircraft and/or flight number.

13. *Question:* Are carriers required to make their records available to DOT on request?

Answer: Yes, carriers must retain and make available to Department of Transportation officials at their request correspondence and records of action taken on all disability-related complaints for three years after receipt of the complaint or creation of the record of action taken.

Issued this 22nd day of December, 2004, at Washington DC.

Jeffrey A. Rosen,

General Counsel, U.S. Department of Transportation.

[FR Doc. 04–28543 Filed 12–27–04; 11:54 am]

BILLING CODE 4910–62–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 738, 740, 742, 745 and 774

[Docket No. 041221359–4359–01]

RIN 0694–AD25

Implementation of the Understandings Reached at the June 2004 Australia Group (AG) Plenary Meeting and Through a Subsequent AG Intersessional Decision; Clarifications to the Scope of ECCNs 1A004, 1A995, and 2B351; Corrections to Country Group D and ECCNs 1C355, 1C395, and 1C995; Additions to the List of States Parties to the Chemical Weapons Convention

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) is publishing this final rule to amend the Export Administration Regulations (EAR) to implement the understandings reached at the June 2004 plenary meeting of the Australia Group (AG) and through a subsequent AG intersessional decision. Specifically, this final rule amends the EAR by adding three new bacteria and two new viruses to the list of AG-controlled plant pathogens described on the Commerce Control List (CCL). In addition, this rule amends the EAR to indicate that certain medical products identified on the CCL, which contain AG-controlled conotoxins, no longer require a license for chemical/biological (CB) reasons. The AG-related licensing policies in the EAR are amended by adding a new criterion to the list of factors that BIS will consider when determining what action should be taken on license applications for AG-listed items. This rule also amends the EAR to reflect the addition of five new member countries to the Australia Group. This rule corrects an inadvertent omission from a previous AG plenary rule (published on May 31, 2002) by removing Bulgaria from the EAR list of countries of concern for chemical and biological reasons. This rule also amends the EAR to implement an AG intersessional decision, which was adopted after the June 2004 AG plenary meeting, by adding nine precursor chemicals to the list of AG-controlled precursor chemicals described on the CCL.

In addition to the amendments to the EAR resulting from the AG understandings described above, this rule amends the EAR by revising a CCL entry containing protective and detection equipment identified on the Wassenaar Arrangement dual-use list to indicate that chemical/biological (CB) controls in the EAR apply to certain chemical detection systems and dedicated detectors therefor, described in that entry, because such systems and detectors also are included on the AG ''Control List of Dual-Use Chemical Manufacturing Facilities and Equipment and Related Technology.'' A related AG entry on the CCL is revised to indicate that it does not control any of the chemical detection systems described in the Wassenaar list entry, thereby eliminating any appearance of an overlap between the two CCL entries.

This rule also amends three CCL entries, which control certain precursor chemicals and/or mixtures and test kits containing such chemicals, to restore the text of the license requirements notes that were inadvertently omitted from these ECCNs in a rule that BIS published on July 30, 2004.

Finally, this rule updates the list of countries that currently are States Parties to the Chemical Weapons Convention (CWC) by adding seven countries that recently became States Parties.

DATES: This rule is effective December 29, 2004.

ADDRESSES: Written comments should be addressed to Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, Room 2705, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230, e-mailed to *wfisher@bis.doc.gov*, or faxed to (202) 482–3355.

FOR FURTHER INFORMATION CONTACT: Douglas Brown, Office of Nonproliferation Controls and Treaty Compliance, Bureau of Industry and Security, telephone: (202) 482–7900.

SUPPLEMENTARY INFORMATION:

Background

A. Revisions to the EAR Based on Understandings Reached at the June 2004 Plenary Meeting of the Australia Group and Through a Subsequent AG Intersessional Decision

The Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) to implement the understandings reached at, and subsequent to, the annual plenary meeting of the Australia Group (AG) that was held in Paris on June 7–10, 2004. The Australia Group is a multilateral forum, consisting of 38 participating countries, that maintains export controls on a list of chemicals, biological agents, and related equipment and technology that could be used in a chemical or biological weapons program. The AG periodically reviews items on its control list to enhance the effectiveness of participating governments' national controls and to achieve greater harmonization among these controls.

The understandings reached at the June 2004 plenary meeting included a decision to add five pathogens to the AG ''List of Plant Pathogens for Export Controls.'' This final rule implements these changes by amending the EAR to add three bacteria and two viruses to the AG list of plant pathogens described in Export Control Classification Number (ECCN) 1C354 on the Commerce Control List (CCL) (Supplement No. 1 to Part 774 of the EAR).

Specifically, this rule adds the following three bacteria to the AG-listed plant pathogens described in ECCN 1C354.a on the CCL: *Xanthomonas oryzae* pv. *oryzae* (syn. *Pseudomonas campestris* pv. *oryzae*), *Clavibacter michiganensis* subspecies *sepedonicus* (syn. *Corynebacterium michiganensis* subspecies *sepedonicum* or *Corynebacterium sepedonicum*), and *Ralstonia solanacearum* Races 2 and 3 (syn. *Pseudomonas solanacearum* Races 2 and 3 or *Burkholderia solanacearum* Races 2 and 3). In addition, this rule amends ECCN 1C354 by adding a new 1C354.c that controls the following two viruses: Potato Andean latent tymovirus and Potato spindle tuber viroid. These AG-listed bacteria and viruses, along with all other items controlled by ECCN 1C354, require a license for export or reexport to all destinations, worldwide.

Another understanding reached at the June 2004 AG plenary meeting was the removal of certain medical products containing conotoxins from the AG list of biological agents (*i.e.*, human and zoonotic pathogens and toxins). This rule amends the EAR to implement this understanding by revising ECCN

1C991.c to control medical products, as defined in that ECCN, that contain conotoxins controlled by ECCN 1C351.d.3–1C991.c also controls medical products that contain botulinum toxins controlled by 1C351.d.1. This rule also makes a conforming change to ECCN 1C991.d to indicate that 1C991.d no longer controls medical products containing conotoxins. As a result of the changes made by this rule, medical products containing conotoxins no longer require a license to those countries indicated under CB Column 3 on the Commerce Country Chart (Supplement No. 1 to Part 738 of the EAR). However, such medical products continue to require a license to certain destinations for anti-terrorism (AT) reasons.

The understandings reached at the June 2004 plenary meeting also included the addition of a new licensing factor to the AG ''Guidelines for Transfers of Sensitive Chemical or Biological Items'' (Guidelines). This new factor requires that, when evaluating export license applications for AG-listed items, the export licensing authorities of AG participating countries must take into consideration the extent and effectiveness of the export control system in the importing country and in any intermediary country through which the items being exported or reexported will transit or be transshipped en route to the importing country. This rule revises the AG-related licensing policies in the EAR to conform with this new requirement by amending Section 742.2(b)(2) of the EAR to include the new licensing factor in the list of factors that BIS will consider when determining what action should be taken on license applications to export or reexport AG-listed items identified on the Commerce Control List (CCL).

In addition, this rule amends the EAR to add Estonia, Latvia, Lithuania, Malta, and Slovenia as the newest participating countries in the Australia Group (which now includes a total of 38 countries). Supplement No. 1 to Part 740 (Country Groups) is revised to add these five countries to Country Group A:3 (Australia Group) and Supplement No. 1 to Part 738 (Commerce Country Chart) is revised to remove the licensing requirements for these countries under CB Column 2, in conformance with the licensing policy that applies to other AG participating countries.

Finally, this rule amends the EAR to implement an AG intersessional decision, which was adopted after the June 2004 AG plenary meeting, by adding nine precursor chemicals to the list of AG-controlled precursor chemicals described in Export Control Classification Number (ECCN) 1C350 on the Commerce Control List (CCL). Specifically, this rule adds four precursor chemicals (Methylphosphonic acid; Diethyl methylphosphonate; N,N-dimethylamino-phosphoryl dichloride; and Methylphosphonothioic dichloride) to ECCN 1C350.b and one precursor chemical (Ethyldiethanolamine) to ECCN 1C350.c, which describe dual-use AG-listed precursor chemicals also identified as Schedule 2 chemicals and Schedule 3 chemicals, respectively, under the Chemical Weapons Convention (CWC). This rule also adds the following four precursor chemicals to the list of chemicals in ECCN 1C350.d that may be used as precursors to toxic chemical agents: Tri-isopropyl phosphite; O,O-diethyl phosphorothioate; O,O-diethyl phosphorodithioate; and Sodium hexafluorosilicate.

B. Clarification of Controls on Chemical Detection Equipment in ECCNs 1A004, 1A995, and 2B351

This final rule amends ECCNs 1A004 and 2B351 on the Commerce Control List (CCL) to clarify the scope of these ECCNs and to provide an accurate description of the items in each entry that are subject to the chemical/biological (CB) controls in the EAR that apply to the toxic gas monitoring systems included on the Australia Group (AG) ''Control List of Dual-Use Chemical Manufacturing Facilities and Equipment and Related Technology.''

Specifically, this rule amends ECCN 1A004 on the CCL by revising the License Requirements section of the ECCN to add a chemical/biological (CB) reason for control paragraph, which indicates that CB controls apply to chemical detection systems and certain components therefor (*i.e.*, dedicated detectors), in 1A004.c, that also have the technical characteristics described in ECCN 2B351.a. A license is required, for CB reasons, to export or reexport such systems and detectors to destinations indicated under CB Column 3 on the Commerce Country Chart (Supplement No. 1 to Part 738 of the EAR). These systems and detectors in 1A004.c also require a license for national security (NS) and anti-terrorism (AT) reasons to destinations indicated under NS Column 2 and AT Column 1, respectively, on the Commerce Country Chart.

In addition, this rule amends ECCN 2B351 by revising the heading of the entry to indicate that this ECCN does not control toxic gas monitoring systems and dedicated detectors therefor that are controlled under ECCN 1A004.c. This change, coupled with the addition of a CB Reason for Control paragraph in the License Requirements section of ECCN 1A004, means that toxic gas monitoring systems and dedicated detectors therefor that have the technical characteristics of both 1A004.c and 2B351.a are now controlled under ECCN 1A004 for NS, CB, and AT reasons. ECCN 2B351 controls toxic gas monitoring systems, and dedicated detectors therefor, that are not controlled by ECCN 1A004.c and that have the technical characteristics described in 2B351.a.

This rule also revises the Related Controls paragraph in the List of Items Controlled section of ECCN 2B351 to provide more specific references to the chemical detection systems that are controlled under related ECCNs 1A004 and 1A995. To further clarify the relationship between ECCNs 2B351 and 1A995, this rule revises the heading of ECCN 1A995 to indicate that 1A995 controls certain detection equipment not controlled under ECCN 2B351.

Finally, this rule revises Section 742.2(a)(3)(i) to include a reference to the chemical detection systems in ECCN 1A004.c that are controlled for CB reasons and require a license to destinations and countries indicated under CB Column 3 on the Commerce Country Chart.

C. Correction to Country Group D (Supplement No. 1 to Part 740—Country Groups)

This rule also makes a correction, in Country Group D of Supplement No. 1 to Part 740 (Country Groups), by removing the ''X'' under the column labeled ''[D:3] Chemical & Biological'' in the entry for Bulgaria. Bulgaria was admitted to the Australia Group in 2001. A final rule published by BIS on May 31, 2002 (67 FR 37977) added Bulgaria to Country Group A:3 (Australia Group) and removed the licensing requirements for Bulgaria, under CB Column 2 and CB Column 3 of the Commerce Country Chart (Supplement No. 1 to Part 738 of the EAR), in conformance with the licensing policy that applies to other AG participating countries. However, the rule did not remove Bulgaria from Country Group D:3 (*i.e.*, countries of concern for chemical and biological reasons). This final rule corrects that oversight.

D. Corrections to ECCNs 1C355, 1C395, and 1C995

This rule amends ECCNs 1C355, 1C395, and 1C995 (which control certain chemical precursors and/or mixtures and test kits containing precursor chemicals) to restore the

license requirements notes in each ECCN that were inadvertently removed by an interim final rule that BIS published in the **Federal Register** on July 30, 2004 (69 FR 46069). The July 30th rule revised the License Requirements section in ECCNs 1C355 and 1C395, by removing anti-terrorism (AT) controls for exports and reexports to Iraq, and also revised the language in the AT controls paragraph of ECCN 1C995, which retained AT controls on Iraq. These revisions to the License Requirements section in ECCNs 1C355, 1C395, and 1C995, which were intended to affect only the language in the anti-terrorism (AT) controls paragraphs, inadvertently omitted the text of the existing license requirements notes for these ECCNs.

E. Revisions to the EAR Based on the Addition of New States Parties to the Chemical Weapons Convention (CWC)

This rule revises Supplement No. 2 to Part 745 of the EAR (titled ''States Parties to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction'') by adding the names of seven countries that recently have become States Parties to the CWC (*i.e.*, Chad, Madagascar, Marshall Islands, Rwanda, Saint Kitts and Nevis, Sierra Leone, and Solomon Islands).

Savings Clause

Exports and reexports that did not require a license or that were eligible for a License Exception prior to publication of this rule and for which this rule imposes a new license requirement or removes that License Exception availability may be made without a license or under that License Exception if the items being exported or reexported were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export pursuant to actual orders for export or reexport, on or before January 13, 2005, and exported or reexported January 28, 2005. Any such exports or reexports not meeting those deadlines require a license in accordance with this regulation.

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule contains a collection of information subject to the requirements of the PRA. This collection has been approved by OMB under Control Number 0694–0088 (Multi-Purpose Application), which carries a burden hour estimate of 58 minutes to prepare and submit form BIS–748. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to David Rostker, Office of Management and Budget (OMB), by e-mail to *David_Rostker@omb.eop.gov*, or by fax to (202) 395–7285; and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. 553 or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

Therefore, this regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to Willard Fisher, Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2705, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230.

List of Subjects

15 CFR Part 738

Administrative practice and procedure, Exports, Foreign trade.

15 CFR Part 740

Administrative practice and procedure, Exports, Foreign trade, Reporting and recordkeeping requirements.

15 CFR Part 742

Exports, Foreign trade.

15 CFR Part 745

Administrative practice and procedure, Chemicals, Exports, Foreign trade, Reporting and recordkeeping requirements.

15 CFR Part 774

Exports, Foreign trade, Reporting and recordkeeping requirements.

■ Accordingly, Parts 738, 740, 742, 745 and 774 of the Export Administration Regulations (15 CFR Parts 730–799) are amended as follows:

PART 738—[AMENDED]

■ 1. The authority citation for 15 CFR Part 738 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 287c; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 6, 2004, 69 FR 48763 (August 10, 2004).

■ 2. Supplement No. 1 to Part 738 is amended by revising the entries for ''Estonia'', ''Latvia'', ''Lithuania'', ''Malta'', and ''Slovenia'' to read as follows:

SUPPLEMENT NO. 1 TO PART 738—COMMERCE COUNTRY CHART

[Reason for control]

Countries	Chemical & biological weapons			Nuclear nonproliferation		National security		Missile tech	Regional stability		Firearms convention	Crime control			Anti-terrorism	
	CB1	CB2	CB3	NP1	NP2	NS1	NS2	MT1	RS1	RS2	FC1	CC1	CC2	CC3	AT1	AT2
*			*			*		*		*		*			*	
Estonia	X			X		X	X	X	X							
*			*			*		*		*		*			*	
Latvia	X					X	X	X	X							
*			*			*		*		*		*			*	
Lithuania	X			X		X	X	X	X							
*			*			*		*		*		*			*	
Malta	X			X		X	X	X	X	X		X		X		
*			*			*		*		*		*			*	
Solvenia	X					X	X	X	X							
*			*			*		*		*		*			*	

PART 740—[AMENDED]

■ 3. The authority citation for 15 CFR part 740 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; Sec. 901–911, Pub. L. 106–387; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 6, 2004, 69 FR 48763 (August 10, 2004).

■ 4. In Supplement No. 1 to Part 740, Country Groups, Country Group A is amended by adding, in alphabetical order, new entries for ''Estonia'', ''Lithuania'', and ''Malta'' and by revising the entries for ''Latvia'' and ''Slovenia'' to read as follows:

SUPPLEMENT NO. 1 TO PART 740—COUNTRY GROUPS

[Country Group A]

Country	[A:1]	Missile technology control regime [A:2]	Australia group [A:3]	Nuclear suppliers group [A:4]
*	*	*	*	*
Estonia			X	
*	*	*	*	*
Latvia			X	X
*	*	*	*	*
Lithuania			X	
*	*	*	*	*
Malta			X	
*	*	*	*	*
Slovenia			X	X
*	*	*	*	*

■ 5. In Supplement No. 1 to Part 740, Country Groups, Country Group D is amended by removing the ''X'' under the column labeled ''[D:3] Chemical & Biological'' in the entry for Bulgaria.

PART 742—[AMENDED]

■ 6. The authority citation for 15 CFR Part 742 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of October 29, 2003, 68 FR 62209, 3 CFR, 2003 Comp., p. 347; Notice of August 6, 2004, 69 FR 48763 (August 10, 2004).

■ 7. Section 742.2 is amended by revising paragraph (a)(3)(i), by redesignating paragraphs (b)(2)(iv) through (b)(2)(ix) as paragraphs (b)(2)(v)

through (b)(2)(x), respectively, and by adding a new paragraph (b)(2)(iv) to read as follows:

§ 742.2 Proliferation of chemical and biological weapons.

(a) * * *

(3) * * *

(i) Equipment and materials identified in ECCN 2B350 or 2B351 on the CCL, chemical detection systems controlled by 1A004.c for detecting chemical warfare agents and having the characteristics of toxic gas monitoring systems described in 2B351.a, and valves controlled by ECCN 2A226 or ECCN 2A292 having the characteristics of those described in 2B350.g, which can be used in the production of chemical weapons precursors or chemical warfare agents.

* * * * *

(b) * * *

(2) * * *

(iv) The extent and effectiveness of the export control system in the importing country and in any intermediary country through which the items being exported or reexported will transit or be transshipped en route to the importing country;

* * * * *

PART 745—[AMENDED]

■ 8. The authority citation for 15 CFR Part 745 is revised to read as follows:

Authority: 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; Notice of October 29, 2003, 68 FR 62209, 3 CFR, 2003 Comp., p. 347.

■ 9. Supplement No. 2 to Part 745 is amended by revising the undesignated center heading ''List of States Parties as of March 1, 2004'' to read ''List of States Parties as of December 1, 2004'' and by adding, in alphabetical order, the countries ''Chad'', ''Madagascar'', ''Marshall Islands'', ''Rwanda'', ''Saint Kitts and Nevis'', ''Sierra Leone'', and ''Solomon Islands'.

PART 774—[AMENDED]

■ 10. The authority citation for 15 CFR Part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 287c; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 6, 2004, 69 FR 48763 (August 10, 2004).

■ 11. In Supplement No. 1 to part 774 (the Commerce Control List), Category 1—''Materials, Chemicals, ''Microorganisms'' & ''Toxins' '', ECCN 1A004 is amended by revising the License Requirements section of the ECCN to read as follows:

1A004 Protective and detection equipment and components not specially designed for military use as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, CB, AT

Control(s)	*Country Chart*
NS applies to entire entry	NS Column 2.
CB applies to chemical detection systems and dedicated detectors therefor, in 1A004.c, that also have the technical characteristics described in 2B351.a.	CB Column 3.
AT applies to entire entry	AT Column 1.

* * * * *

■ 12. In Supplement No. 1 to part 774 (the Commerce Control List), Category 1—''Materials, Chemicals, 'Microorganisms' & 'Toxins' '', the heading of ECCN 1A995 is revised to read as follows:

1A995 Protective and detection equipment and components not specially designed for military use and not controlled by ECCN 1A004 or ECCN 2B351, as follows (see List of Items Controlled).

* * * * *

■ 13. In Supplement No. 1 to part 774 (the Commerce Control List), Category 1—''Materials, Chemicals, 'Microorganisms' & 'Toxins' '', ECCN 1C350 is amended by revising the List of Items Controlled to read as follows:

1C350 Chemicals that may be used as precursors for toxic chemical agents.

* * * * *

List of Items Controlled

Unit: Liters or kilograms, as appropriate.

Related Controls: The chemicals 0-Ethyl-2-diisopropylaminoethyl methyl phosphonite (QL) (C.A.S. #57856–11–8); Ethyl phosphonyl difluoride (C.A.S. #753–98–0); and Methyl phosphonyl difluoride. (C.A.S. #676–99–3); methylphosphinyl dichloride (C.A.S. 676–83–5); methylphosphinyl difluoride (C.A.S. #753–59–3); and methylphosphonyl dichloride (C.A.S. #676–97–1) are subject to the licensing jurisdiction of the Directorate of Defense Trade Controls, U.S. Department of State.

Related Definitions: See § 770.2(k) of the EAR for synonyms for the chemicals listed in this entry.

Items

a. [RESERVED]

b. Australia Group-controlled precursor chemicals also identified as Schedule 2 chemicals under the CWC, as follows, and mixtures in which at least one of the following chemicals constitutes 30 percent or more of the weight of the mixture:

b.1. (C.A.S. #7784–34–1) Arsenic trichloride;
b.2. (C.A.S. #76–93–7) Benzilic acid;
b.3. (C.A.S. #78–38–6) Diethyl ethylphosphonate;
b.4. (C.A.S. #15715–41–0) Diethyl methylphosphonite;
b.5. (C.A.S. #2404–03–7) Diethyl-N,N-dimethylphosphoroamidate;
b.6. (C.A.S. #5842–07–9) N,N-Diisopropyl-beta-aminoethane thiol;
b.7. (C.A.S. #4261–68–1) N,N-Diisopropyl-beta-aminoethyl chloride hydrochloride;
b.8. (C.A.S. #96–80–0) N,N-Diisopropyl-beta-aminoethanol;
b.9. (C.A.S. #96–79–7), N,N-Diisopropyl-beta-aminoethyl chloride;
b.10. (C.A.S. #6163–75–3) Dimethyl ethylphosphonate;
b.11. (C.A.S. #756–79–6) Dimethyl methylphosphonate;
b.12. (C.A.S. #1498–40–4) Ethyl phosphonous dichloride [Ethyl phosphinyl dichloride];
b.13. (C.A.S. #430–78–4) Ethyl phosphonus difluoride [Ethyl phosphinyl difluoride];
b.14. (C.A.S. #1066–50–8) Ethyl phosphonyl dichloride;
b.15. [RESERVED]
b.16. [RESERVED]
b.17. [RESERVED]
b.18. (C.A.S. #464–07–3) Pinacolyl alcohol;
b.19. (C.A.S. #1619–34–7) 3-Quinuclidinol;
b.20. (C.A.S. #111–48–8) Thiodiglycol;
b.21. (C.A.S. #993–13–5) Methylphosphonic acid;
b.22. (C.A.S. #683–08–9) Diethyl methylphosphonate;
b.23. (C.A.S. #667–43–0) N,N-dimethylamino-phosphoryl dichloride;
b.24. (C.A.S. #676–98–2) Methylphosphonothioic dichloride.

c. Australia Group-controlled precursor chemicals also identified as Schedule 3 chemicals under the CWC, as follows, and mixtures in which at least one of the following chemicals constitutes 30 percent or more of the weight of the mixture:

c.1. (C.A.S. #762–04–9) Diethyl phosphite;
c.2. (C.A.S. #868–85–9) Dimethyl phosphite (dimethyl hydrogen phosphite);
c.3. (C.A.S. #10025–87–3) Phosphorus oxychloride;
c.4. (C.A.S. #10026–13–8) Phosphorus pentachloride;
c.5. (C.A.S. #7719–12–2) Phosphorus trichloride;
c.6. (C.A.S. #10025–67–9) Sulfur monochloride;
c.7. (C.A.S. #10545–99–0) Sulfur dichloride;
c.8. (C.A.S. #7719–09–7) Thionyl chloride;
c.9. (C.A.S. #102–71–6) Triethanolamine;
c.10. (C.A.S. #122–52–1) Triethyl phosphite;
c.11. (C.A.S. #121–45–9) Trimethyl phosphite;
c.12. (C.A.S. #139–87–7) Ethyldiethanolamine.

d. Other Australia Group-controlled precursor chemicals not also identified as Schedule 1, 2, or 3 chemicals under the CWC, as follows, and mixtures in which at least one of the following chemicals constitutes 30 percent or more of the weight of the mixture:

d.1. (C.A.S. #1341–49–7) Ammonium hydrogen fluoride;
d.2. (C.A.S. #107–07–3) 2-Chloroethanol;
d.3. (C.A.S. #100–37–8) N,N-Diethylaminoethanol;
d.4. (C.A.S. #108–18–9) Di-isopropylamine;
d.5. (C.A.S. #124–40–3) Dimethylamine;
d.6. (C.A.S. #506–59–2) Dimethylamine hydrochloride;
d.7. (C.A.S. #7664–39–3) Hydrogen fluoride;
d.8. (C.A.S. #3554–74–3) 3-Hydroxyl-1-methylpiperidine;
d.9. (C.A.S. #76–89–1) Methyl benzilate;
d.10. (C.A.S. #1314–80–3) Phosphorus pentasulfide;
d.11. (C.A.S. #75–97–8) Pinacolone;
d.12. (C.A.S. #151–50–8) Potassium cyanide;
d.13. (C.A.S. #7789–23–3) Potassium fluoride;
d.14. (C.A.S. #7789–29–9) Potassium bifluoride;
d.15. (C.A.S. #3731–38–2) 3-Quinuclidone;
d.16. (C.A.S. #1333–83–1) Sodium bifluoride;
d.17. (C.A.S. #143–33–9) Sodium cyanide;
d.18. (C.A.S. #7681–49–4) Sodium fluoride;
d.19. (C.A.S. #1313–82–2) Sodium sulfide;
d.20. (C.A.S. #637–39–8) Triethanolamine hydrochloride;
d.21. (C.A.S. #116–17–6) Tri-isopropyl phosphite;
d.22. (C.A.S. #2465–65–8) O,O-diethyl phosphorothioate;
d.23. (C.A.S. #298–06–6) O,O-diethyl phosphorodithioate;
d.24. (C.A.S. #16893–85–9) Sodium hexafluorosilicate.

■ 14. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1—Materials, Chemicals, ''Microorganisms'' & ''Toxins,'' ECCN 1C354 is amended by revising the List of Items Controlled to read as follows:

1C354 Plant pathogens, as follows (see List of Items Controlled).

* * * * *

List of Items Controlled

Unit: $ Value.

Related Controls: All vaccines are excluded from the scope of this entry. See ECCN 1C991.

Related Definitions: N/A

Items

a. Bacteria, as follows:

a.1. *Xanthomonas albilineans*;
a.2. *Xanthomonas campestris* pv. *citri* including strains referred to as *Xanthomonas campestris* pv. *citri* types A,B,C,D,E or otherwise classified as *Xanthomonas citri, Xanthomonas campestris* pv. *aurantifolia* or *Xanthomonas campestris* pv. *citrumelo*;
a.3. *Xanthomonas oryzae* pv. *oryzae* (syn. *Pseudomonas campestris* pv. *oryzae*);
a.4. *Clavibacter michiganensis* subspecies *sepedonicus* (syn. *Corynebacterium michiganensis* subspecies *sepedonicum* or *Corynebacterium sepedonicum*);
a.5. *Ralstonia solanacearum* Races 2 and 3 (syn. *Pseudomonas solanacearum* Races 2 and 3 or *Burkholderia solanacearum* Races 2 and 3);

b. Fungi, as follows:

b.1. *Colletotrichum coffeanum* var. *virulans* (*Colletotrichum kahawae*);
b.2. *Cochliobolus miyabeanus* (*Helminthosporium oryzae*);
b.3. *Microcyclus ulei* (syn. *Dothidella ulei*);
b.4. *Puccinia graminis* (syn. *Puccinia graminis* f. sp. *tritici*);
b.5. *Puccinia striiformis* (syn. *Puccinia glumarum*);
b.6. *Magnaporthe grisea* (*pyricularia grisea/pyricularia oryzae*);

c. Viruses, as follows:

c.1. Potato Andean latent tymovirus;
c.2. Potato spindle tuber viroid.

■ 15. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1—Materials, Chemicals, ''Microorganisms'' & ''Toxins,'' ECCN 1C355 is amended by revising the License Requirements section to read as follows:

1C355 Chemical Weapons Convention (CWC) Schedule 2 and 3 chemicals and families of chemicals not controlled by ECCN 1C350 or by the Department of State under the ITAR.

License Requirements

Reason for Control: CW, AT

Control(s)

CW applies to entire entry. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons. A license is required to export or reexport CWC Schedule 2 chemicals and mixtures identified in 1C355.a to States not Party to the CWC (*i.e.*, destinations *not* listed in Supplement No. 2 to part 745 of the EAR). A license is required to export CWC Schedule 3 chemicals and mixtures identified in 1C355.b to States not Party to the CWC, unless an End-Use Certificate issued by the government of the importing country is obtained by the exporter, prior to export. A license is required to reexport CWC Schedule 3 chemicals and mixtures identified in 1C355.b from a State not Party to the CWC to any other State not Party to the CWC. (See § 742.18 of the EAR for license requirements and policies for toxic and precursor chemicals controlled for CW reasons.)

AT applies to entire entry. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for AT reasons in 1C355. A license is required, for AT reasons, to export or reexport items controlled by 1C355 to a country in Country Group E:1 of Supplement No. 1 to part 740 of the EAR. (See part 742 of the EAR for additional information on the AT controls that apply to Iran, Libya, North Korea, Sudan, and Syria. See part 746 of the EAR for additional information on the comprehensive trade sanctions that apply to Cuba and Iran. See Supplement No. 1 to part 736 of the EAR for export controls on Syria.)

License Requirements Notes

1. *Mixtures:* a. Mixtures containing toxic and precursor chemicals identified in ECCN 1C355, in concentrations that are below the control levels indicated in 1C355.a and .b, are controlled by ECCN 1C995 and are subject to the license requirements specified in that ECCN.

b. Mixtures containing chemicals identified in this entry are not controlled by ECCN 1C355 when the controlled chemical is a normal ingredient in consumer goods packaged for retail sale for personal use or packaged for individual use. Such consumer goods are classified as EAR99.

Note to mixtures: Calculation of concentrations of CW-controlled chemicals:

a. *Exclusion.* No chemical may be added to the mixture (solution) for the sole purpose of circumventing the Export Administration Regulations;

b. *Percent Weight Calculation.* When calculating the percentage, by weight, of components in a chemical mixture, include all components of the mixture, including those that act as solvents.

2. *Compounds:* Compounds created with any chemicals identified in this ECCN 1C355 may be shipped NLR (No License Required), without obtaining an End-Use Certificate, unless those compounds are also identified in this entry or require a license for reasons set forth elsewhere in the EAR.

Technical Notes: For purposes of this entry, a ''mixture'' is defined as a solid, liquid or gaseous product made up of two or more components that do not react together under normal storage conditions.

* * * * *

■ 16. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1—Materials, Chemicals, ''Microorganisms'' & ''Toxins,'' ECCN 1C395 is amended by revising the License Requirements section to read as follows:

1C395 Mixtures and medical, analytical, diagnostic, and food testing kits not controlled by ECCN 1C350, as follows (See List of Items Controlled).

License Requirements

Reason for Control: CB, CW, AT

Control(s)

CB applies to entire entry. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CB reasons in 1C395. A license is required, for CB reasons, to export or reexport mixtures controlled by 1C395.a and test kits controlled by 1C395.b to States not Party to the CWC (*i.e.*, destinations not listed in Supplement No. 2 to part 745 of the EAR).

CW applies to entire entry. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons. A license is required for CW reasons, as follows, to States not Party to the CWC (*i.e.*, destinations not listed in Supplement No. 2 to part 745 of the EAR): (1) Exports and reexports of mixtures controlled by 1C395.a, (2) exports and reexports of test kits controlled by 1C395.b

that contain CWC Schedule 2 chemicals controlled by ECCN 1C350, (3) exports of test kits controlled by 1C395.b that contain CWC Schedule 3 chemicals controlled by ECCN 1C350, except that a license is not required, for CW reasons, to export test kits containing CWC Schedule 3 chemicals if an End-Use Certificate issued by the government of the importing country is obtained by the exporter prior to export, and (4) reexports from States not Party to the CWC of test kits controlled by 1C395.b that contain CWC Schedule 3 chemicals. (*See* § 742.18 of the EAR for license requirements and policies for toxic and precursor chemicals controlled for CW reasons.)

AT applies to entire entry. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for AT reasons in 1C395. A license is required, for AT reasons, to export or reexport items controlled by 1C395 to a country in Country Group E:1 of Supplement No. 1 to part 740 of the EAR. (See part 742 of the EAR for additional information on the AT controls that apply to Iran, Libya, North Korea, Sudan, and Syria. See part 746 of the EAR for additional information on the comprehensive trade sanctions that apply to Cuba and Iran. See Supplement No. 1 to part 736 of the EAR for information on export controls that apply to Syria.)

License Requirements Notes

1. 1C395.b does not control mixtures that contain precursor chemicals identified in ECCN 1C350.b or .c in concentrations below the control levels for mixtures indicated in 1C350.b or .c. 1C395.a and 1C995.a.1 and a.2.a control such mixtures, unless they are consumer goods, as described in License Requirements Note 2 of this ECCN.

2. This ECCN does not control mixtures when the controlled chemicals are normal ingredients in consumer goods packaged for retail sale for personal use. Such consumer goods are classified as EAR99.

* * * * *

■ 17. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1—Materials, Chemicals, ''Microorganisms'' & ''Toxins,'' ECCN 1C991 is amended by revising the List of Items Controlled to read as follows:

1C991 Vaccines, immunotoxins, medical products, diagnostic and food testing kits, as follows (see List of Items Controlled).

* * * * *

List of Items Controlled

Unit: $ value.

Related Controls: Medical products containing ricin or saxitoxin, as follows, are controlled for CW reasons under ECCN 1C351:

(1) Ricinus Communis Agglutinin$_{II}$ (RCA$_{II}$), also known as ricin D, or Ricinus Communis Lectin$_{III}$ (RCL$_{III}$);

(2) Ricinus Communis Lectin$_{IV}$ (RCL$_{IV}$), also known as ricin E; or

(3) Saxitoxin identified by C.A.S. #35523–89–8.

Related Definitions: For the purpose of this entry, ''*immunotoxin*'' is defined as an antibody-toxin conjugate intended to destroy specific target cells (*e.g.*, tumor cells) that bear antigens homologous to the antibody. For the purpose of this entry, ''*medical products*'' are: (1) Pharmaceutical formulations designed for human administration in the treatment of medical conditions, (2) prepackaged for distribution as medical products, and (3) approved by the U.S. Food and Drug Administration to be marketed as medical products. For the purpose of this entry, ''*diagnostic and food testing kits*'' are specifically developed, packaged and marketed for diagnostic or public health purposes. Biological toxins in any other configuration, including bulk shipments, or for any other end-uses are controlled by ECCN 1C351. For the purpose of this entry, ''*vaccine*'' is defined as a medicinal (or veterinary) product in a pharmaceutical formulation, approved by the U.S. Food and Drug Administration or the U.S. Department of Agriculture to be marketed as a medical (or veterinary) product or for use in clinical trials, that is intended to stimulate a protective immunological response in humans or animals in order to prevent disease in those to whom or to which it is administered.

Items

a. Vaccines against items controlled by ECCN 1C351, 1C352, 1C353, or 1C354;

b. Immunotoxins containing items controlled by 1C351.d;

c. Medical products containing botulinum toxins controlled by ECCN 1C351.d.1 or conotoxins controlled by ECCN 1C351.d.3;

d. Medical products containing items controlled by ECCN 1C351.d, except botulinum toxins controlled by ECCN 1C351.d.1, conotoxins controlled by ECCN 1C351.d.3, and items controlled for CW reasons under 1C351.d.5 or .d.6; and

e. Diagnostic and food testing kits containing items controlled by ECCN 1C351.d, except items controlled for CW reasons under ECCN 1C351.d.5 or .d.6.

■ 18. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1—Materials, Chemicals, ''Microorganisms'' & ''Toxins,'' ECCN 1C995 is amended by revising the License Requirements section to read as follows:

1C995 Mixtures not controlled by ECCN 1C350, ECCN 1C355 or ECCN 1C395 that contain chemicals controlled by ECCN 1C350 or ECCN 1C355 and medical, analytical, diagnostic, and food testing kits not controlled by ECCN 1C350 or ECCN 1C395 that contain chemicals controlled by ECCN 1C350.d, as follows (see List of Items Controlled).

License Requirements

Reason for Control: AT

Control(s)	Country chart
AT applies to entire entry	AT Column 1 and Iraq.

License Requirement Notes

1. This ECCN does not control mixtures containing less than 0.5% of any single toxic or precursor chemical controlled by ECCN 1C350.b, .c, or .d or ECCN 1C355 as unavoidable by-products or impurities. Such mixtures are classified as EAR99.

2. 1C995.c does not control mixtures that contain precursor chemicals identified in 1C350.d in concentrations below the levels for mixtures indicated in 1C350.d. 1C995.a.2.b controls such mixtures, unless they are consumer goods as described in License Requirements Note 3 of this ECCN.

3. This ECCN does not control mixtures when the controlled chemicals are normal ingredients in consumer goods packaged for retail sale for personal use. Such consumer goods are classified as EAR99.

* * * * *

■ 19. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 2—Materials Processing, ECCN 2B351 is amended by revising the List of Items Controlled to read as follows:

2B351 Toxic gas monitoring systems that operate on-line and dedicated detectors therefor, except those systems and detectors controlled by ECCN 1A004.c.

* * * * *

List of Items Controlled

Unit: Equipment in number.

Related Controls: Also see ECCN 1A004, which controls chemical detection systems and specially designed components therefor that are specially designed or modified for detection or identification of chemical warfare agents, but not specially designed for military use, and ECCN 1A995, which controls certain detection equipment and components not controlled by ECCN 1A004 or by this ECCN.

Related Definitions: For the purposes of this entry, the term ''continuous operation'' describes the capability of the equipment to operate on line without human intervention. The intent of this entry is to control toxic gas monitoring systems capable of collection and detection of samples in environments such as chemical plants, rather than those used for batch-mode operation in laboratories.

Items

a. Designed for continuous operation and usable for the detection of chemical warfare agents or chemicals controlled by 1C350 at concentrations of less than 0.3 mg/m^3; or

b. Designed for the detection of cholinesterase-inhibiting activity.

Dated: December 23, 2004.

Peter Lichtenbaum,

Assistant Secretary for Export Administration.

[FR Doc. 04–28538 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 176

Indirect Food Additives: Paper and Paperboard Components

CFR Correction

In Title 21 of the Code of Federal Regulations, Parts 170 to 199, revised as of April 1, 2004, on page 207, in § 176.170, alphabetically add the following entry to the table in paragraph (b)(2):

§ 176.170 Components of paper and paperboard in contact with aqueous and fatty foods.

* * * * *

(b) * * *

(2) * * *

List of substances	Limitations
* * * *	* * *
Butanedioic acid, sulfo-1,4-di-(C_9-C_{11} alkyl) ester, ammonium salt (also known as butanedioic acid, sulfo-1,4-diisodecyl ester, ammonium salt [CAS Reg. No. 144093–88–9]).	For use as a surface active agent in package coating inks at levels not to exceed 3 percent by weight of the coating ink.
* * * *	* * *

* * * * *

In the same Title, revised as of the same date, on page 218, in § 176.180, alphabetically add the following entry to the table in paragraph (b)(2):

§ 176.180 Components of paper and paperboard in contact with dry food.

* * * * *

(b) * * *

(2) * * *

List of substances	Limitations
* * * *	* * *
Butanedioic acid, sulfo-1,4-di-(C_9-C_{11} alkyl) ester, ammonium salt (also known as butanedioic acid, sulfo-1,4-diisodecyl ester, ammonium salt [CAS Reg. No. 144093–88–9]).	For use as a surface active agent in package coating inks at levels not to exceed 3 percent by weight of the coating ink.
* * * *	* * *

* * * * *

[FR Doc. 04–55521 Filed 12–28–04; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 510

New Animal Drugs; Change of Sponsor's Name and Address

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor's name from Pharmacia & Upjohn Co. to Pharmacia & Upjohn Co., a Division of Pfizer, Inc., and to correct the sponsor's mailing address.

DATES: This rule is effective December 29, 2004.

FOR FURTHER INFORMATION CONTACT: David R. Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6967, e-mail: *david.newkirk@fda.gov.*

SUPPLEMENTARY INFORMATION: Pharmacia & Upjohn Co., 7000 Portage Rd., Kalamazoo, MI 49001–0199, has informed FDA of a change of sponsor's name and mailing address to Pharmacia & Upjohn Co., a Division of Pfizer, Inc., 235 East 42d St., New York, NY 10017. Accordingly, the agency is amending the regulations in 21 CFR 510.600(c) to reflect these changes.

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

List of Subjects in 21 CFR Part 510

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

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

PART 510—NEW ANIMAL DRUGS

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

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

■ 2. Section 510.600 is amended in the table in paragraph (c)(1) by revising the entry for ''Pharmacia & Upjohn Co.'' and in the table in paragraph (c)(2) by revising the entry for ''000009'' to read as follows.

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * *	* *
Pharmacia & Upjohn Co., a Division of Pfizer, Inc., 235 East 42d St., New York, NY 10017	000009
* * *	* *

(2) * * *

Drug labeler code	Firm name and address
* *	* * *
000009	Pharmacia & Upjohn Co., a Division of Pfizer, Inc., 235 East 42d St., New York, NY 10017
* *	* * *

Dated: December 10, 2004.

Steven D. Vaughn,

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

[FR Doc. 04–28461 Filed 12–28–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 870 and 882

[Docket No. 2003N–0567]

Cardiovascular and Neurological Devices; Reclassification of Two Embolization Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final rule to reclassify two embolization device types from class III (premarket approval) into class II (special controls). The agency is also changing the names and revising the identifications of these devices. The vascular embolization device (previously the arterial embolization device) is intended to control hemorrhaging due to aneurysms, certain types of tumors, and arteriovenous malformations. The neurovascular embolization device (previously the artificial embolization device) is intended to permanently occlude blood flow to cerebral aneurysms and cerebral arteriovenous malformations. FDA is reclassifying these devices on its own initiative on the basis of new information. FDA is taking this action under the Federal Food, Drug, and Cosmetic Act (the act), as amended by the Medical Device Amendments of 1976 (the 1976 amendments), the Safe Medical Devices Act of 1990, the Food and Drug Administration Modernization Act of 1997, and the Medical Device User Fee and Modernization Act of 2002.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document that will serve as the special control for these devices.

DATES: This rule is effective January 28, 2005.

FOR FURTHER INFORMATION CONTACT: Peter L. Hudson, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3090.

SUPPLEMENTARY INFORMATION:

I. Background

The act (21 U.S.C. 301 *et seq.*) established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act, FDA refers to devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), as ''preamendments devices.'' FDA classifies these devices after the agency initiates the following procedures: (1) Receives a recommendation from a device classification panel (an FDA advisory committee); (2) publishes the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) publishes a final regulation classifying the device. FDA has classified most preamendments devices under these procedures. FDA refers to devices that were not in commercial distribution before May 28, 1976, as ''postamendments devices.''

These devices are classified automatically by statute (section 513(f) of the act) into class III without any FDA rulemaking process. The devices remain in class III and require premarket approval, unless FDA initiates the following procedures: (1) Reclassifies the device into class I or II; (2) issues an order classifying the device into class I or II in accordance with section 513(f)(2) of the act; or (3) issues, under section 513(i) of the act, an order finding the device substantially equivalent to a predicate device that does not require premarket approval. As described in section 510(k) of the act (21 U.S.C. 360(k)) and under part 807 of the regulations (21 CFR part 807), FDA determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures. Through premarket notification procedures, a person may, without submission of a premarket approval application (PMA), market a preamendments device that has been classified into class III until FDA issues a final regulation under section 515(b) of the act (21 U.S.C. 360e(b)) requiring premarket approval.

Section 513(e) of the act addresses the reclassification of classified devices. This section provides that FDA may, by rulemaking, reclassify a device based on ''new information.'' Under section 513(e) of the act, FDA can initiate reclassification or an interested person can petition FDA to reclassify a preamendments device. The term ''new information,'' as used in section 513(e) of the act, includes information developed after the date of the device's original classification. This information could include a reevalution of the original data or information from the time of the device's original classification that was not presented, available, or developed at that time. (See, e.g., *Holland Rantos v. United States Department of Health, Education, and Welfare*, 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch*, 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard*, 366 F.2d 177 (7th Cir. 1966).)

Reevaluation of the data previously used by FDA is an appropriate basis for subsequent regulatory action where the reevaluation is made in light of newly available regulatory authority (see *Bell*v. *Goddard*, supra, 366 F.2d at 181; *Ethicon*, Inc. v. *FDA*, 762 F.Supp. 382, 389–91 (D.D.C. 1991)), or in light of changes in ''medical science.'' (See *Upjohn* v. *Finch*, supra, 422 F.2d at 951.) Whether data before FDA are past or new data, the ''new information'' to support reclassification under section 513(e) of the act must be ''valid scientific evidence,'' as defined in section 513(a)(3) of the act and 21 CFR 860.7(c)(2). (See, e.g., *General Medical Co.* v. *FDA*, 770 F.2d 214 (D.C. Cir. 1985); *Contact Lens Assoc.* v. *FDA*, 766 F.2d 592 (D.C. Cir.), cert. denied, 474 U.S. 1062 (1985).) FDA relies upon ''valid scientific evidence'' in the classification process to determine the level of regulation for devices. When reclassifying a device, FDA can only consider valid scientific evidence that is publicly available. Publicly available information excludes trade secret and confidential commercial information, e.g., the contents of a pending PMA. (See section 520(c) of the act (21 U.S.C. 360j(c).)

II. Regulatory History of the Devices

In the **Federal Register** of February 25, 2004 (69 FR 8600), FDA issued a proposed rule to change the names, revise the identifications, and reclassify the two devices from class III (premarket

approval) into class II (special controls). FDA identified the draft guidance document entitled ''Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices'' as the proposed special control capable of providing of providing reasonable assurance of the safety and effectiveness for these devices. The vascular embolization device (previously the arterial embolization device) is intended to control hemorrhaging due to aneurysms, certain types of tumors, and arteriovenous malformations. The neurovascular embolization device (previously the artificial embolization device) is intended to permanently occlude blood flow to cerebral aneurysms and cerebral arteriovenous malformations. FDA invited interested persons to comment on the proposed rule by May 25, 2004. FDA received one comment. The comment was supportive of the proposed reclassification but made suggestions on the guidance document's content. FDA considered the suggestions and made appropriate revisions to the guidance document.

III. Conclusion

Based on the information discussed in the preamble to the proposed rule, FDA concludes that special controls, in conjunction with general controls, will provide reasonable assurance of the safety and effectiveness for these devices. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document entitled ''Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices'' as the guidance document that will serve as the special control for these devices. FDA believes that this special controls guidance document in addition to the general controls will provide reasonable assurance of the safety and effectiveness of these devices. Following the effective date of this rule, any firm submitting a 510(k) submission for these embolization devices will need to address the issues covered in the class II special controls guidance document. However, the firm need only show that its device meets the recommendations of the class II special controls guidance document or in some other way provides equivalent assurances of safety and effectiveness.

In addition to reclassifying these devices from class III into class II, FDA has revised the name and identification of 21 CFR parts 870.330 and 882.5950. FDA believes that renaming the arterial embolization device as the ''vascular embolization device'' and the artificial embolization device as the ''neurovascular embolization device'' more accurately reflect the intended uses of these devices.

Section 870.1(e) (21 CFR 870.1(e)), which was included in the proposed rule, was previously added by a final rule published in the **Federal Register** of October 28, 2003 (68 FR 61342). Section 882.1(e) (21 CFR 882.1(e)), which was included in the proposed rule, was previously added by a final rule published in the **Federal Register** of December 18, 2003 (68 FR 70435).

IV. Environmental Impact

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

V. Analysis of Impacts

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

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Reclassification of these devices from class III into class II will relieve all manufacturers of the devices of the cost of eventually complying with the premarket approval requirements in section 515 of the act. Because reclassification will therefore reduce the regulatory costs associated with these devices and may permit small potential competitors to enter the marketplace by lowering their costs, the agency certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $110 million. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

VI. Federalism

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

VII. Paperwork Reduction Act of 1995

This final rule does not contain information collection provisions that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

List of Subjects in 21 CFR Parts 870 and 882

Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 870 and 882 are amended as follows:

PART 870—CARDIOVASCULAR DEVICES

■ 1. The authority citation for 21 CFR part 870 continues to read as follows:

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

■ 2. Section 870.3300 is revised to read as follows:

§ 870.3300 Vascular embolization device.

(a) *Identification.* A vascular embolization device is an intravascular implant intended to control hemorrhaging due to aneurysms, certain types of tumors (e.g., nephroma, hepatoma, uterine fibroids), and arteriovenous malformations. This does not include cyanoacrylates and other embolic agents, which act by polymerization or precipitation. Embolization devices used in neurovascular applications are also not

included in this classification, see § 882.5950 of this chapter.

(b) *Classification.* Class II (special controls.) The special control for this device is the FDA guidance document entitled ''Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices.'' For availability of this guidance document, see § 870.1(e).

PART 882—NEUROLOGICAL DEVICES

■ 3. The authority citation for 21 CFR part 882 continues to read as follows:

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

■ 4. Section 882.5950 is revised to read as follows:

§ 882.5950 Neurovascular embolization device.

(a) *Identification.* A neurovascular embolization device is an intravascular implant intended to permanently occlude blood flow to cerebral aneurysms and cerebral ateriovenous malformations. This does not include cyanoacrylates and other embolic agents, which act by polymerization or precipitation. Embolization devices used in other vascular applications are also not included in this classification, see § 870.3300.

(b) *Classification.* Class II (special controls.) The special control for this device is the FDA guidance document entitled ''Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices.'' For availability of this guidance document, see § 882.1(e).

Dated: December 15, 2004.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 04–28437 Filed 12–28–04; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–VA–0005; FRL–7853–7]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Approval of the Control of VOC Emissions From Municipal Solid Waste Landfills in Northern Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the Commonwealth of Virginia (the Commonwealth) State Implementation Plan (SIP). The revision establishes regulations for the control of volatile organic compound (VOC) emissions from municipal solid waste landfills (MSWLs) located in the Northern Virginia Portion of the Metropolitan Washington, D.C. Ozone Nonattainment Area. (Northern Virginia). EPA is approving this revision to the SIP in accordance with the requirements of the Clean Air Act (CAA or the Act).

DATES: This rule is effective on February 28, 2005, without further notice, unless EPA receives adverse written comment by January 28, 2005. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Regional Material in Edocket (RME) ID Number R03–OAR–2004–VA–0005 by one of the following methods:

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

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

C. *E-mail: Morris.Makeba@epa.gov.*

D. Mail: R03–OAR–2003–VA–0005, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to RME ID No. R03–OAR–2004–VA–0005. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov Web sites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Janice Lewis, (215) 814–2185, or by e-mail at *lewis.janice@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On February 12, 2004, the Commonwealth submitted a revision to its State Implementation Plan (SIP). The SIP revision consists of regulations to control VOC emissions from Municipal Solid Waste Landfills (MSWLs) in the Northern Virginia portion of the Metropolitan Washington, D.C. Ozone Nonattainment Area. The regulation establishes emission standards for MSWLs, as well as operational, monitoring and reporting requirements. This revision applies to the Northern Virginia portion of the Metropolitan Washington, D.C. Ozone Nonattainment Area, and is not intended to apply to

any other portion of the Commonwealth.

II. Summary of SIP Revision

The Commonwealth's February 12, 2004 submittal includes regulations that apply to MSWLs which commenced construction, reconstruction, or modification before May 30, 1991 in the Northern Virginia VOC Control Area (Arlington County, Alexandria City, Fairfax County, Fairfax City, Falls Church City, Loudon County, Manassas City, Manassas Park City, Prince William County, and Stafford County) as designated in 9 VAC 5–20–206. The landfill design capacity applicability criteria is 1.0 million megagrams (Mg) or more and 1.0 million cubic meters. The emission rate applicability criteria is emissions of nonmethane organic compound (NMOCs) greater than or equal to 23 Mg per year. The primary components of MSWL emissions are methane and NMOCs. VOCs are a component of NMOCs.

Landfills that have a design capacity greater than or equal to 1.0 million Mg and 1.0 million cubic meters are required to test and report their emission rate annually. If the NMOC emission rate exceeds 23 Mg per year, the MSWL is required to submit plans for and to install a collection system and control system for the subject emissions. The regulation establishes specifications for the collection and control systems and provide test methods and calculation procedures for estimating NMOC emission rates. In addition, the regulation provides compliance schedules and reporting requirements, and incorporates control and equipment maintenance and malfunction provisions.

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995 Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law,Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the Clean Air Act, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the Clean Air Act is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Final Action

EPA is approving the revision to the Commonwealth's SIP which establish regulations for the control of emission of volatile organic compound (VOC) emissions from municipal solid waste landfills (MSWLs) located in Northern Virginia portion of the Metropolitan Washington, D.C. Ozone Nonattainment Area (Northern Virginia). This revision applies only to the Northern Virginia Ozone Nonattainment Area, and is not intended to apply to any other part of the Commonwealth.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on February 28, 2005 without further notice unless EPA receives adverse comment by January 28, 2005. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

V. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the

Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 28, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action, approving the Commonwealth of Virginia's regulation to require municipal solid waste landfills in Northern Virginia to control emissions of volatile organic compounds may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 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 VV—Virginia

■ 2. Section 52.2420, the table in paragraph (c) is amended by adding entries under chapter 40, part II to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) *EPA approved regulations and statutes.*

EPA—APPROVED REGULATIONS AND STATUTES IN THE VIRGINIA SIP

State citation (9 VAC 5)	Title/subject	State effective date	EPA approval date	Explanation (former SIP section)
*	*	*	*	*
Chapter 40 Existing Stationary Sources				

EPA—APPROVED REGULATIONS AND STATUTES IN THE VIRGINIA SIP—Continued

State citation (9 VAC 5)	Title/subject	State effective date	EPA approval date	Explanation (former SIP section)
*	*	*	*	*
Part II Emission Standards				
*	*	*	*	*
Article 43 Municipal Solid Waste Landfills (Rule 4–43)				
5–40–5800	Applicability and Designation of Affected Facility.	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5810	Definitions	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5820	Standards for Air Emissions	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5822	Operational standards for collection and control systems.	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5824	Specifications for active collection systems	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5850	Compliance	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5855	Compliance schedule	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5860	Test methods and procedures	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5870	Monitoring	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5880	Reporting	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5890	Recordkeeping	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5900	Registration	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5910	Facility and control equipment maintenance or malfunction.	1/29/04	12/29/04 [Insert page number where the document begins].	
5–40–5920	Permits	1/29/04	12/29/04 [Insert page number where the document begins].	

[FR Doc. 04–28351 Filed 12–28–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–DC–0004; FRL–7853–5]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; VOC Emission Standards for Portable Fuel Containers and Spouts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the District of Columbia State Implementation Plan (SIP). Specifically, EPA is approving new emission standards for portable fuel containers and spouts sold, supplied, offered for sale, or manufactured for sale in the District of Columbia (the District). EPA is approving the new portable fuel container and spouts standards to reduce emissions of volatile organic compounds (VOC) in accordance with the requirements of the Clean Air Act (CAA or the Act).

DATES: This rule is effective on February 28, 2005 without further notice, unless EPA receives adverse written comment by January 28, 2005. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0004 by one of the following methods:

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

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

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

D. Mail: R03–OAR–2004–DC–0004, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to RME ID No. R03–OAR–2004–DC–0004. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit

information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov Web sites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of Public Health, Air Quality Division, 51 N Street, NE., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by e-mail at *powers.marilyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On April 16, 2004, the District of Columbia (the District) submitted revisions to its SIP, including a regulation to control emissions from portable fuel containers. The standards and requirements contained in the District's regulation for portable fuel containers and spouts are based on the Ozone Transport Commission (OTC) model rule. The OTC developed control measures into model rules for a number of source categories. The OTC portable fuel container model rule is based on the existing rules developed by the California Air Resources Board, which were analyzed and modified by the OTC workgroup to address VOC reduction needs in the Ozone Transport Region (OTR).

II. Summary of SIP Revision

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

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

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

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

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

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

The April 16, 2004 submittal also includes new definitions that were added in section 799, a new section 307 to Chapter 3—to provide for a fee penalty pursuant to section 185 of the Act, and amendments to Chapters 1, 2, 6, 7, and 8 to satisfy the Act's requirements for severe ozone nonattainment areas pursuant to the Metropolitan Washington DC 1-hour ozone nonattainment area's reclassification on January 24, 2003 from serious to severe nonattainment.

On September 20, 2004, the District supplemented its April 16, 2004 submittal. This supplemental submittal provides copies of standards that are incorporated by reference in the Districts's new and amended regulations and a copy of the District's responses to comments it received during its rule adoption process. On November 26, 2004, the District submitted another supplemental revision to its April 16, 2004 submittal. This supplemental submittal consists of revised versions of the new VOC regulations. These are minor revisions to the regulations which clarify the standards that are incorporated by reference and correct cross-referencing and typographical errors. This action concerns only new Sections 735 through 741 (Portable Fuel Containers and Spouts) and revised section 799 containing the associated definitions for the Portable Fuel Containers and Spouts rule. The remaining SIP revisions submitted on April 16, 2004 and supplemented on September 20, 2004 and November 26, 2004 are the subjects of separate rulemaking actions.

The standards and requirements contained in the District's portable fuel container and spouts rule are based on the OTC model rule. The provisions of the portable fuel containers and spouts rule will apply to any person who sells, supplies, offers for sale, or manufactures a portable fuel container or spout for use in the District of Columbia. Affected persons must comply by January 1, 2005. The rule does not apply to any portable fuel container and spout manufactured for shipment, sale and use outside of the District of Columbia.

This regulation requires that by January 1, 2005, each portable fuel container and spout sold in the District of Columbia meets the following requirements: (1) Have an automatic shut-off and closure device; (2) contain one opening for both filling and pouring; (3) meet minimal fuel flow rate based on nominal capacity; (4) meet a permeation standard, and (5) have a manufacturer's warranty against defects. The District's regulation includes standards, testing procedures, exemptions, recordkeeping requirements, and administrative requirements.

III. Final Action

EPA is approving a revision to the District of Columbia SIP to establish a regulation for the control of VOC emissions from portable fuel containers and spouts. Implementation of this VOC control measure strengthens the District of Columbia SIP, and results in emission reductions in the District of Columbia. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on February 28, 2005 without further notice unless EPA receives adverse comment by January 28, 2005. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule,

EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 28, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action to approve the District of Columbia's portable fuel containers and spouts rule may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 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 J—District of Columbia

■ 2. In § 52.470, the table in paragraph (c) is amended by adding the following entries to ''District of Columbia Municipal Regulations (DCMR), Title 20—Environment, Chapter 7—Volatile Organic Compounds'':

a. Adding entries for Section 735 through Section 741.

b. Adding a new entry for Section 799 after the existing entry for Section 799.

The added entries read as follows:

§ 52.470 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED DISTRICT OF COLUMBIA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
District of Columbia Municipal Regulations (DCMR), Title 20—Environment				
*	*	*	*	*
Chapter 7	Volatile Organic Compounds			
*	*	*	*	*
Section 735	Portable Fuel Containers and Spouts—General Requirements.	4/16/04; 11/26/04	12/29/04 [Insert page number where the document begins].	

EPA-APPROVED DISTRICT OF COLUMBIA REGULATIONS—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
Section 736	Portable Fuel Containers and Spouts— Performance Standards.	4/16/04; 11/26/04	12/29/04 [Insert page number where the document begins].	
Section 737	Portable Fuel Containers and Spouts—Exemptions From Performance.	4/16/04; 11/26/04	12/29/04 [Insert page Standards number where the document begins].	
Section 738	Portable Fuel Containers and Spouts—Labeling Requirements.	4/16/04; 11/26/04	12/29/04 [Insert page number where the document begins].	
Section 739	Portable Fuel Containers and Spouts—Testing Procedures.	4/16/04; 11/26/04	12/29/04 [Insert page number where the document begins].	
Section 740	Portable Fuel Containers and Spouts—Innovative Product Exemption.	4/16/04; 11/26/04	12/29/04 [Insert page number where the document begins].	
Section 741	Portable Fuel Containers and Spouts—Variance.	4/16/04; 11/26/04	12/29/04 [Insert page number where the document begins].	
*	* *	*	* *	*
Section 799	Definitions	4/16/04; 11/26/04	12/29/04 [Insert page number where the document begins].	
*	* *	*	* *	*

* * * * *

[FR Doc. 04–28353 Filed 12–28–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–DC–0005; FRL–7853–3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; VOC Emission Standards for Solvent Cleaning

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the District of Columbia State Implementation Plan (SIP). The revision establishes regulations for the control of volatile organic compound (VOC) emissions from solvent cleaning operations in the District of Columbia (the District). EPA is approving this revision to the District of Columbia SIP in accordance with the requirements of the Clean Air Act (CAA or the Act).

DATES: This rule is effective on February 28, 2005 without further notice, unless EPA receives adverse written comment by January 28, 2005. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0005 by one of the following methods:

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

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

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

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

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

Instructions: Direct your comments to RME ID No.R03–OAR–2004–DC–0005. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov websites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency,

Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of Public Health, Air Quality Division, 51 N Street, NE., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by e-mail at *powers.marilyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I.

On April 16, 2004, the District of Columbia (the District) submitted revisions to its SIP, including a regulation to control emissions from solvent cleaning operations. The standards and requirements contained in the District's regulation for solvent cleaning are based on the Ozone Transport Commission (OTC) model rule. The OTC developed control measures into model rules for a number of source categories. The OTC solvent cleaning model rule is based on the existing rules developed by the California Air Resources Board, which were analyzed and modified by the OTC workgroup to address VOC reduction needs in the Ozone Transport Region (OTR).

II. Summary of SIP Revision

The District's April 16, 2004 SIP revision includes both new regulations and amendments to Title 20 of the District of Columbia Municipal Regulations (20 DCMR). The new regulations in Title 20 DCMR (Environment), Subtitle A: Air Quality, Chapter 7, Volatile Organic Compounds are:

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

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

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

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

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

The April 16, 2004 submittal also includes new definitions that were added in section 799, a new section 307 to Chapter 3—to provide for a fee penalty pursuant to section 185 of the Act, and amendments to Chapters 1, 2, 6, 7, and 8 to satisfy the Act's requirements for severe ozone nonattainment areas pursuant to the Metropolitan Washington, DC 1-hour ozone nonattainment area's reclassification on January 24, 2003 from serious to severe nonattainment.

On September 20, 2004, the District supplemented its April 16, 2004 submittal. This supplemental submittal provides copies of standards that are incorporated by reference in the Districts's new and amended regulations and a copy of the District's responses to comments it received during its rule adoption process. On November 26, 2004, the District submitted another supplemental revision to its April 16, 2004 submittal. This supplemental submittal consists of revised versions of the new VOC regulations. These are minor revisions to the regulations which clarify the standards that are incorporated by reference and correct cross-referencing and typographical errors. This action concerns only sections 742 through 748—Solvent Cleaning and revised section 799 containing the associated definitions for the solvent cleaning regulation. The remaining SIP revisions submitted on April 16, 2004 and supplemented on September 20, 2004 and November 26, 2004 are the subjects of separate rulemaking actions.

The District's solvent cleaning rule (sections 742 through 748) applies to any person who sells, supplies, offers for sale, or manufactures any solvent on or after January 1, 2005 for use in the District of Columbia. The regulation applies to all cold cleaning machines, batch vapor cleaning machines, in-line vapor cleaning machines, and airless and air-tight cleaning machines that process metal parts. The District's regulations for solvent cleaning include definitions, emission standards, equipment requirements, operating procedures, compliance requirements, and monitoring and recordkeeping requirements.

III. Final Action

EPA is approving a revision to the District of Columbia SIP to establish a regulation for the control of VOC emissions from solvent cleaning. Implementation of this VOC control measure strengthens the SIP, and results in emission reductions in the District of Columbia. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on February 28, 2005 without further notice unless EPA receives adverse comment by January 28, 2005. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the

relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 28, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action to approve the District of Columbia's solvent cleaning regulations may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2))

List of Subjects in 40 CFR Part 52

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

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 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 J—District of Columbia

■ 2. In § 52.470, the table in paragraph (c) is amended by adding the following entries to ''District of Columbia Municipal Regulations (DCMR), Title 20—Environment, Chapter 7—Volatile Organic Compounds'':

a. Adding entries for Section 742 through Section 748.

b. Adding a new entry for Section 799 after the existing entry for Section 799.

The added entries read as follows:

§ 52.470 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED DISTRICT OF COLUMBIA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
District of Columbia Municipal Regulations (DCMR), Title 20—Environment				
*	*	*	*	*
Chapter 7	Volatile Organic Compounds			
*	*	*	*	*
Section 742	Solvent Cleaning—General Requirements.	4/16/04; 11/26/04	[*12/29/04 and Federal Register date citation*].	
Section 743	Solvent Cleaning—Cold Cleaning	4/16/04; 11/26/04	[*12/29/04 and Federal Register date citation*].	
Section 744	Solvent Cleaning—Batch Vapor Cleaning.	4/16/04; 11/26/04	[*12/29/04 and Federal Register date citation*].	
Section 745	Solvent Cleaning—In-Line Vapor Cleaning.	4/16/04; 11/26/04	[*12/29/04 and Federal Register date citation*].	
Section 746	Solvent Cleaning—Airless and Air-Tight Cleaning.	4/16/04; 11/26/04	[*12/29/04 and Federal Register date citation*].	
Section 747	Solvent Cleaning—Alternative Compliance.	4/16/04; 11/26/04	[*12/29/04 and Federal Register date citation*].	
Section 748	Solvent Cleaning—Recordkeeping and Monitoring.	4/16/04; 11/26/04	[*12/29/04 and Federal Register date citation*].	
*	*	*	*	*
Section 799	Definitions	4/16/04; 11/26/04	[12/29/04] [Insert page number where the document begins].	
*	*	*	*	*

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[FR Doc. 04–28355 Filed 12–28–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–VA–0004; FRL–7853–1]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Excess Volatile Organic Compound and Nitrogen Oxides Emissions Fee Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Commonwealth of Virginia's (Virginia) State Implementation Plan (SIP) for ozone. The rule requires major stationary sources of volatile organic compounds (VOC) and nitrogen oxides (NO_X) in the Virginia portion of the Metropolitan Washington D.C. Severe Ozone Nonattainment Area to pay a fee to the state if the area fails to attain the one-hour national ambient air quality standard for ozone by November 15, 2005. The fee must be paid beginning in 2006, and in each calendar year thereafter, until the area is redesignated to attainment for the pollutant ozone. Virginia submitted this rule on April 19, 2004, pursuant to the requirements of Section 110 of the Clean Air Act.

DATES: This rule is effective on February 28, 2005 without further notice, unless EPA receives adverse written comment by January 28, 2005. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

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

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

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

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

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

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

Instructions: Direct your comments to RME ID No. R03–OAR–2004–VA. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov websites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of material to be incorporated by reference are available at the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 1301 Constitution Avenue, NW, Room B108, Washington, DC 20460. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Catherine L. Magliocchetti, (215) 814–2174, or by e-mail at *magliocchetti.catherine@epa.gov.*

SUPPLEMENTARY INFORMATION:

Throughout this document, ''we,'' ''us,'' and ''our'' refer to EPA. This supplementary information is organized as follows.

Table of Contents

I. What Final Action Is EPA Taking?
II. Who Has To Pay These Fees?
III. How Are the Fees Calculated?
IV. Is Virginia Required To Adopt an Excess Emission Fee Rule?
V. What Are the Exceptions to this Rule?
VI. What Impact Do Virginia's Privilege and Immunity Statutes Have on This Rule?
VII. Statutory and Executive Order Reviews

I. What Final Action Is EPA Taking?

EPA is approving a revision to Virginia's ozone SIP. The SIP revision requires major stationary sources of VOC and NO_X in the Virginia portion of the Metropolitan Washington D.C. Severe Ozone Nonattainment Area (Area) to pay a fee to the Commonwealth if the Area fails to attain the national ambient air quality standard (NAAQS) for ozone by November 15, 2005. The fee must be paid beginning in 2006 and in each calendar year thereafter, until the Area is redesignated to attainment for ozone. The payment is due by August 31 of each year.

We are approving this rule because it is consistent with the requirements of the Clean Air Act (Act).

EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipates no adverse comment, since no comments were received during the state's regulatory process. However, in the ''Proposed Rules'' section of today's **Federal Register**, we are publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on February 28, 2005 without further notice unless EPA receives adverse comment by January 28, 2005. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all

public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

II. Who Has To Pay These Fees?

This rule applies to major stationary VOC and NO_X sources located in the Virginia portion of the Metropolitan Washington DC Severe Ozone Nonattainment Area. At this time, the counties of Arlington, Fairfax, Loudon, and Prince William; and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park in Virginia are part of the Area, and are subject to this rule. Any owner of a major VOC or NO_X stationary source, which is a stationary source that emits or has the potential to emit 25 tons or more per year of VOC or NO_X, within the severe ozone nonattainment area is subject to this rule.

III. How Are the Fees Calculated?

The fee is initially set at $5,000 per ton of VOC or NO_X emitted by the source during the previous calendar year in excess of 80% of the baseline amount. The fee is to be adjusted annually, beginning in 1991, by the percentage by which the consumer price index has been adjusted. The baseline is the lower of the source's actual or allowable VOC or NO_X emissions during calendar year 2005. Virginia may calculate the baseline amount using a period of more than one year, provided the determination is consistent with Federal requirements.

IV. Is Virginia Required To Adopt an Excess Emission Fee Rule?

Under sections 182(d)(3), 182(e), and 185 of the Clean Air Act (the Act), states are required to adopt an excess emissions fee regulation for ozone nonattainment areas classified as severe or extreme. This SIP revision requires major stationary sources of VOC in the nonattainment area to pay a fee to the state if the area fails to attain the standard by the attainment date set forth in the Act. In Virginia, the Northern Virginia area that is part of the Metropolitan Washington, DC ozone nonattainment area is classified as severe.

Section 182(f) of the Act requires states to apply the same requirements to major stationary sources of oxides of nitrogen (NO_X) as are applied to major stationary sources of VOC.

V. What Are the Exceptions to This Rule?

As per section 185 of the Clean Air Act, the Commonwealth's SIP revision provides for an exception of the fee during any year that is treated as an extension year under section 181(a)(5) of the Clean Air Act.

VI. What Impact Do Virginia's Privilege and Immunity Statutes Have on This Rule?

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec.10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts* * *'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the Clean Air Act, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the Clean Air Act is likewise unaffected by this, or any, state audit privilege or immunity law.

VII. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule

will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

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

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 28, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This approval of the Commonwealth of Virginia's Excess VOC and NOx Emission Fee SIP revision, as required under Section 185 and 182(f) of the Clean Air Act, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

40 CFR part 52 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 VV–Virginia

■ 2. In § 52.2420, the table in paragraph (c) is amended by revising the paragraph title and paragraph heading, and adding entries for ''Code of Virginia'' and ''Section 10.1–1316.1A. Through D.'' at the end of the table to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) *EPA-Approved Regulations and Statutes*

EPA–APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation (9 VAC 5)	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
Code of Virginia				
Section 10.1–1316.1A. Through D	Severe ozone nonattainment areas; fees.	7/1/04	12/29/04	Provision authorizes the Department of Environmental Quality (DEQ) to collect Federal penalty fees from major stationary sources if the nonattainment area does not attain the ozone standard by the statutory attainment date.

* * * * *

[FR Doc. 04–28357 Filed 12–28–04; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 20, and 43

[WC Docket No. 04–141; FCC 04–266]

Local Telephone Competition and Broadband Reporting

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission extends and modifies the FCC Form 477 local competition and broadband data gathering program, established by the Commission's *Data Gathering Order* published Wednesday, April 12, 2000, 65 FR 19675.

DATES: The rules in this document contain information collection requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date.

Compliance date: September 1, 2005. Providers subject to the requirements and regulations adopted herein shall complete and file the amended FCC Form 477 on the compliance date and semiannually thereafter.

FOR FURTHER INFORMATION CONTACT: Ellen Burton, Assistant Chief, James Eisner, Senior Economist, or Thomas J. Beers, Deputy Chief, Industry Analysis and Technology Division, Wireline Competition Bureau, at (202) 418–0940. 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 Report and Order (Order) in WC Docket No. 04–141, adopted on November 9, 2004, and released on November 12, 2004. The full text of this document is available on the Commission's Web site Electronic Comment Filing System and for public inspection Monday through Thursday from 8 a.m. to 4:30 p.m. and Friday from 8 a.m. to 11:30 a.m. in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC 20554. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365. The full text of the NPRM may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Room CY–B402, 445 Twelfth Street, SW., Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563, or through *www.bcpiweb.com*.

Paperwork Reduction Act

This Order contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to OMB for review under section 3507(d) of the PRA.

Summary of the Report and Order

1. In this Order, we adopt rules and a standardized form to improve our Form 477 local competition and broadband data gathering program, including extending the program for five years beyond its currently designated sunset in March 2005, eliminating existing reporting thresholds, and gathering more granular data from service providers. The information collected in the Form 477 program helps the Commission and the public understand the extent of local telephone competition and broadband deployment, which is important to the nation's economic, educational, and social well-being. The improvements we adopt here, which include some but not all of the modifications proposed in our recent *Data Collection NPRM*, are necessary to ensure that the Commission can continue to effectively evaluate broadband and local competition developments as they affect all Americans. At the same time, we have acted to minimize, wherever possible, the administrative burdens imposed on reporting entities by the modified Form 477 program.

2. The *Data Gathering Order* established a reporting program (using the FCC Form 477) to collect basic information about two critical areas of the communications industry: the deployment of broadband services and the development of local telephone service competition. The Commission concluded that collecting this information would materially improve its ability to develop, evaluate, and revise policy in these rapidly changing areas and provide valuable benchmarks for Congress, the Commission, other policy makers, and consumers. Since adoption of the Form 477 in 2000, broadband service providers and local telephone service providers have reported data ten times, and we have issued regular reports based in significant part on this information. In the *Data Gathering Order*, the Commission adopted a sunset provision pursuant to which the collection program terminates after five years (*i.e.*, in March 2005) unless the Commission acts to extend it.

3. Form 477 includes separate sections on broadband deployment, local telephone service competition, and mobile telephone service provision. In the *Data Gathering Order*, the Commission required entities to report only when they meet or exceed defined reporting thresholds, and, then, to complete only those portions of the form for which they meet or exceed the reporting thresholds. The Commission required entities that meet a threshold to file data on a state-by-state basis. The Commission also required facilities-based providers of broadband connections and local exchange carriers (LECs) to report lists of the Zip Codes in which they serve end users, for each state for which they complete a form. In the case of broadband connections, reporting entities include incumbent and competitive LECs, cable companies, operators of terrestrial and satellite wireless facilities, municipalities, and any other facilities-based provider of broadband connections to end users.

4. In the *Data Collection NPRM*, we proposed to: (1) Extend the data collection for an additional five years; (2) modify Form 477 to collect more-detailed information about broadband connection speeds and the localized deployment of broadband technologies; (3) collect information about subscribership to bundled local and interstate long distance telephone services; and (4) eliminate or revise those local telephone service questions that elicit imprecise or infrequently used information. We also invited comment on whether we should eliminate or lower the current reporting thresholds; modify our policies for publishing or sharing Form 477 data; require filers to categorize broadband connections according to the information transfer rates observed by end users; and require filers to report numbers of broadband connections in service by Zip Code or technology, or, alternatively, by Zip Code, technology, and speed.

5. We have considered the record of this proceeding, including comment about reporting burdens associated with current Form 477 reporting requirements, potential burdens associated with additional reporting requirements proposed or otherwise noticed for discussion in the *Data Collection NPRM*, and potential burdens associated with alternatives suggested by the parties, as well as our experience with the Form 477 to date. As discussed below, in this Order we: (1) Extend the Form 477 program for five years beyond

its currently designated sunset in March 2005; (2) eliminate reporting thresholds; and (3) adopt various modifications to the Form 477.

6. *Five-Year Extension.* We conclude that it is reasonable to extend the Form 477 program for five years beyond the current March 2005 sunset given our statutory obligations to study and report on the availability of broadband capability, as well as our continuing obligations to promote telecommunications services competition generally. We conclude that extending the Form 477 program for an additional five years with the modifications discussed below will materially improve the Commission's ability to develop, evaluate, and revise policy in the rapidly changing areas of broadband deployment and local telephone competition, and provide valuable benchmarks for Congress, the Commission, other policy makers, and consumers. As discussed in more detail in the following sections and in the Final Regulatory Flexibility Analysis attached to this Order, we also conclude that extending the Form 477, as modified, will not impose an undue burden on the entities that are required to report. In this regard, we have taken or will take the following steps to reduce associated burdens: (1) We decline to adopt certain modifications to the Form 477 proposed in the *Data Collection NPRM*, including the proposed requirement that filers categorize broadband connections according to the information transfer rate (speed) actually observed by the end user; (2) we eliminate various questions from the wireline local telephone section of the form; (3) we eliminate the requirement that filers seeking confidential treatment of Form 477 data prepare and submit a separate, redacted Form 477; (4) responding to comments submitted by the Office of Advocacy of the Small Business Administration, we will publish a *Small Entity Compliance Guide* to provide a set of user-friendly explanations to direct small entities to those sections of the Form 477 relevant to their operations.

7. We reject calls for extending the Form 477 program for less than five years because our statutory responsibilities to study and report on broadband deployment and encourage the development of local telephone service competition are on-going. We find that a five-year extension is prudent given continuing and rapidly-evolving developments in broadband and local telephone services markets. Reviewing the adequacy of our form at regular intervals is essential to ensure that it is, in fact, capturing the most relevant and critical information given the dynamic nature of these markets. Accordingly, we affirm our analysis and conclusion in the *Data Gathering Order*, namely, that a five-year program best balances our continuing need to understand evolving market developments against our desire to minimize costs and ensure that adopted regulation does not outlive its usefulness. Moreover, we disagree with comments that the availability of alternative data sources is an adequate substitute for the Form 477. In our experience, most if not all commercially available studies of residential services adoption derive their data in significant part from the Commission's Form 477-based public reports. And, no nationwide studies of broadband deployment or of local telephone competition are based on better sources of data for rural and other hard-to-serve areas. Voluntary membership surveys conducted by commenters NTCA and OPASTCO, and also by the National Exchange Carrier Association (NECA), provide welcome evidence that the incumbent LECs that *respond* to the surveys are deploying broadband services to substantial—and increasing— percentages of their customer base. Entities that choose not to participate in these voluntary surveys may have a different experience. By contrast, surveys such as those about Internet use conducted by the Pew Internet & American Life Project, and the Census Bureau's Current Population Survey, use random samples that are constructed to avoid overlooking particular population groups. To obtain statistically significant results for particular rural populations, however, a large (and therefore expensive) random sample is required. For example, because the random sample (of about 57,000 households) for the Current Population Survey does not over-sample households located in rural areas in particular states, the Department of Commerce was able to discuss nationwide differences between rural and urban households in its report, *A Nation Online: How Americans Are Expanding Their Use of the Internet* (February 2002), but was not able to discuss such differences *within* particular states. Similarly, the Pew Internet & American Life Project has compared only *nationwide* differences in Internet use by residents of rural and urban areas on the basis of random samples of about 20,000 Americans age 18 and older.

8. *Elimination of Reporting Thresholds.* We also modify the Form 477 program to require all facilities-based providers of broadband connections to end users to report broadband data, all local exchange carriers to report local telephone service data, and *all* mobile telephone carriers to report mobile telephone data. In reaching this conclusion, we note that comments from state agencies, and from some service providers, generally supported eliminating, or substantially reducing, the reporting thresholds. As we stated in the *Data Collection NPRM*, we believe that the current data collection misses several hundred small facilities-based broadband providers, *e.g.*, rural incumbent LECs, wireless Internet service providers, and municipalities. Moreover, we agree with those commenters who argue that it is important to capture a more accurate picture of broadband deployment and local telephone competition in rural, sparsely populated areas, which are more likely to be served by small carriers.

9. In reaching our conclusion, we recognize that in the *Data Gathering Order* the Commission concluded that a reporting threshold for broadband and local competition appropriately balanced its need for an inclusive reporting requirement against the burdens imposed on small entities. At the same time, the Commission stated ''[we] are committed to revising these thresholds (either upward or downward) should it be necessary based either on our experience or on changes in the relevant markets.'' And, the Commission pointed out that ''[by] excluding any providers we necessarily face the possibility of understating the amount of competitive activity and broadband deployment in smaller, rural areas.'' Based on our experience with the Form 477 over the past nearly five years, we now conclude that the current thresholds render impossible a thorough understanding of the dynamics of broadband deployment in states with rural and/or underserved areas. We find that lowering the existing thresholds to some other, more or less arbitrary, number means that certain of these areas will continue to elude our scrutiny. Such a result seems inimical to Congress's charge, in section 706 of the Act, that we make determinations on the ''availability of advanced telecommunications capability to all Americans.'' Thus, we believe that are better equipped to make sound policy determinations affecting the broadband market to the extent we have the most accurate and comprehensive data possible upon which to base our decisions.

10. Similarly, based on our extensive experience in collection local competition data, we now conclude that we must gather an appropriate amount of information about the status of local competition from all areas of the country. We believe that the current 10,000 line reporting threshold significantly understates the amount of local competition in states that include rural and/or other underserved areas. As a result, our understanding of rural and underserved market development is not as precise as it could be. Having more accurate information about competition in rural markets will assist the Commission in its review of portability and eligibility policies. Merely lowering existing thresholds to some arbitrary number does not overcome this problem or mitigate its effects.

11. Moreover, this problem predictably will only get worse as networks continue to evolve, *i.e.*, as network architectures reflect the continued convergence of traditional telephony and broadband. Given such convergence, which was only at its initial stages when we adopted the *Data Gathering Order* almost five years ago, it becomes essential that our broadband and local competition data collection methodologies are equally comprehensive. We therefore conclude that we should collect local telephone service information on the same comprehensive basis upon which we collect information about broadband connections.

12. We conclude that the benefits to the policy making process that derive from the additional data outweigh the reporting burdens on new Form 477 filers (*i.e.*, entities that would not be required to file Form 477 if we retained the current mandatory reporting thresholds). As we noted in the *Data Collection NPRM*, the small facilities-based broadband providers that currently file Form 477 on a voluntary basis find that only a few questions apply to their situations. Moreover, among the smaller entities that are currently required to report broadband data on Form 477 (*i.e.*, entities that report between 250 and 499 broadband connections in a state), 68 percent reported connections in only one technology category, and 98 percent reported connections in two or fewer technology categories. Accordingly, we conclude that the broadband reporting requirements we adopt here are not overly burdensome for small providers. Similarly, among the smaller incumbent LECs that are currently required to report wireline local telephone data (*i.e.*, carriers that report between 10,000 and 24,999 voice-grade equivalent local exchange lines), 95 percent report only one of the five rows of information that will appear in the modified form. Therefore, we conclude that the local telephone reporting requirements we adopt here are not overly burdensome for small carriers. We also note that, for many new incumbent LEC filers, some answers (*e.g.*, percent of local exchange lines provided over the filer's own local loops) are unlikely to change from filing to filing, and that, more generally, filers will be able to complete their filings more efficiently as they gain experience with the data collection. We conclude that it is not possible to develop an adequately comprehensive picture of broadband deployment and local telephone competition in the United States without including information about the situation in rural, sparsely populated areas. As NECA emphasizes, the more than 1,100 rural carriers that belong to NECA's Traffic Sensitive pool generally serve sparse populations over wide geographical areas—frequently fewer than 10 customers per square mile. Therefore, we conclude that the benefits to policy making of developing a more accurate picture of broadband deployment and local telephone competition—including in rural, sparsely populated areas—outweigh the costs of reporting that we impose on carriers that have previously been exempt from filing Form 477.

13. We recognize, however, the particular concerns about reporting burden that have been raised by smaller incumbent LECs, and we consequently decide not to pursue at this time certain options about which we requested comment in the *Data Collection NPRM*. In particular, we decide not to require filers to determine what information transfer rate an end user actually observes on his or her broadband connection, and, as discussed below, we also decide to eliminate from the form several questions about local telephone service.

14. *Broadband Data.* Based on our review of the record in this proceeding and on our experience with the Form 477, we adopt a number of modifications to the broadband data collected by the Form 477. We conclude that these modifications are necessary to ensure that we have a full picture of developing broadband deployment trends nationwide. First, we modify the Form 477 to require filers to determine what percentage of their broadband or high-speed connections are faster than 200 kbps in both directions, and to categorize these connections into five ''speed tiers'' based on the information transfer rate in the connection's faster direction: (1) Greater than 200 kbps and less than 2.5 megabits per second (mbps); (2) greater than or equal to 2.5 mbps and less than 10 mbps; (3) greater than or equal to 10 mbps and less than 25 mbps; (4) greater than or equal to 25 mbps and less than 100 mbps; and (5) greater than or equal to 100 mbps. Some comments in this proceeding assert that collecting information about connections with very high speeds (*e.g.*, above 10 mbps) would be irrelevant (*e.g.*, because connections operating at such speeds are now not generally available to consumers in the United States). As we noted in the *Fourth 706 Report*, however, we have observed some service providers offering faster and faster connections, perhaps because they are able to do so at relatively little cost, and thereby differentiate their products from competitors' slower services. As these faster services are introduced, it is vitally important that we understand the evolving dynamics of higher speed broadband availability in order to fulfill our statutory responsibilities to report about whether broadband capability is available to all Americans.

15. We also modify Form 477 to require filers to report symmetric xDSL broadband connections separately from traditional wireline (such as T-carrier) connections, and to separately report broadband connections delivered over electric power lines. Thus, we require filers to report broadband connections in the following technology categories: asymmetric xDSL, symmetric xDSL, traditional wireline (such as T-carrier), cable modem, optical carrier (fiber to the end user), satellite, terrestrial fixed wireless, terrestrial mobile wireless, electric power line, or ''all other.'' In contrast to asymmetric xDSL, symmetric xDSL is well-suited to applications, such as videoconferencing, that require high-speed capacity in the upstream path as well as the downstream path. When Form 477 was implemented, it was the Commission's understanding that symmetric xDSL service was being deployed and marketed principally to businesses, as a substitute for the more traditional T-carrier services, and the Commission therefore specified that symmetric xDSL connections should be reported along with connections over ''other traditional wireline'' technologies. We now observe that some symmetric xDSL services are being offered to residential end users. For example, while we note that information about a broad range of symmetric high-speed xDSL services appears in marketing materials, such as Web pages, that are directed to business customers, we also observe that some

relatively low priced symmetric xDSL connections are being advertised on Web pages identified specifically for residential customers. We therefore disagree with comments that it is unnecessary or meaningless to distinguish symmetric xDSL services from traditional wireline services in the data collection. We also decide to establish electric power line as a separate broadband technology category to enable us to monitor its deployment specifically.

16. Additionally, we modify Form 477 to require incumbent LECs that report DSL connections (or whose affiliates report DSL connections) to report the extent to which DSL connections are available to the residential end user premises to which the incumbent LEC offers local telephone service. Similarly, we modify Form 477 to require cable system operators that report cable modem connections (or whose affiliates report cable modem connections) to report the extent to which cable modem connections are available to the residential end user premises to which the cable system offers cable television service. We adopt these requirements in order to obtain state-level ''availability'' estimates from the major providers of the broadband services with the greatest residential acceptance in the United States to date, to better enable us to monitor the extent to which these broadband platforms are available to all Americans, and to ascertain with more precision the pattern of competition between these platforms.

17. In response to commenter concerns, we modify the availability metric that we proposed in the *Data Collection NPRM* to conform more closely with the system-wide metrics with which cable system operators are generally familiar. By relying as much as possible on such industry practices, we believe that we can collect, in a minimally burdensome manner, more-detailed information about the extent to which the widely deployed and widely utilized cable modem and DSL infrastructures are available to potential residential end users in a minimally burdensome manner. We note that residential broadband connections in service in the United States are primarily cable modem or DSL connections. Because of the relatively small numbers of residential subscribers to broadband services that are provided by means of satellite, fixed wireless, mobile wireless, optical carrier, and other technologies, at this time, we do not require providers of those services to report availability estimates. We may, however, propose to do so in the future if circumstances warrant.

18. We also modify Form 477 to require all filers that report information about wired or fixed wireless broadband connections to end user locations to report technology-specific lists of the Zip Codes *in which at least one such connection is in service*. Specifically, we require separate such lists for connections provided by mean of asymmetric xDSL, symmetric xDSL, cable modem, optical carrier (fiber to the end user), satellite, terrestrial fixed wireless, electric power line, and (as a single category) other wireline technologies. With respect to mobile wireless broadband services, which are now beginning to be deployed commercially, we note that the end user of such a service must be within a broadband service coverage area to make use of the service, but may move around within and among coverage areas. Particularly during the initial stages of commercial deployment, moreover, there may be a mismatch between the billing addresses of some early-adopter subscribers, such as persons who travel frequently on business, and the physical locations where the subscriber can actually use the service. Because of the particular characteristics of mobile services, some have argued that CMRS providers should be completely exempt from reporting broadband data on Form 477. We disagree. Rather, we acknowledge that mobile broadband services differ in particular respects from fixed broadband services and make provision for such differences in this data collection. In particular, we specify that mobile wireless service providers will report the number of subscribers to their mobile wireless broadband services. And, we require, at this time, that filers reporting mobile wireless broadband subscribers on Form 477 also provide a list of Zip Codes that best represent the filer's mobile wireless broadband coverage areas. We observe mobile wireless broadband service providers using Zip Code-based information in their own marketing initiatives, and we conclude that providing such information on Form 477 will not be overly burdensome.

19. Finally, we note that various commenters argued that the Commission did not adequately identify and justify the need for the broadband (and local competition) reporting modifications proposed in the *Data Collection NPRM*. We disagree. In the *Data Collection NPRM*, we carefully noted justifications for gathering information about broadband deployment and local telephone competition in the Form 477. We also stated that additional information ''would be extremely useful'' in identifying and tracking relevant developments, particularly in rural areas. Moreover, in the context of broadband deployment, we specifically noted ''the emergence of competing platforms to deliver high-speed services, increasing data speeds of services offered, and a steady improvement in mass-market acceptance of services.'' Our discussion of changes to the current Form 477 was clearly tied to these observations, as well as to the Commission's experience with the Form 477. We have carefully reviewed the record developed in response to these proposals, and find that it supports extending the Form 477 program with the modifications adopted in this Order. We also draw attention to the Commission's statements in its most recent Report to Congress, pursuant to section 706 of the 1996 Act, regarding the availability of broadband services in the United States. In that Report, the Commission affirmed the need to track broadband deployment in sparsely served, rural areas, as well as the need to better track the developing consumer appetite for broadband services at speeds well in excess of the Commission's current minimum 200 kbps speed. We find that all of the Form 477 modifications proposed in the *Data Collection NPRM* and adopted here derive from these two basic concerns, as well as from regulatory mandates imposed by section 706 of the Telecommunications Act of 1996 and, more generally, by the Communications Act.

20. *Local Telephone Data.* Based on our review of the record in this proceeding and our experience with the Form 477, we adopt far fewer modifications to the local telephone data reported on the form. In fact, we adopt only two. First, we modify Form 477 to require LECs to report the extent to which they are also the end user's default interstate long distance carrier. We disagree with those commenters that argued such information is not relevant for monitoring local telephone service competition. As we noted in the *Data Collection NPRM*, consumers increasingly can choose among telephone service offerings that permit both local and long distance calling, often for a single price. Indeed, it appears to us that offering combinations of services at attractive prices appears to be an important, rapidly evolving way for providers to compete by providing potential end users more, and higher value, choices. It is important for us to more precisely understand how such

bundling affects the overall development of local telephone service competition.

21. Second, we modify Form 477 to require LECs to report their use of UNE loops to serve their own end-user customers separately from their use of UNE-Platform to do so. Because the current form does not require this distinction to be made, we are not able at this time to compare data and thereby evaluate, for accuracy and completeness, the information reported to us about the numbers of UNE loops and UNE-Platform *provided to* unaffiliated carriers. Therefore, we modify the form to require LECs to report the extent to which they provision voice-grade equivalent lines to their own local telephone service customers over their own local loop facilities (or the fixed wireless last-mile equivalent), over UNE loops obtained from an unaffiliated carrier without switching, over UNE-Platform, or by reselling another carrier's services (such as Centrex or special access) or facilities obtained under commercial arrangements.

22. Finally, to simplify the form and thus minimize reporting burdens where possible, we eliminate from the Form 477 several questions about local telephone service that, in our experience, have confused filers or otherwise have provided information of limited usefulness. Specifically, we eliminate current requirements that force LECs to: (1) Estimate the types of customers unaffiliated carriers serve by means of the lines and UNE arrangements the LEC provides; (2) report the extent to which they use local loop facilities they own and UNE loops they obtain from another carrier to provision the services the LEC provides to unaffiliated carriers for resale; and (3) report information related to ''collocation'' arrangements with unaffiliated carriers.

23. We also eliminate the current requirement that LECs report on the Form 477 information about special access circuits that they provide to unaffiliated carriers or to end users. (Filers' *use* of channelized special access circuits to provide local exchange service to their own end user customers will continue to be reflected in the Form 477 data, however.) The current Form 477 collects information about the number of special access circuits provided to unaffiliated carriers or end users irrespective of the capacity of those circuits (*e.g.*, DS1, DS3, OCn), which seriously limits the usefulness of these data in evaluating the extent of competition. We may, however, consider collecting more precise information about special access services in the future if circumstances warrant. Finally, we decide not to adopt the proposal in the *Data Collection NPRM* to require mobile telephone carriers to report the extent to which they are the default interstate long distance carrier for the mobile telephone subscribers they report.

24. *Other Issues.* We will retain our current policies and procedures regarding the confidential treatment of submitted Form 477 data, including the exclusive use of aggregated data in our published reports. Moreover, we have decided not to adopt a different approach with regard to historical data. Almost all commenters supported our current data protection policies, and most argued that even historical data remains competitively sensitive. We believe our current policies and procedures afford more than adequate protection to any entity submitting competitively sensitive information in the Form 477. We will continue, however, our current practice of publishing most of the local telephone information reported by the Bell operating companies after consultation with the individual companies.

25. Because filers submitting Form 477 data routinely assert that some or all such data are competitively sensitive, we see no need to continue to require them to provide a separate, redacted file. Accordingly, we eliminate that requirement. We expect that this action by itself will substantially reduce the reporting burden imposed on a large number of individual filers.

26. We also decide to retain our current policies and procedures regarding the sharing of Form 477 data with state commissions. Such data sharing only occurs where state entities formally declare to us that they are willing and able to treat submitted information subject to restrictions on data release that are at least as stringent as federal requirements. Commenters generally do not oppose continuing data-sharing arrangements on these terms.

27. Upon careful consideration of the record in this proceeding, we decline to adopt certain modifications proposed or discussed in the *Data Collection NPRM*. We decide not to modify Form 477 to require filers to categorize broadband connections according to information transfer rate (speed) that is actually observed by the end user of the broadband connection. The record of this proceeding does not identify a methodology or practice that currently could be applied, consistently and by all types of broadband filers, to measure the information transfer rates actually observed by end users. Moreover, we expect broadband service providers to be mindful of general consumer protection law and to advertise their services with sufficient accuracy to enable end users to select the offering—as distinguished by ''speed tier'' and other features—that best fits the end user's needs and budget.

28. We also decide not to require filers to report the number of broadband connections, by technology, in particular Zip Codes, or to report, for each Zip Code, any information about the number of connections provided in various ''speed tiers.'' Rather, by requiring filers to report technology-specific lists of broadband Zip Codes in the modified Form 477—and removing the reporting threshold to require all facilities-based broadband providers to report—we believe we will substantially enhance our ability to monitor the deployment of established and emerging broadband platforms. Moreover, the comments of several broadband providers asserted that developing the software and systems necessary to generate such Zip Code-level data would impose a large burden on the filer's financial and personnel resources, or would require a number of months to implement. Accordingly, we decline to require broadband providers to report this level of detail at this time. We continue to recognize, however, that the presence of reported subscribers in a Zip Code does not necessarily mean service is available throughout the Zip Code, and we may revisit our decisions about reporting detailed Zip Code-level data in the future. To this end, we direct the Wireline Competition Bureau to assess more fully the extent to which our Zip Code data adequately reflect the availability of service throughout a Zip Code and to report its conclusions in the next section 706 report.

29. Similarly, we also decide not to adopt at this time any additional requirements that were not specifically proposed in the *Data Collection NPRM*. For example, we decide not to require broadband providers to report information about the prices at which they offer broadband services to end users in particular Zip Codes, to require mobile telephone carriers to estimate the percentage of wireless subscribers that use their service as a replacement for traditional landline service, or to require entities to report data according to city boundaries. We are not convinced at this time that potential benefits derived from collecting these additional data outweigh their associated costs.

Procedural Matters

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Data Collection NPRM* (Notice). The Commission sought written public comment on the proposals in the Notice, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

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

2. The Commission initiated this rulemaking and made specific proposals to improve its Form 477 local competition and broadband data-gathering program and to extend the program for five years beyond its currently designated sunset in March 2005. The Commission adopted the Form 477 in the Spring of 2000 to help the Commission and the public understand the extent of local telephone service competition and broadband services deployment, which is important to the nation's economic, educational, and social well-being. The decisions reached in this Order will further that goal while minimizing burdens on marketplace competitors and innovators, as well as small businesses.

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

3. In the IRFA, we stated that we would seek to minimize the burden imposed on smaller entities by establishing requirements for reporting that balanced the needs of the Commission to receive data on the development of local competition and deployment of broadband against the burden such reporting places on smaller entities. In response to the Notice, the Commission received comments from 14 parties and reply comments from 7 parties. In addition, the Office of Advocacy, U.S. Small Business Administration (SBA), Verizon and the Vermont Public Service Department (VPSD) made *ex parte* presentations. Among those parties, only the SBA, the National Cable Television Association (NCTA), the National Telecommunications Cooperative Association (NTCA), and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) commented specifically on the IRFA. We note that many other commenters raised issues about the proposed rules and we encourage readers of this FRFA to consult the complete text of this Order, which describes in detail our analysis of commenter proposals.

4. In its *ex parte* presentation regarding the IRFA, the VPSD made recommendations to simplify the expanded Form 477 proposed in the Notice. In its *ex parte* presentation, SBA recommends that the Commission consider less burdensome alternatives for small carriers, such as simplifying the proposed Form 477 or establishing a ''short form or Form 477–EZ'' for small carriers previously exempt from reporting. OPASTCO stated that the Commission's estimated time to complete the proposed Form 477 of 15 hours is understated, and that the real number is 23 to 28 hours. NTCA agreed with OPASTCO and urged the Commission to develop a new Form 477 that will reduce the amount of information required from small carriers and take 30 minutes or less to complete. NTCA further stated that the lowering or removing of the current threshold exemption would result in an unwarranted burden on small carriers. NCTA further recommended that the Commission establish a new threshold of ''not lower than 100 broadband lines per state'' to reduce that burden, while at the same time achieving the Commission's objectives.

5. In an effort to balance the needs of the Commission with the costs our data gathering may place on smaller entities, the Commission has taken the suggestions of OPASTCO, NTCA and the SBA and simplified the Form 477 proposed in the Notice. By doing so, we will lessen the burden on all entities required to submit reports. We believe that these modifications satisfy SBA's request that we significantly reduce the burdens for those small entities that must comply. Moreover, we conclude that these modifications will allow the Commission to comply with Congress' charge in section 706 of the 1996 Act to determine whether advanced telecommunications capability, commonly known as ''broadband,'' is being deployed to *all* Americans. In order to gain the comprehensive understanding—as called for in section 706—of the broadband market, particularly in rural and inner-city areas and among demographic groups that are traditionally underserved, it is necessary to gather data from entities that are most likely to serve these areas and groups, which includes some smaller entities.

6. Among the other actions taken to reduce the overall burden on small entities, we retain the ''decoupled'' feature where the broadband and local competition reporting requirements are separate on the Form 477. Thus, we reduce reporting burdens on traditionally smaller providers by only requiring data that covers services they actually offer.

7. To further reduce the potential burden this data gathering program may place on smaller entities, we retain several of the time-saving and burden-reducing features of the original Form 477. Specifically, the report frequency remains semiannual. We still require carriers to report information about broadband connections and local telephone services on a state-by-state basis. To supplement this information, we ask providers of broadband connections and local exchange services to provide lists of the Zip Codes in which they serve at least one customer. Finally, we reaffirm that this reporting scheme continues to offer the best balance of our need to achieve geographically disaggregated information while minimizing burdens on all entities, including small entities.

8. Overall, we believe that our approach (*e.g.*, simplifying the form and retaining the burden-reducing features of the original Form 477) will result in a program that is not overly burdensome on reporting entities, and thus balances the concerns raised by SBA and other commenters with the Commission's need to gain a better understanding of developments in these markets.

III. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

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

10. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, is the data that the Commission publishes in its *Trends in Telephone Service* report. The SBA has developed

small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers, Paging, and Cellular and Other Wireless Telecommunications. Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

11. We have included small incumbent local exchange carriers (LECs) in this present RFA analysis. As noted above, 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 LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

12. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year. Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more. Thus, under this size standard, the great majority of firms can be considered small.

13. *Incumbent Local Exchange Carriers (ILECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,310 carriers reported that they were engaged in the provision of local exchange services. Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

14. *Competitive Local Exchange Carriers (CLECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to ''Other Local Exchange Carriers,'' all of which are discrete categories under which TRS data are collected. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 563 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 563 companies, an estimated 472 have 1,500 or fewer employees and 91 have more than 1,500 employees. In addition, 37 carriers reported that they were ''Other Local Exchange Carriers.'' Of the 37 ''Other Local Exchange Carriers,'' an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and ''Other Local Exchange Carriers'' are small entities that may be affected by the rules and policies adopted herein.

15. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 281 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of these 281 companies, an estimated 254 have 1,500 or fewer employees and 27 have more than 1,500 employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

16. *Cellular Licensees.* The SBA has developed a small business size standard for Cellular and Other Wireless Telecommunication, which consists of all such firms having 1,500 or fewer employees. According to Census bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this size standard, the majority of firms can be considered small.

17. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined ''small entity'' for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For Block F, an additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.'' These standards defining ''small entity'' in the context of broadband PCS auctions have been approved by the SBA. No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses. Based on this information, the Commission concludes that the number of small broadband PCS licenses will include the 90 winning C Block bidders, the 93 qualifying bidders in the D, E, and F Block auctions, the 48 winning bidders in the 1999 re-auction, and the 29 winning bidders in the 2001 re-auction, for a total of 260 small entity broadband PCS providers, as defined by the SBA small business size standards and the Commission's auction rules. Consequently, the Commission estimates that 260 broadband PCS providers are small entities that may be affected by the rules and policies adopted herein.

18. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, ''small businesses'' were entities

with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's rules. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

19. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This standard provides that such a company is small if it employs no more than 1,500 persons. According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard.

20. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz Third Report and Order, we adopted a small business size standard for ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business size standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.

21. *Fixed Microwave Services.* Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

22. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico. There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for ''Cellular and Other Wireless Telecommunications'' services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.

23. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A ''small business'' is an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as ''very small business'' entities, and one that qualified as a ''small business'' entity. We conclude that the number of geographic area WCS licensees affected by this analysis includes these eight entities.

24. *Satellite Services.* The SBA has developed a small business size standard for Satellite Telecommunications, which consists of all such firms having $12.5 million or less in annual receipts. According to Census Bureau data for 1997, in this category there was a total of 324 firms

that operated for the entire year. Of this total, 273 firms had annual receipts of under $10 million, and an additional twenty-four firms had receipts of $10 million to $24,999,999. Thus, under this size standard, the majority of firms can be considered small.

25. In addition to the estimates provided above, we consider certain additional entities that may be affected by the data collection from broadband service providers. Because section 706 requires us to monitor the deployment of broadband regardless of technology or transmission media employed, we anticipate that some broadband service providers will not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

26. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has defined a small business size standard for Cable and other Program Distribution, consisting of all such companies having annual receipts of no more than $12.5 million. According to Census Bureau data for 1997, there were 1,311 firms in the industry category Cable and Other Program Distribution, total, that operated for the entire year. Of this total, 1,180 firms had annual receipts of $10 million or less, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Thus, under this standard, we estimate that the majority of providers in this service category are small businesses.

27. *Cable System Operators (Rate Regulation Standard).* The Commission has developed, with SBA approval, its own definition of a small cable system operator for purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. The Commission's rules define a ''small system,'' for purposes of rate regulation, as a cable system with 15,000 or fewer subscribers. The Commission does not request nor does the Commission collect information concerning cable systems serving 15,000 or fewer subscribers, and thus is unable to estimate, at this time, the number of small cable systems nationwide.

28. *Cable System Operators (Telecom Act Standard).* The Communications Act, as amended, also contains a size standard for a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

29. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

30. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers. The license terms require the licensees to build their wireless facilities within ten years of the grant. As a result, more information on the licensees will become available in the year 2008, when the licensees are required to show the Commission that they have achieved substantial service as part of the application renewal process.

31. *Electric Power Generation, Transmission and Distribution.* This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the

following activities: (1) Operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer. The SBA has developed a small business size standard for the category of Electric Power Generation, Transmission and Distribution. Under that standard, a firm is small if, including its affiliates, its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. According to Census Bureau data for 1997, there were 1,519 firms in this category that operated for the entire year. Census data do not track electric output and we have not determined how many of these firms fit the SBA definition for small, with fewer than 4 million megawatt hours of electric output. Consequently, the Commission estimates that all 1,519 firms may be considered small by the SBA definition.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

32. The Order extends the data collection for five years and adopts changes to the Form 477 that will affect reporting, recordkeeping, and other compliance requirements. The Order requires all facilities-based providers of broadband connections to end users to report broadband data, all LECs to report local telephone service data, and all mobile telephone carriers to report mobile telephone data. The other changes to the Form 477 are described below.

33. The Form 477 changes:

- Require cable systems that use (or whose affiliates or agents use) the cable system's own plant to provide broadband cable modem connections also to report a best estimate of the extent to which those connections are available to the residential end user premises to which the cable system offers cable programming service.
- Require ILECs that use (or whose affiliates or agents use) the ILEC's own telephone plant to provide broadband DSL connections also to report a best estimate of the extent to which those connections are available to the residential end user premises to which the ILEC provides local telephone service.
- Require filers to report the percentage of connections that have information transfer rates exceeding 200 kilobits per second (kbps) in both directions and rates in the faster direction that are, respectively: (1) Greater than 200 kbps and less than 2.5 megabits per second (mbps); (2) greater than or equal to 2.5 mbps and less than 10 mbps; (3) greater than or equal to 10 mbps and less than 25 mbps; (4) greater than or equal to 25 mbps and less than 100 mbps; and (5) greater than or equal to 100 mbps. (In the current Form 477 program, filers report the percentage of connections that are faster than 2 mbps in both directions.)
- In place of the previous requirement that all filers report broadband connections over ''other traditional wireline including symmetric xDSL technology'' at the end user location, require filers to report broadband connections separately for ''symmetric xDSL'' and ''traditional wireline such as T-carrier'' technologies.
- Require filers to report Zip Code lists separately for asymmetric xDSL, symmetric xDSL, cable modem, optical carrier (fiber to the end user), satellite, terrestrial fixed wireless, terrestrial mobile wireless, electric power line, and (as a single category) other technologies. (In the current Form 477 program, filers report a single list of Zip Codes in which the filer has at least one subscriber to broadband service without indicating the type of technology used.)
- Require filers to estimate the percentage of reported broadband connections that have information transfer rates exceeding 200 kbps in both directions, and that connect to residential end user premises.
- Require reporting competitive LECs explicitly to distinguish their use of unbundled network element (UNE) loops from their use of the UNE-Platform, and explicitly to report the extent to which they provide telephone service lines by reselling another carriers' services (such as Centrex or special access) or facilities obtained under commercial arrangements. (In the current Form 477 program, competitive LECs report their use of all types of UNEs together, and competitive LECs' use of resold service and facilities obtained under commercial arrangements must be estimated, as a residual, from other data they report.)
- Remove the requirement, in the current Form 477 program, that LECs must estimate the types of customers unaffiliated carriers serve by means of the services and facilities the LEC provides under ''Total Service Resale'' arrangements, other resale arrangements, or as unbundled network elements (UNEs).
- Remove the requirement, in the current Form 477 program, that LECs must report the extent to which they use local loop facilities that they own and UNE loops that they obtain from another carrier to provision the services they provide to unaffiliated carriers for resale.
- Remove the requirement, in the current Form 477 program, that LECs must report information related to their ''collocation'' arrangements with unaffiliated carriers.
- Require LECs report the extent to which they are also the end user's default interstate long distance carrier.

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

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

35. We have had the benefit of four year's experience since the adoption of the original Form 477 reporting program. Accordingly, in the Notice, we sought comment on ways that the Commission might improve this data gathering effort. The Notice asked whether the collection of more granular data would enhance the Commission's ability to understand the status and degree of broadband deployment pursuant to section 706 of the 1996 Act. At the same time, the Notice asked for comment on ways by which the Commission can limit burdens imposed on providers, particularly with regard to smaller providers that may have limited resources, prevent the dissemination of competitively-sensitive information, and limit the data collection, wherever possible, to information that providers routinely keep in the ordinary course of business or that is easily derived from their records. The proposed changes to the Form 477 set forth in the Notice would minimize additional reporting burden by (1) focusing direct questions about service availability on the two major residential high-speed services and (2) allowing providers of those services to estimate state-level service availability using methodologies they may already employ to inform the investment community about system-wide service availability. As a practical

matter, any additional reporting burdens on small entities should be minimal. The few small facilities-based broadband service providers that currently file Form 477 on a voluntary basis find that only a few questions apply to their situation.

36. The Notice asked whether eliminating—or lowering—the reporting threshold for broadband data (*i.e.*, at least 250 high-speed lines (or wireless channels) in a state connecting end users to the Internet) would yield significantly improved data about broadband deployment, particularly in rural areas, and requested that parties identify with specificity any associated burdens. The Notice similarly asked about the benefits and specific associated burdens of lowering the reporting threshold for local telephone competition data (*i.e.*, at least 10,000 local telephone service lines (or wireless channels), or at least 10,000 mobile telephone service subscribers, in a state). At the same time, the Notice expressly stated the Commission's desire and intention to work closely with service providers, including small entities, to minimize burdens wherever possible, particularly for smaller providers that may have limited resources.

37. In the Order, we take several significant steps to minimize the burdens of reporting broadband information on small entities. First, we simplify the new Form 477 from the one proposed in the Notice. We expect that this simplification will reduce the time and administrative burden to all carriers, including small entities. Next, we eliminate the proposed requirements for carriers to report the number of broadband connections, by technology, in particular Zip Codes, or to report, for each Zip Code, any information about the number of connections provided in various ''speed tiers.''

38. In this Order, we also take several significant steps to minimize the burdens of reporting local telephone service data. We do this by eliminating several reporting requirements of the original Form 477. In the new and simplified Form 477, LECs are no longer required to report information about how they provision the wholesale local telephone service connections that they report they provide to unaffiliated carriers. Also, we no longer require LECs to report information about how they provision unbundled network elements (UNEs) that they report they provide to unaffiliated carriers. We will also no longer require LECs to report information about special access circuits that they provide. To the extent that carriers (*e.g.*, competitive LECs) obtain special access circuits, or private line circuits, from unaffiliated LECs and use them to provision switched access lines to their own end-user customers, however, they will continue to include, in their own Form 477 filings, the switched access lines that they provision in this manner.

39. To further simplify the filing process and reduce the administrative burdens on all carriers, we will no longer require filers to provide a separate, redacted file when the filer requests confidential treatment of reported data. The new and simplified Form 477 promulgated by this Order will continue to enable filers to request confidential treatment of their data by using a drop-down box located on the first page of the Form 477 to indicate that claim. Then, if the Commission receives a request for, or proposes the disclosure of, information reported on that particular Form 477, the filer will be notified and afforded the opportunity to make the necessary showing that the data should not be disclosed. We will continue the current practice of releasing only aggregated broadband information in our published reports to protect against release of filer-specific information directly or indirectly, as might occur, for example, if published aggregates could be compared to redacted files.

VI. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

40. The FCC Form 477 promulgated in this Order and the FCC Form 325 (Annual Report of Cable Systems) collect data on cable modem and cable-telephony service subscribers. The Form 325, however, focuses on cable physical system (PSID) data. A Form 325 is required from each PSID that has at least 20,000 subscribers and from a random sample of PSIDs that have fewer than 20,000 subscribers. The data are associated on the form with other aspects of physical system operation to give a complete picture of related aspects of PSID operation. By contrast, the requirement to report cable modem service connections on Form 477 applies to holding companies whose subsidiaries and affiliates provide high-speed connections to end users in a particular state, and the requirement to report cable-telephony lines applies when the holding company provides local telephone service lines in a particular state. Form 325 collects information based on operations as of a typical day in the last full week of June. Form 477 collects data as of June 30 and December 31. In the new Form 477 promulgated by this Order, facilities-based providers report information about high-speed connections on Form 477, which, for its intended purposes, focuses on and is analyzed on a holding company rather than PSID basis.

Ordering Clauses

Accordingly, *it is ordered* that, pursuant to sections 1–5, 10, 11, 201–205, 215, 218–220, 251–271, 303(r), 332, 403, 502, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 151–155, 160, 161, 201–205, 215, 218–220, 251–271, 303(r), 332, 403, 502, and 503, and pursuant to section 706 of the Telecommunications Act of 1996, 47 U.S.C. 157nt, this ORDER, with all attachments, is hereby adopted.

The rules in this document contain information collection requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date.

It is further ordered that providers subject to the requirements and regulation established in this Order shall complete and file the amended Local Telephone Competition and Broadband Reporting Form (FCC Form 477) no later than September 1, 2005, and semiannually thereafter.

It is further ordered that the Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of the Local Telephone Competition and Broadband Reporting ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FCC Form 477 and Instructions

BILLING CODE 6712–01–P

FCC Form 477 -- Local Telephone Competition and Broadband Reporting **Cover Page: Name & Contact Information** OMB NO: 3060-0816

EXPIRATION DATE: __/__/____

All filers must complete Items 1 through 8 of this Cover Page. **Data as of:** June 30, 2005

Review Instructions before completing this form. Instructions are posted at:
http://www.fcc.gov/Forms/Form477/477instr.pdf

1. Company.

2. Filers must report data for ILEC and non-ILEC operations on separate forms.
Use the following drop-down box to indicate whether this worksheet contains data for ILEC or for non-ILEC operations.
Click and select from drop-down list

3. Use the following drop-down box to select the name of your parent or controlling entity. If you are not affiliated with any other filer, select your company name. Select "not shown" if no appropriate name appears in the list. See Instructions section IV.B.1 for information on preparing file names.
Click and select from drop-down list

If you selected "not shown" above, then provide the following:
Parent or controlling entity name (if none, enter company name).

4. Filers must report data for different states in separate forms.
State. Click and select from drop-down list

5. Contact person (person who prepared the data contained below).

6. Contact person telephone number and email address.
Phone.
Email.

7. Indicate whether this is an original or revised filing.
Click and select from drop-down list

8. Indicate whether you request non-disclosure of some or all of the information in this file because you believe that this information is privileged and confidential and public disclosure of such information would likely cause substantial harm to the competitive position of the filer.
Click and select from drop-down list

Reminders:

1) Ensure files are virus free by using up-to-date virus detection software. Filers are encouraged to submit files via email (address: FCC477@fcc.gov).

2) If you are filing original or revised data for an earlier semi-annual reporting period, do not use this particular form (which is only for data as of June 30, 2005). See reminder 4.

3) You may not insert or delete columns or rows, move cells, or edit text or numbers outside the cells provided for data entries. Filers will be required to correct and resubmit any files that cannot be opened in EXCEL2002, any files whose structure has been altered, and any files with improper names.

4) If you have questions about the form, contact the Wireline Competition Bureau, Industry Analysis and Technology Division at (202) 418-0940; via email at 477INFO@fcc.gov; or via TTY at (202) 418-0484.

5) You must submit a Certification Statement signed by an officer of your company. A single statement may cover all files submitted. See Instructions sections IV & V.

6) Name your files as specified in Instructions section IV.B.1. To assist you, complete this Cover Page to generate an "example" name, below. Replace the character "#" in this example name with a sequence number as specified in Instructions. This number should be "1" unless using "1" would cause you to submit more than one file with the identical file name.

Example >>> SST#J05name.XLS

FCC Form 477 -- Local Telephone Competition and Broadband Reporting **Part I: Broadband**

OMB NO: 3060-0816

EXPIRATION DATE: __/__/____

Complete Part I.A if you provide one or more lines or wireless channels in the state that connect end users to the Internet at information transfer rates exceeding 200 kbps in at least one direction. For this purpose, include connections provided over your own local loop facilities or over lines or wireless channels you provisioned to enable information transfer at the end user location at rates exceeding 200 kbps in at least one direction. See Instructions for definitions of "broadband", "end user", "own local loop facilities", and "residential end user premises".

If you complete Part I.A, you must provide in Part V specified lists of 5-digit Zip Codes. See Instructions.

Do not report anywhere in the form any high-capacity connections between two locations of the same end user customer, ISP or communications carrier.

Data as of June 30, 2005

I.A. Lines and wireless channels connecting end users to the Internet that you provided over your own local loop facilities, or over UNE loops or other lines and wireless channels that you obtained from unaffiliated entities and equipped as broadband, categorized by technology at the end user location.

	(a)	Percentages of lines and wireless channels reported in (a), and									
		(b)	(c)	(d)	That have information transfer rates exceeding 200 kbps in both directions, and: (e)	(f)	(g)	(h)	(i)	(j)
	Total connections to end users (information transfer rates exceeding 200 kbps in at least one direction)	Provided to residential end user premises	Provided over your own local loop facilities or the wireless last-mile equivalent	Billed (or incorporated in a service billed) to end users by you, or your affiliates or agents	Provided to residential end user premises	Have information transfer rates in the faster direction greater than 200 kbps and less than 2.5 mbps	Have information transfer rates in the faster direction greater than or equal to 2.5 mbps and less than 10 mbps	Have information transfer rates in the faster direction greater than or equal to 10 mbps and less than 25 mbps	Have information transfer rates in the faster direction greater than or equal to 25 mbps and less than 100 mbps	Have information transfer rates in the faster direction greater than or equal to 100 mbps
I - 1. Asymmetric xDSL.										
I - 2. Symmetric xDSL.										
I - 3. Traditional wireline such as T-carrier.										
I - 4. Cable modem.										
I - 5. Optical carrier (fiber to the end user).										
I - 6. Satellite.										
I - 7. Terrestrial fixed wireless (licensed or unlicensed).										
I - 8. Terrestrial mobile wireless (licensed or unlicensed).										
I - 9. Electric power line.										
I - 10. All other technologies. Report specific technology and the corresponding number of connections in the comment section of Part IV.										

Note: In Part I.A, report actual counts of connections. Do not report voice-grade equivalent measures.

OMB NO: 3060-0816
EXPIRATION DATE: __/__/____

Complete Part I.B **ONLY IF** you are an ILEC (or an affiliate of an ILEC) that is reporting asymmetric or symmetric xDSL connections in Part I.A **OR** you are a cable system (or an affiliate of a cable system) that is reporting cable modem connections in Part I.A.

For the purposes of completing Part I.B:

(1) "Residential end user premises" include residential living units, individual living units in such institutional settings as college dormitories and nursing homes, and other end user locations to which you (including affiliates and agents) market broadband services that are primarily designed for residential use.

(2) The "service area" of an ILEC consists of those residential end user premises to which the ILEC can deliver telephone service over local loop facilities (or the fixed-wireless last mile equivalent) that it owns.

(3) The "service area" of a cable system consists of those residential end user premises to which the system can deliver cable service over cable plant that it owns.

		(a) Estimated % of residential end user premises
I.B.	Report your best estimate of the percentage of residential end user premises in your service area, in this state, to which your broadband connections could be provided using installed distribution facilities.	
I - 11.	Providers of xDSL (asymmetric or symmetric) connections should base responses on the service area of the affiliated ILECs.	
I - 12.	Providers of cable modem connections should base responses on the service area of the affiliated cable systems.	

FCC Form 477 -- Local Telephone Competition and Broadband Reporting **Part II: Wireline and Fixed Wireless Local Telephone** OMB NO: 3060-0816

EXPIRATION DATE: __/__/____

Complete Part II if you provided one or more voice-grade equivalent lines or wireless voice-grade equivalent channels used for local exchange or exchange access service in the state. See Instructions about including lines provisioned over channelized high-capacity facilities, including PRI circuits used to provide local connectivity to dial-up ISPs. Also see Instructions for definitions of "voice telephone service", "voice-grade equivalent", "end user", "residential lines", "default interstate long distance carrier", "own local loop facilities", and "UNE-Platform".

If in Part II you report voice-grade equivalent lines or voice-grade equivalent wireless channels for service provided to end users, you must provide in Part V a list containing the 5-digit Zip Codes of the locations to which you provide those lines or channels. See Instructions.

Do not report anywhere in the form special access lines or any high-capacity connections between two locations of the same end user customer, ISP or communications carrier. Note that competitive LECs (CLECs) typically do not provide either Total Service Resale or UNE arrangements. Therefore, on Line II-3 of Part II, CLECs typically report any wholesale switched voice lines and channels sold to unaffiliated communications carriers.

Data as of June 30, 2005

	(a) Total voice-grade equivalent lines and voice-grade equivalent wireless channels in service	Percentages of lines and wireless channels reported in (a)								
		(b) Residential lines	(c) For which you (including affiliates) are the default interstate long distance carrier	(d) Residential lines for which you (including affiliates) are the default interstate long distance carrier	(e) Provided over your own local loop facilities or the fixed wireless last-mile equivalent	(f) Provided over UNE loops obtained without UNE switching	(g) Provided over UNE-Platform	(h) Provided by reselling another carrier's service (including Centrex/Centron or channelized special access service)	(i) Provided over coaxial cable at the end user premises ("cable telephony")	(j) Provided over fixed wireless at the end user premises
II.A. Voice telephone service provided to end users.										
II - 1. Total lines and channels you provided to end users.										
II.B. Voice telephone service that you provided to unaffiliated communications carriers, categorized by:										
II - 2. Lines and channels you provided to unaffiliated communications carriers under Total Service Resale arrangements.										
II - 3. Lines and channels you provided to unaffiliated communications carriers under other resale arrangements, such as resold Centrex or resold channelized special access service.										
II.C. UNE loops that you provided to unaffiliated communications carriers, categorized by:	Total lines and wireless channels									
II - 4. Lines and channels that you provided to unaffiliated communications carriers under a UNE loop arrangement, where you did not provide switching for the line.										
II - 5. Lines and channels that you provided to unaffiliated communications carriers under a UNE loop arrangement, where you also provided switching for the line ("UNE-Platform").										

FCC Form 477 -- Local Telephone Competition and Broadband Reporting **Part III: Mobile Local Telephone** OMB NO: 3060-0816

EXPIRATION DATE: __/__/____

Complete Part III if you serve one or more mobile voice telephony subscribers in the state over your own facilities. See Instructions for definitions of "mobile voice telephony subscribers" and "own facilities".

Data as of June 30, 2005

	(a) Network telephone service subscribers	(b) Percentage of subscribers reported in (a) that are directly billed or pre-paid subscribers
III.A. Mobile voice telephony subscribers in service and served over your own facilities. (Include directly billed subscribers, pre-paid subscribers, and subscribers served via resellers.)		
III - 1. Cellular, PCS and other mobile telephony.		

Note: In Part III, count a subscriber as a mobile handset, car-phone or other revenue-generating active voice unit that has a unique phone number and that can place and receive calls from the public switched network. Subscriber counts by state should be based on the area codes of the phone numbers provided to subscribers.

FCC Form 477 -- Local Telephone Competition and Broadband Reporting Part IV: Explanations and Comments

OMB NO: 3060-0816

EXPIRATION DATE: __/__/____

Space for comments or explanatory notes.

Part	Line	Comment

BILLING CODE 6712-01-C

FCC Form 477 -- Local Telephone Competition and Broadband Reporting **Part V: Zip Code Listings**

OMB NO: 3060-0816

EXPIRATION DATE: __/__/____

Filers reporting broadband connections (Part I) must supply lists of the 5-digit Zip Codes in which the filer provided each type of broadband connection reported in Part I, **except that**: (1) filers reporting mobile wireless broadband connections must report in column (g) the Zip Codes that best represent the "coverage area" in which the filer's mobile wireless broadband service was deployed and offered for sale to end users; and (2) the traditional wireline and other categories are combined in column (i).

Filers reporting voice telephone service provided to end users (Line II-1 of Part II) must provide in column (j) a list of the Zip Codes in which the filer provided such service.

V - 1. 5-digit Zip Codes, in the state, that are associated with the information reported in Part I and Part II, as specified herein. (Do not provide customer counts by Zip Code.)

Data as of June 30, 2005

	Broadband connections reported in Part I									Telephone service reported in Part II
	(a) Asymmetric xDSL	(b) Symmetric xDSL	(c) Cable modem	(d) Optical carrier (fiber to the end user)	(e) Satellite	(f) Terrestrial fixed wireless	(g) Terrestrial mobile wireless	(h) Electric power line	(i) Other including traditional wireline	(j) Wireline and fixed wireless exchange telephone
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FCC Form 477, Instructions for September 1, 2005 Filing (of data as of 6/30/05)

OMB No: 3060–0816; Expiration Date: xx/xx/xxxx.

Estimated Average Burden Hours Per Response: 10 Hours.

Instructions for Local Telephone Competition and Broadband Reporting Form (FCC Form 477)

I. Purpose

FCC Form 477 collects information about broadband connections to end user locations, and about wired and wireless local telephone services, in individual states. The term ''state'' includes the District of Columbia and the ''Territories and possessions'' (*see* 47 U.S.C. 153(40)). Data obtained from this form will be used to describe the deployment of broadband infrastructure and competition to provide local telecommunications services. *See Local Telephone Competition and Broadband Reporting*, Report and Order, FCC 04–266 (rel. Nov. 12, 2004) for additional information about this data collection.

II. Who Must File This Form?

Three types of entities must file this form. For purposes of this information collection, the term ''entity'' (and synonyms used in these instructions) includes all commonly-controlled or commonly-owned affiliates. (*See* 47 U.S.C. 153(1) (establishing a 10 percent equity interest, or the equivalent thereof, as indicia of ownership.))

- Facilities-based Providers of Broadband Connections to End User Locations: Entities that are facilities-based providers of broadband connections—which, for purposes of this information collection, are wired ''lines'' or wireless ''channels'' that enable the end user to receive information from and/or send information to the Internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction—must complete and file the applicable portions of this form for each state in which the entity provides one or more such connections to end user locations. For the purposes of Form 477, an entity is a ''facilities-based'' provider of broadband connections to end user locations if it owns the portion of the physical facility that terminates at the end user location, if it obtains unbundled network elements (UNEs), special access lines, or other leased facilities that terminate at the end user location and provisions/equips them as broadband, or if it provisions/equips a broadband wireless channel to the end user location over licensed or unlicensed spectrum. Such entities include incumbent and competitive local exchange carriers (LECs), cable system operators, fixed wireless service providers (including ''wireless ISPs''), terrestrial and satellite mobile wireless service providers, MMDS providers, electric utilities, municipalities, and other entities. (Such entities do not include equipment suppliers unless the equipment supplier uses the equipment to provision a broadband connection that it offers to the public for sale. Such entities also do not include providers of fixed wireless services (*e.g.*, ''Wi-Fi'' and other wireless ethernet, or wireless local area network, applications) that only enable local distribution and sharing of a premises broadband facility.) For such entities, the applicable portions of the form are: (1) The Cover Page; (2) Part I; (3) Part IV (if necessary); and (4) The relevant portion(s) of Part V.
- Providers of Wired or Fixed Wireless Local Telephone Services: Incumbent and competitive LECs must complete and file the applicable portions of the form for each state in which they provide local exchange service to one or more end user customers (which may include ''dial-up'' ISPs). For such entities, the applicable portions of the form are: (1) The Cover Page; (2) Part II; (3) Part IV (if necessary); and (4) Column (j) of Part V.
- Providers of Mobile Telephony Services: Facilities-based providers of mobile telephony services (*see* 47 CFR 20.15(b)(1)) must complete and file the applicable portions of this form for each state in which they serve one or more mobile telephony subscribers. A mobile telephony service is a real-time, two-way switched voice service that is interconnected with the public switched network using an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless handoff of subscriber calls. A mobile telephony service provider is considered ''facilities-based'' if it serves a subscriber using spectrum for which the entity holds a license, that it manages, or for which it has obtained the right to use via lease or other arrangement with a Band Manager. For such entities, the applicable portions of this form. The applicable portions of the form are: (1) The Cover Page; (2) Part III; and (3) Part IV (if necessary).

III. Line-by-Line Instructions for Completing FCC Form 477

(Note: Key terms that appear in this section are summarized in VI. Glossary of Selected Terms Appearing on FCC Form 477.)

A. Cover Page—Name and Contact Information (All Filers Must Complete the Cover Page)

Line 1: Provide the name of the company or operations whose data are reported in this form. (If the filer has a holding company or other controlling entity with a different name, that controlling entity's name must be reported in Line 3 of the Cover Page.)

Line 2: Use the drop-down box to indicate whether the data in this form are for incumbent LEC (ILEC) operations or for non-ILEC operations. (Data for affiliated operations in a single state may be combined in a single form, except that filers may not combine data for ILEC operations with data for non-ILEC operations.)

Line 3: Use the drop-down box to select the single name, such as a holding company name, that identifies all commonly-owned or commonly-controlled entities that are filing Form 477. (If the appropriate name is not included in the provided list, enter the appropriate name in the space provided. If you have no holding company or other controlling entity, enter in Line 3 the same name as you entered in Line 1 of the Cover Page.)

Line 4: Use the drop-down box to select the state for which data are reported in this form. (You may not combine, in a single form, data for operations in more than one state. For example, the only data that may be reported in a ''headquarters state'' form are data for operations within that specific state.)

Line 5: Provide a contact name for the person who prepared this filing.

Line 6: Provide the telephone number and e-mail address for the contact person listed in Line 5 of the Cover Page.

Line 7: Use the drop-down box in Line 7 to indicate whether this filing is an original or a revised filing. (You must file a revised form if you discover mistakes as specified in Section IV.D. of these instructions.)

Line 8: Use the drop-down box to indicate whether you request non-disclosure of information reported in this form. You may request non-disclosure if you believe some or all of the information reported in this form is privileged and confidential and that public disclosure of such information would likely cause substantial harm to the competitive position of the filer.

B. Part I.A: Broadband

Include in Part I.A: In Part I.A., facilities-based providers of broadband connections to end user locations report information about those connections. See page 1 of these instructions for definitions of facilities-based provider and broadband connection. End users are residential, business, institutional and government entities who use broadband services for their own purposes and who do not resell such services to other entities or incorporate such services into retail Internet-access services that they market to end users. (Note that an Internet Service Provider is not an ''end user'' for purposes of Part I of FCC Form 477.) The end users of retail services delivered over the broadband connections reported in Part I.A. may be billed by the filer (including affiliates), by an agent of the filer, or by an unaffiliated entity. In categorizing lines as ''broadband,'' filers should consider the end user's authorized maximum information transfer rate (speed) on that connection. Do not convert into voice-grade equivalent measures any connections reported in Part I.A.

Exclude in Part I.A: Exclude subscribership connections for cable television service and other multi-channel video programming service; video-on-demand type service unless it is bundled with Internet-type access or uses Internet-type delivery protocols; and services that do connect to the Internet but restrict the end user to both transmitting data to the Internet and receiving data from the Internet at information transfer rates (speeds) of 200 kbps or less. Exclude connections between two locations of the same business or other end user entity (such as point-to-point connections within private or semi-private data networks or corporate telephone systems). Exclude high-capacity connections between network components within the public switched telephone network or the Internet (note that such connections do not terminate at an end user location). Exclude in Part I.A. high-capacity dedicated connections (special access circuits) between end users and interexchange (telephone) carrier points of presence.

Lines in Part I.A

Report broadband connections to end user locations on Lines A.I–1 through A.I–10 based on the technology employed by the part of the connection that actually connects to the end user location. If different technologies are used in the two directions of information transfer (downstream and upstream), report the connection in the technology category for the higher-rate direction. Count only connections that are in service, including connections over which you (including affiliates or agents) provide an Internet-access service to the end user and connections over which an unaffiliated entity (which is not your agent) provides an Internet-access service to the end user.

Line A.I–1: Report the number of broadband connections provided over asymmetric xDSL technologies. Do not convert these connections into a voice-grade equivalent measure.

Line A.I–2: Report the number of broadband connections provided over symmetric xDSL technologies. Do not convert these connections into a voice-grade equivalent measure.

Line A.I–3: Report the number of broadband connections provided over traditional wireline facilities, such as T-carrier. Do not include broadband connections provided over symmetric xDSL service, but report such connections in Line A.I–2. Do not convert these connections into a voice-grade equivalent measure.

Line A.I–4: Report the number of cable modem connections. Do not convert these connections into a voice-grade equivalent measure.

Line A.I–5: Report the number of broadband connections provided over optical carrier terminations at the end-user premises. (Note that broadband connections that are provisioned over optical fiber facilities used elsewhere in the network should not be reported in this category. For example, connections provisioned as ''fiber to the curb'' do not qualify because, by using a non-fiber ''drop,'' they are not ''fiber to the home.'') Do not convert these connections into a voice-grade equivalent measure.

Line A.I–6: Report the number of broadband connections provided over satellite facilities. Do not convert these connections into a voice-grade equivalent measure.

Line A.I–7: Report the number of broadband connections provided over terrestrial fixed wireless facilities (whether provisioned/equipped over licensed spectrum or over spectrum used on an unlicensed basis). Do not convert these connections into a voice-grade equivalent measure. (Do not report those fixed wireless services (*e.g.*, ''Wi-Fi'' and other wireless ethernet, or wireless local area network, applications) that only enable local distribution and sharing of a premises broadband facility.)

Line A.I–8: Report the number of subscribers to broadband services provided over terrestrial mobile wireless facilities (whether provisioned/equipped over licensed spectrum or over spectrum used on an unlicensed basis). Terrestrial wireless broadband providers should report the number of end users whose mobile devices, such as wireless modem laptop cards, smartphones, or handsets, are capable of sending or receiving data at speeds in excess of 200 kbps and whose billing addresses are within the areas of terrestrial mobile wireless broadband availability as reported in Part V.

Line A.I–9: Report the number of broadband connections provided over electric power lines. Do not convert these connections into a voice-grade equivalent measure.

Line A.I–10: Report the number of broadband connections provided over all other technologies. Do not convert these connections into a voice-grade equivalent measure. Note that the filer must identify each specific technology used to provide the connections reported in Line A.I–10, and the corresponding number of connections for each specific technology, in the comment section of Part IV of the form.

Columns in Part I.A

General Note about Reporting Percentage Breakouts: Parts I, II, and III of Form 477 direct filers to provide percentage breakouts for specific counts of connections. If disaggregated counts exist for another purpose, then these must be used to calculate the requested percentage breakouts. However, filers are not expected to calculate percentages based on exhaustive counts performed solely for this task. Rather, where disaggregated counts do not exist, filers may provide good faith estimates of percentages based on the best information available to the filer. For example, if there is a pricing distinction between services provided to residential end users, then billing information may be used to estimate the percentage of connections provided to such end users. In the absence of such information, however, filers should rely on studies done for other purposes such as marketing and business plan information, demographic data, etc. A filer should conduct limited special studies only in the event that it cannot provide estimates of percentage breakouts that it reasonably expects to be accurate within plus or minus five percentage points.

Column (a): Report the total number of broadband connections as described in each of Lines A.I–1 through A.I–10, above.

Column (b): Report the percentage of total connections reported in column (a) that are residential connections in the

sense that these connections are used to deliver Internet-access services that are primarily purchased by, designed for, and/or marketed to residential end users. (Such Internet-access services may differ in price, ''speed tier,'' and other features from Internet-access services that are primarily purchased by, designed for, and/or marketed to non-residential end users.)

Column (c): Report the percentage of total connections reported in column (a) that are provided over your own local loop facilities, or the wireless last-mile equivalent. Your own such facilities include wired local loop facilities that you (including affiliates) owned, wireless connections to end user locations that you (including affiliates) have provisioned/equipped over spectrum that you use on an unlicensed basis or over spectrum for which you hold a license, manage, or have obtained the right to use via lease or other arrangement with a Band Manager, and facilities you obtained the right to use from unaffiliated entities as dark fiber or satellite transponder capacity (and that you used as part of your own system). Do not include, in column (c), broadband connections to end users that you provided over UNEs, special access lines, and other leased lines that you obtained from an unaffiliated entity and equipped as broadband.

Column (d): Report the percentage of total connections reported in column (a) that are billed (or incorporated in a service billed) to end users by the filer (including affiliates) or its agents. Do not include in this percentage any lines reported in column (a) that are billed to an unaffiliated Internet Service Provider (ISP) that has incorporated the filer's broadband service into a premium Internet-access service marketed under the unaffiliated ISP's own name.

Note on columns (e)–(j) of Part I.A: The percentages reported in columns (e)–(j) of Part I.A refer, in each case, to connections that carry information, at the end user location, at information transfer rates exceeding 200 kbps in both directions. In categorizing broadband connections in this manner, filers should consider the end user's authorized maximum information transfer rate (speed) on that connection.

Column (e): Report the percentage of total connections reported in column (a) that carry information, at the end user location, at information transfer rates exceeding 200 kbps in both directions and that are residential connections in the sense that they are used to deliver Internet-access services that are primarily purchased by, designed for, and/or marketed to residential end users. (As noted in the instructions for column (b), above, such Internet-access services may differ in price, ''speed tier,'' and other features from Internet-access services that are primarily purchased by, designed for, and/or marketed to non-residential end users.)

Column (f): Report the percentage of total connections reported in column (a) that carry information, at the end user location, at information transfer rates exceeding 200 kbps in both directions and, in the faster direction, at rates greater than 200 kbps and less than 2.5 mbps.

Column (g): Report the percentage of total connections reported in column (a) that carry information, at the end user location, at information transfer rates exceeding 200 kbps in both directions and, in the faster direction, at rates greater than or equal to 2.5 mbps and less than 10 mbps.

Column (h): Report the percentage of total connections reported in column (a) that carry information, at the end user location, at information transfer rates exceeding 200 kbps in both directions and, in the faster direction, at rates greater than or equal to 10 mbps and less than 25 mbps.

Column (i): Report the percentage of total connections reported in column (a) that carry information, at the end user location, at information transfer rates exceeding 200 kbps in both directions and, in the faster direction, at rates greater than or equal to 25 mbps and less than 100 mbps.

Column (j): Report the percentage of total connections reported in column (a) that carry information, at the end user location, at information transfer rates exceeding 200 kbps in both directions and, in the faster direction, at rates greater than or equal to 100 mbps.

C. Part I.B: Broadband (continued)

Incumbent LECs that report xDSL (asymmetric or symmetric) connections in Part I.A (or whose affiliates report such connections) must complete Line B.I–11. Cable system operators that report cable modem connections (or whose affiliates report such connections) in Part I.A. must complete Line B.I–12.

Line B.I–11: Of those residential end user premises in this state to which you (including affiliates) can deliver telephone service over local loop facilities that you own (or over the fixed wireless last-mile equivalent), report your best estimate of the percentage of premises to which broadband (asymmetric or symmetric) xDSL service is also available from you (or your affiliate, or an agent of you or your affiliate) over those facilities.

Line B.I–12: Of those residential end user premises in this state to which you (including affiliates) can offer cable television service over cable plant that you own, report the best estimate of the percentage of premises to which broadband cable modem service also is available from you (or your affiliate, or an agent of you or your affiliate) over that plant.

Residential end user premises include residential living units (*e.g.*, single family dwellings and individual households in multiple dwelling units such as apartments, condominiums, mobile home parks, etc.) and also individual living units in such institutional settings as college dormitories and nursing homes. For the purposes of this data collection, residential end user premises also include other end user locations to which you (including your affiliates and agents) market broadband services that are primarily designed for residential use.

Guidance on generating a ''best estimate': Rather than setting out detailed methodologies to which filers must adhere in reporting information in Part I.B., we intend to rely on current ''best practices'' in the local exchange and cable television industries to provide us with carefully considered estimates. Filers should note the following points. (1) The reported estimate of xDSL or cable modem service availability should not require degradation, outside of normal operating parameters, of the service quality of the filer's most heavily purchased type(s) of xDSL or cable modem service. (2) Filers should take into account rule-of-thumb lessons from the experience of deploying particular broadband services in similar areas (*e.g.*, differences between actual and theoretical availability of xDSL service to end user premises in areas in which the service already has been deployed, such as may arise due from loop conditioning factors and loop lengths).

D. Part II: Wireline and Fixed Wireless Local Telephone

Include in Part II: Report lines or wireless channels (hereafter, ''lines'') that you (including affiliates) use to provide voice telephone service in this state. For purposes of this data collection, ''voice telephone service'' means local exchange or exchange access services that allow end users to originate and/or terminate local telephone calls on the public switched network, whether used by the end user for voice telephone calls or for other types of calls carried over the public switched network (for example, lines

used for facsimile equipment or lines used occasionally or exclusively for ''dial-up'' connection to the Internet). See ''Note for reporting channelized service,'' below.

Exclude in Part II: Do not report in Part II lines not yet in service, lines used for interoffice trunking, company official lines, lines used for special access service, or lines that were reported in Part I of this form. Do not report in Part II any lines that connect two locations of the same end user customer, ISP, or communications carrier. Where you are already reporting the portion of a circuit between the end user and your switching center, do not separately count the portion of that circuit between your switching center and a circuit switched, Internet protocol, or ATM network, irrespective of whether you multiplexed the circuit onto a higher-capacity facility between your switching center and that network. Note for reporting channelized service: In Part II.A and Part II.B, providers must report voice-grade equivalent lines. Count as one voice-grade equivalent line: traditional analog POTS lines, Centrex-CO extensions, and Centrex-CU trunks.

Count lines based on how they are charged to the customer rather than how they are physically provisioned. That is, when a customer is charged for channelized service, report the number of activated, charged-for channels rather than the theoretical capacity of the line. Examples: Count Basic Rate Integrated (BRI) Services Digital Network (ISDN) lines as two voice-grade equivalent lines. Count fully-channelized PRI circuits (including PRIs that are used exclusively to provide local connectivity to ''dial-up'' ISPs) as 23 voice-grade equivalent lines. But report, for example, 8 voice-grade equivalent lines if a customer is charged for 8 trunks that happen to be provisioned over a DS1 circuit. If a customer is charged for a fully-channelized DS1 circuit, however, report 24 voice-grade equivalent lines. In Part II.C, however, any high-capacity UNEs should not be reported in voice-grade equivalents. UNEs should be reported as actual circuit counts. Note for competitive LECs providing local exchange service over hybrid fiber-coaxial cable systems: If you cannot determine the number of lines from your records, you may report the number of subscribers.

Lines in Part II

In Line A.II–1 (service provided to end users) and Lines B.II–2 through B.II–3 (service provided to unaffiliated carriers for resale), report voice-grade equivalent lines used to provide voice telephone service. See ''Note for reporting channelized service,'' above.

Line A.II–1: Report total voice-grade equivalent lines that you (including affiliates and agents) provided—that is, billed—directly to end users. Include lines provided to end users by your agents or under traditional marketing arrangements; for example, include lines provided to shared-tenant service providers. Note that an Internet Service Provider (ISP) may be an end user of local exchange service lines. (For example, a ''dial-up'' ISP may purchase channelized PRI circuits so that its customers can reach it *via* a local telephone call.)

Line B.II–2: Report total voice-grade equivalent local telephone service lines that you provided to unaffiliated telecommunications carriers under a Total Service Resale arrangement (*i.e.*, provided pursuant to section 251(c)(4) of the Communications Act of 1934, as amended).

Line B.II–3: Report total voice-grade equivalent local telephone service lines that you provided to unaffiliated telecommunications carriers under other arrangements, such as Centrex/Centron or special access service, that provide the unaffiliated carrier with a connection to the end user premises and enable the unaffiliated carrier to provide local telephone service to the end user.

In Lines C.II–4 and C.II–5, report counts of circuits. Do not convert circuits to voice-grade equivalent measures.

Line C.II–4: Report the number of circuits you provided to unaffiliated telecommunications carriers under an unbundled network element (UNE) loop arrangement, where you do not provide switching for that circuit. Do not convert any high capacity circuits provided under such UNE arrangements into voice-grade equivalent measures.

Line C.II–5: Report the number of circuits you provided to unaffiliated telecommunications carriers under a UNE loop arrangement, where you also provide switching for that circuit (*i.e.*, ''UNE-Platform''). Do not convert any high-capacity circuits provided under such UNE arrangements into voice-grade equivalent measures.

Columns in Part II

Column (a): For Lines A.II–1 through B.II–3, report voice-grade equivalent lines used to provide voice telephone service, as defined above. For Lines C.II–4 and C.II–5, report the number of circuits (*i.e.*, not the voice-grade equivalent of those circuits).

Columns (b)–(j): Complete columns (b)–(j) for Line A.II–1. See also ''General note about reporting percentage breakouts,'' above.

Column (b): Report the percentage of the lines reported in column (a) that are used for residential service. Include lines provided to shared-tenant service providers in apartment buildings and similar residential settings. ILEC filers may report based on the percentage of lines reported in column (a) that are tariffed residential lines, with an appropriate adjustment for lines provided under shared-tenant service arrangements. Carriers that do not have separate residential tariffs or price lists should use marketing or other information about the demographic characteristics of the areas they serve to develop a comparable estimate, or should undertake a limited special study.

Column (c): Report the percentage of the lines reported in column (a) for which you (including affiliates) are the default interstate long distance carrier, *i.e.*, the (facilities-based or reseller) carrier to which an interstate long distance call is routed automatically, without the use of any access code by the end user.

Column (d): Report the percentage of the lines reported in column (a) that are used for residential service (as specified in the instructions for column (b), above) and for which you (including affiliates) are the default interstate long distance carrier (as specified in the instructions for column (c), above).

Column (e): Report the percentage of the lines reported in column (a) that are provided over your own local loop facilities connecting to the end user's premises. Count as your own such facilities, those wired local loop facilities you (including affiliates) own, those facilities you obtain the right to use from unaffiliated entities as dark fiber or satellite transponder capacity (and that you use as part of your own system), those fixed-wireless connections to end user premises that are deployed over spectrum for which you hold a license, manage, or have obtained the right to use via lease or other agreement with a Band Manager, or those fixed-wireless connections that are deployed over spectrum that you use on an unlicensed basis. Do not include, in column (c), lines provided over UNE loops, special access lines, or other leased lines that you obtained from an unaffiliated carrier.

Note for competitive LECs that own telephone switches: A competitive LEC should include, in column (e), a line for which it provided its own switching only if it also owned (as just discussed) the local loop facilities that connect to the end user's premises.

Column (f): Report the percentage of lines reported in column (a) that are provided over UNE loops that you obtained from an unaffiliated carrier without also obtaining UNE switching from that carrier.

Column (g): Report the percentage of lines reported in column (a) that are provided over UNE-Platform (*i.e.*, the combination of loop UNE, switching UNE, and transport UNE) that you obtained from an unaffiliated carrier.

Column (h): Report the percentage of lines reported in column (a) that are provided by reselling a telecommunications service (such as Centrex/Centron or special access) that you obtained from an unaffiliated carrier, or by using facilities that you obtained from an unaffiliated carrier under a commercial arrangement.

Column (i): Report the percentage of lines reported in column (a) that are delivered over coaxial cable facilities used in the part of the line that connects to the end user premises (''cable telephony'').

Column (j): Report the percentage of lines reported in column (a) that are delivered over fixed wireless facilities used in the part of the line that connects to the end user premises.

E. Part III: Mobile Local Telephone

Line A. III–1: Report all mobile voice telephony subscribers served over your own facilities that give customers the ability to place or receive calls from the public switched telephone network. (See column (a), below, for how to count subscribers.) Include: satellite, cellular, and PCS telephone service and other terrestrial mobile services; and, units in service that combine voice telephone with other services. Report subscribers that you (including affiliates) serve using spectrum for which you hold a license, manage, or have obtained the right to use via lease or other agreement with a Band Manager. Do not report any subscribers that you serve by reselling an unaffiliated carrier's mobile telephone service.

Note: Exclude mobile services that customers cannot use to directly place calls to subscribers of ordinary telephone service, such as dispatch services and one-way or two-way paging services. Also exclude voice services that permit communications between only a narrow range of locations such as automobile units that permit drivers to communicate only with a specific road service.

Column (a): Report the total number of mobile voice telephony subscribers in the state that are served over your own facilities. Count as a subscriber a mobile handset, car-phone, or other revenue-generating, active, voice unit that has a unique phone number and that can place and receive calls from the public switched network. Include in column (a) subscribers that you (including affiliates) bill directly (including through agents), pre-paid subscribers, and subscribers served via unaffiliated mobile telephone service resellers. Subscriber counts by state should be based on the area codes of the phone numbers provided to subscribers.

Column (b): Report the percentage of subscribers in column (a) that you bill directly (including through agents) or serve on a pre-paid basis. Do not include subscribers that are billed by an unaffiliated mobile telephone service reseller.

F. Part IV: Explanations and Comments

Filers that must report: If there is a non-zero entry in column (a) of Line A.I–10 of Part I of a form, the filer must identify each specific technology used to provide the broadband connections reported in Line A.I–10, and the corresponding number of connections for each specific technology, in the comment section of Part IV of the form.

Other filers: Complete Part IV to furnish relevant explanatory information with your data. For example, an explanation should be provided if a percentage figure has changed noticeably from earlier filings. In Part IV, filers should identify the Part and Line to which their comment applies in the columns provided.

G. Part V: Zip Code Listings

Line V–1: Report, in the appropriate column, the 5-digit Zip Codes—for this state—in which you provide at least one of the broadband connections reported in Part I.A, or at least one of the voice-grade telephone service lines provided to end users reported in Part II, Line II.A–1. Do not report line counts or subscriber counts by Zip Code.)

Column (a)–(i): If you file broadband information in Part I, you must provide, for each individual technology indicated by the column head, a list of Zip Codes in the state in which at least one of the broadband connections reported in Part I is in service—except that the Zip Codes reported in column (g) should be the Zip Codes in the state in which the mobile wireless broadband service provider's service is advertised and available to actual and potential subscribers.

Column (j): If you file local telephone service information in Part II, Line II.A–1, you must provide a list of Zip Codes in the state in which you have end user customers for your voice telephone service. (See the definition of ''voice telephone service,'' above.) Providers of mobile telephony services that report data in Part III should not report this Zip Code information.

Note: Zip Code lists reported in a form should be reviewed prior to filing to eliminate any out-of-state Zip Codes (such as may appear in Zip Code lists generated directly from billing databases).

IV. General Information

A. Where and When to File

1. When to File

- March 1st of each year: providers must file data as of December 31 of the preceding year.
- September 1st of each year: providers must file data as of June 30 of the same year.

2. Where To File

All filers must deliver to the FCC the signed, original paper copy of the Certification Statement. The Certification Statement is the single page that constitutes Section V of these instructions. Filers must deliver completed Form 477(s) to the FCC on electronic media. Paper copies of completed Form 477s may not be submitted. Acceptable electronic media are spreadsheet files attached to an e-mail message, or one or more IBM format compact discs or 3.5-inch floppy diskettes containing such files. The latter should be clearly labeled to identify contents by (at a minimum): FCC Form 477 (6/30/05 data), name of filer, and the states for which data are included. In all cases, filers should use up-to-date virus detection software to ensure that electronic media are virus-free.

Attention: The United States Postal Service (USPS) requires all First Class, Priority, and Express Mail addressed to the Zip Code in which the FCC Headquarters is located to be irradiated (cleaned) prior to delivery. Because irradiation can damage compact discs and floppy diskettes, filers are encouraged to submit Form 477 using one of the following three alternatives—preferably e-mail. (Use only one filing method; do not make duplicate filings. A filer who is unable to use one of the following delivery methods should contact the Industry Analysis and Technology Division, Wireline Competition Bureau, at (202) 418–0940 or via TTY at (202) 417–0484.)

E-mail: Filers are encouraged to deliver completed Form 477(s) as attachments to one or more e-mail messages sent to *FCC477@fcc.gov.* Filers submitting multiple files may use a zip utility to compress them. The subject field of the e-mail should contain the

phrase: FCC Form 477 due 9/1/05. If multiple e-mails must be sent, the subject line should so indicate; for example: FCC Form 477 due 9/1/05 (message 1 of 3). Filers submitting Form 477(s) by e-mail may deliver the signed, original paper copy of the Certification Statement by USPS first-class mail addressed to: FCC FORM 477 (ATTN: WCB/IATD, Room 6–A220), Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. (Alternatively, filers may deliver the signed, original copy of the Certification Statement by one of the following methods.)

Overnight delivery service other than USPS Express Mail or Priority Mail: Compact discs, or floppy diskettes, containing completed Form 477(s)—accompanied by the signed, original copy of the Certification Statement—may be delivered by an overnight delivery service other than USPS Express Mail or Priority Mail (*e.g.*, UPS, DHL, Federal Express). Such deliveries must be addressed and delivered to: FCC FORM 477 (ATTN: WCB/IATD, Room 6–A220), Federal Communications Commission, 9300 East Hampton Drive, Capitol Heights, MD 20743. Filers who want a confirmation of receipt may include a stamped, self-addressed envelope and a photocopy of the Certification Statement, which will be receipt-stamped and returned by mail.

Hand delivery or messenger delivery: Local hand and messenger deliveries directed to the Commission's Secretary are accepted at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. All Form 477 filing materials delivered to this location must be clearly identified to be re-directed to: FCC FORM 477 (ATTN: WCB/IATD, Room 6–A220).

Note: Because the specific requirements for overnight, hand, or messenger delivery may change, you may want to consult the Office of the Secretary (www.fcc.gov/osec) for the most current information.

B. How To File

1. Preparation of Data Files

You must file your local competition and broadband deployment data using the electronic version of Form 477 that is available at *www.fcc.gov/formpage.html* or by purchase from the FCC's duplicating contractor, Best Copy and Printing, Inc. at (202) 488–5300, facsimile (202) 488–5563, or through *www.bcpiweb.com.* Form 477 will be updated for each filing round, and filers must obtain the latest version for each filing period. Filers should also obtain the latest version of Instructions for Form 477.

The electronic version of Form 477 is provided in Excel 2002 format. It contains drop-down boxes and some edit checks. Once you complete a filing, name the file in accordance with instructions provided below.

Note: You may not move cells, insert or delete rows, or change the validation or formatting characteristics of any cell. If the FCC cannot load your files into its databases as a result of modifications to the file, you will be required to correct and resubmit those files. Filers must save each Form 477 as a separate spreadsheet file. Do not submit multiple Form 477 worksheets within a single Excel 2002 workbook. Filers choosing to submit Form 477(s) on a floppy diskette(s), or compact disc(s), may place multiple spreadsheet files on a single diskette or compact disc.

Each file name must adhere to the following convention:
SST#Hyearname.xls, where:

SS is the two letter post office abbreviation for the state.

T is a single character that indicates whether the file contains incumbent LEC (ILEC) data or non-ILEC data (which must be filed separately) and whether the file contains revised data. Select the appropriate code from the following list:

A = original filing for non-ILEC operations
B = original filing for ILEC operations
C = revised filing for non-ILEC operations
D = revised filing for ILEC operations

is a ''sequence number'' (*i.e.*, 1, 2, 3, etc.) to be used to differentiate what would otherwise be identically named files when the file names are constructed according to the convention specified here. If no such redundancy of file names occurs, use the number ''1'' in place of the character ''#''.

H is the half of the year of the data being filed. *Use:* ''J'' for data as of June 30; ''D'' for data as of December 31.

year is the last two digits of the year of the data being filed (*e.g.*, for the filing due September 1, 2005, reported data will be as of June 30, 2005, so 2005 = 05).

name is the company name identified on Line 1 of the Cover Page of Form 477.

Example: NCB1J05BellSouth.xls

2. Additional Directions for Filing

Filers must submit the original, signed paper copy of the Certification Statement (which is the single page that constitutes Section V of these Instructions). The Certification statement must be signed in ink by an officer of the filer of one of the legal entities whose data is included. An officer is a person who occupies a position specified in the articles of incorporation (or partnership agreement), and would typically be president, vice president for operations, vice president for finance, comptroller, treasurer or a comparable position. If the filer is a sole proprietorship, the owner must sign the certification.

C. Requesting Confidentiality

Filers may submit a request that information on Form 477 not be made routinely available for public inspection by so indicating on Line 8 of the Cover Page of the form and on the Certification Statement. *See also* 47 CFR 0.457, 0.459, 1.7001(d), 43.11(c); *Examination of the Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, FCC 98–184 (rel. Aug. 4, 1998).

D. Obligation To File Revisions

Filers must submit a revised form if the filer discovers a significant error in the data. For counts, a difference amounting to 5 percent of the filed number must be re-filed. For percentages, a difference of 5 percentage points is significant and must be re-filed. Revisions should consist of a certification statement and one or more electronic files. Carriers should re-file all data for a state if one or more data element must be revised. A re-filed Form 477 spreadsheet should contain all appropriate data for the state, not just the corrected figures. Note that files containing revisions must be given different names from the original filings, as specified above, Section IV.B.1 of these instructions.

E. Compliance

Service providers that are required to file the Form 477 but fail to do so may be subject to enforcement action under sections 502 and 503 of the Communications Act and any other applicable law, 47 U.S.C. 502, 503.

BILLING CODE 6712–01–P

V. CERTIFICATION STATEMENT

FCC Form 477 Local Telephone Competition and Broadband Reporting (ATTENTION: WCB/IATD, Room 6-A220)

CERTIFICATION STATEMENT

Check the method (use ONLY one) used to deliver completed Form 477(s) to the FCC. See Instructions, Section IV, for the proper address to use for each delivery method:

___ E-mail ___ Overnight service other than United States Postal Service

___ Messenger or hand delivery ___ Other (specify: _____)

Also see Instructions, Section IV, for separate directions on how to submit the signed, original paper copy of this Certification Statement to the FCC.

This filing is an (check one) ___original filing ___revised filing

Organization name: _____

Number of files provided for this reporting period: _____

Year (of the data): _____ Data as of: [Check one: June 30___; December 31 ___]

I certify that I am an officer of _____; that I have examined the information contained in the data files submitted and that to the best of my knowledge, information and belief, all statements of fact contained in such files are true and that said files represent an accurate statement of the affairs of the above named respondent as of the following date:

_____

If I have requested non-disclosure of some or all of the information in FCC Form 477 by so indicating on Line 8 of the Cover Page of the form, I certify that this information is privileged and confidential and that public disclosure of such information would likely cause substantial harm to the competitive position of the respondent.

PRINTED NAME: _____

POSITION: _____ TELEPHONE: _____

SIGNATURE: _____ E-MAIL: _____

DATE: _____

Persons making willful false statements in the report form can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).

CONTACT PERSON: _____

TELEPHONE: _____ E-MAIL: _____

FEDERAL COMMUNICATIONS COMMISSION

BILLING CODE 6712–01–C

VI. Glossary of Selected Terms Appearing on FCC Form 477

The following selected terms are noted on FCC Form 477. The filer must interpret these terms in the specific context of the detailed reporting instructions, above. All terms are as defined for the specific purposes of this information collection.

Part I: Broadband

Broadband connections: Lines (or wireless channels) that terminate at an end user location and enable the end user to receive information from and/or send information to the Internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction.

End user: Residential, business, institutional and government entities who use services for their own purposes and who do not resell such services to other entities. For purposes of Part I of Form 477, an Internet Service Provider (ISP) is not an ''end user'' of a broadband connection.

Facilities-based broadband provider: A provider of broadband connections to end user locations that owns the portion of the physical facility that terminates at the end user location, obtains unbundled network elements (UNEs), special access lines, or other leased facilities that terminate at end user locations and provisions/equips them as broadband, or provisions/equips broadband wireless channels to end user location over licensed spectrum or over spectrum that the provider uses on an unlicensed basis.

Local loop: For purposes of this data collection, the ''last mile'' facilities (either wired facilities or the wireless equivalent) between a central office and the end user premises in a telephone network, a node and the end user premises in a cable network, or the analogous portion of the facilities of other providers of telephone service or broadband connections.

Own local loop facilities: Those wired local loop facilities that the filer (including affiliates) actually owns as well as facilities that the filer obtains the right to use from unaffiliated entities as dark fiber or satellite transponder capacity (and that the filer uses as part of its own system). Also, for purposes of Part I of Form 477, broadband wireless connections to end user locations that the filer provisions/equips as broadband over licensed spectrum or over spectrum that the filer uses on an unlicensed basis. For the purposes of Part I of Form 477, this term does not include unbundled network elements (UNEs), special access lines, or other leased lines that the filer obtains from an unaffiliated entity and equips as broadband.

Residential broadband connection: For the purposes of Part I of Form 477, broadband connections of a type (as indicated by, *e.g.*, price, ''speed,'' or other features) that is primarily purchased by, designed for, and/or marketed to residential end users.

Residential end user premises: Residential living units (*e.g.*, single family dwellings and individual households in multiple dwelling units such as apartments, condominiums, mobile home parks, etc.) and also individual living units in such institutional settings as college dormitories and nursing homes. Also includes other end user locations to which you (including affiliates and agents) market broadband services that are primarily designed for residential use.

Part II: Wireline and Fixed Wireless Local Telephone

Default interstate long distance carrier: The (facilities-based or reseller) carrier to which an interstate long distance call is routed automatically, without the use of any access code by the end user.

End user: Residential, business, institutional and government entities who use services for their own purposes and who do not resell such services to other entities.

Local loop: See the definition provided for Part I, above.

Own local loop facilities: Those wired local loop facilities that the filer (including affiliates) actually owns as well as facilities that the filer obtains the right to use from unaffiliated entities as dark fiber or satellite transponder capacity (and that the filer uses as part of its own system). Also, for purposes of Part II of Form 477, fixed wireless voice-grade channels to end user locations that the filer provisions/equips over licensed spectrum or over spectrum that the filer uses on an unlicensed basis. For the purposes of Part II of Form 477, the term does not include voice-grade channels to end user premises that the filer provisions over UNE loops, special access lines, or other leased lines that the filer obtains from an unaffiliated carrier.

Residential lines: Lines provided to residential end user premises. Also includes any lines the filer provides to a shared-tenant service provider in an apartment building or similar residential setting.

UNE-Platform: The combination of unbundled network elements (UNEs) consisting of loop UNE, switching UNE, and transport UNE. (Unbundled network elements are defined in the FCC Rules. *See* 47 CFR 51.319.)

Voice-grade equivalent: Generally, the number of DS0 (64 kbps) lines/channels in a higher-capacity circuit. In the specific context of Part II of Form 477, see ''Note for reporting channelized service'' in the detailed instructions, above.

Voice telephone service: Local exchange or exchange access services that allow end users to originate and/or terminate local telephone calls on the public switched network, whether used by the end user for voice telephone calls or for other types of calls carried over the public switched network (for example, lines connected to facsimile equipment or lines used occasionally or exclusively for ''dial-up'' connection to the Internet).

Part III: Mobile Local Telephone

Mobile voice telephony subscribers: A mobile handset, car-phone, or other revenue-generating, active, voice unit that has a unique phone number and that can place and receive calls from the public switched network.

Own facilities: Spectrum for which the filer (including affiliates) holds a license, manages, or has obtained the right to use via lease or other agreement with a Band Manager.

VII. Disclosure, Privacy Act, Paperwork Reduction Act Notice

The Privacy Act of 1974 and the Paperwork Reduction Act of 1995 require that when we ask you for information, we must first tell you our legal right to ask for the information, why we are asking for it, and how it will be used. We must also tell you what could happen if we do not receive it and whether your response is voluntary, required to obtain a benefit, or mandatory under the law. See Privacy Act of 1974, Pub. L. 93–579, December 31, 1974, 5 U.S.C. 552a(e)(3), and the Paperwork Reduction Act of 1995, Pub. L. No. 104–13, 44 U.S.C. 3501, *et seq.*

Our legal right to ask for this information is § 1.7000–1.7002, 20.15, 43.01, 43.11 of the Commission's rules. 47 CFR 1.7000–1.7002, 20.15, 43.01, 43.11. Your response is mandatory.

This collection of information stems from the Commission's authority under sections 4(i), 201, 218–220, 251–252, 303(r), 332, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 201, 218–220, 251–252, 303(r), 332, and 403, and section 706 of the Telecommunications Act of 1996. The data in the worksheet will be used to monitor the deployment

of broadband services and the development of local telephone service competition. Selected information provided in the worksheet will be made available to the public in a manner consistent with the Commission's rules and orders.

We have estimated that each response to this collection of information will take, on average, 10 hours. Note that many companies will file multiple responses and that this estimated average reflects the fact that many companies will be required to file only a single service count that should be readily available from internal company records. Our estimate includes the time to read the instructions, look through existing records, gather and maintain the required data, enter the data in a Form 477 spreadsheet, prepare a floppy diskette or compact disc (if the filer decides to submit completed Form 477(s) by a method other than e-mail) and certification, and actually file the report. If you have any comments on this estimate, or how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD–PERM, Washington, DC 20554, Paperwork Reduction Project (3060–0816). We also will accept your comments via the Internet if you send them to *Judith-B.Herman@fcc.gov.* Do not send completed FCC Form 477 to this address. Remember—You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid Office of Management and Budget (OMB) control number. This collection has been assigned an OMB control number of 3060–0816.

The Commission is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this form. If we believe there may be a violation or potential violation of a statute or a Commission regulation, rule, or order, your filing may be referred to the Federal, state, or local agency responsible for investigating, prosecuting, enforcing, or implementing the statute, rule, regulation, or order. In certain cases, the information in your worksheet may be disclosed to the Department of Justice, court, or other adjudicative body when (a) the Commission; or (b) any employee of the Commission; or (c) the United States government, is a party to a proceeding before the body or has an interest in the proceeding.

Reporting entities failing to file Form 477 in a timely fashion may be subject to penalties under the Communications Act, including sections 502 and 503(b).

List of Subjects in 47 CFR Parts 1, 20 and 43

Communications common carriers, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Parts 1, 20, and 43 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, and 303(r).

■ 2. Section 1.7001 is amended by revising paragraph (b) to read as follows:

§ 1.7001 Scope and content of filed reports.

* * * * *

(b) All commercial and government-controlled entities, including but not limited to common carriers and their affiliates (as defined in 47 U.S.C. 153 (1)), cable television companies, Multichannel Multipoint Distribution Service (MMDS/MDS) ''wireless cable'' carriers, other fixed wireless providers, terrestrial and satellite mobile wireless providers, utilities and others, which are facilities-based providers, shall file with the Commission a completed FCC Form 477, in accordance with the Commission's rules and the instructions to the FCC Form 477, for each state in which they provide service.

* * * * *

PART 20—COMMERCIAL MOBILE RADIO SERVICES

■ 3. The authority citation for part 20 is revised to read as follows:

Authority: 47 U.S.C. 154, 157, 160, 251–254, 303, and 332 unless otherwise noted.

■ 4. Section 20.15 is amended by revising paragraph (b)(1) to read as follows:

§ 20.15 Requirements under Title II of the Communications Act.

* * * * *

(b) * * *

(1) File with the Commission copies of contracts entered into with other carriers or comply with other reporting requirements, or with §§ 1.781 through 1.814 and 43.21 of this chapter; except that commercial radio service providers that offer broadband service, as described in § 1.7001(a) of this chapter or mobile telephony are required to file reports pursuant to §§ 1.7000 and 43.11 of this chapter. For purposes of this section, *mobile telephony* is defined as real-time, two-way switched voice service that is interconnected with the public switched network utilizing an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless handoff of subscriber calls.

* * * * *

PART 43—REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

■ 5. The authority citation for part 43 continues to read as follows:

Authority: 47 U.S.C. 154; Telecommunications Act of 1996, Pub. L. 104–104, secs. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220 as amended.

■ 6. Section 43.11 is amended by revising paragraph (a) to read as follows:

§ 43.11 Reports of local exchange competition data.

(a) All common carriers and their affiliates (as defined in 47 U.S.C. 153 (1)) providing telephone exchange or exchange access service (as defined in 47 U.S.C. 153 (16) and (47)) or commercial mobile radio service (CMRS) providers offering mobile telephony (as defined in § 20.15(b)(1) of this chapter) shall file with the Commission a completed FCC Form 477, in accordance with the Commission's rules and the instructions to the FCC Form 477, for each state in which they provide service.

* * * * *

[FR Doc. 04–28415 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 15, 27, 87 and 97

[ET Docket No. 00–258; WT Docket No. 02–8; FCC 04–246]

Advanced Wireless Services

AGENCY: Federal Communications Commission

ACTION: Final rule.

SUMMARY: This document facilitates the introduction of Advanced Wireless

Service (AWS) in the band 1710–1755 MHz—an integral part of a 90 MHz spectrum allocation recently reallocated to allow for such new and innovative wireless services. We largely adopt the proposals set forth in our recent *AWS Fourth NPRM* in this proceeding that are designed to clear the 1710–1755 MHz band of incumbent Federal Government operations that would otherwise impede the development of new nationwide AWS services. These actions are consistent with previous actions in this proceeding and with the United States Department of Commerce, National Telecommunications and Information Administration (''NTIA'') *2002 Viability Assessment*, which addressed relocation and reaccommodation options for Federal Government operations in the band.

DATES: Effective January 28, 2005.

FOR FURTHER INFORMATION CONTACT: Ted Ryder, Office of Engineering and Technology, (202) 418–2803.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Seventh Report and Order*, ET Docket No. 00–258 and WT Docket No. 02–8, FCC 04–246, adopted October 14, 2004, and released October 21, 2004. The full text of this Commission decision is available on the Commission's Internet site at www.fcc.gov. It 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 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Room CY–B402, 445 12th Street, SW., Washington, DC 20554. Alternate formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365.

Summary of the Report and Order

1. In the Seventh Report and Order (7th R&O), we undertook a narrow and specific task—the reaccommodation of Federal Government users in order to make the 1710–1755 MHz band available for AWS use. However, the decisions we made are part of a larger and substantially more complex proceeding. The quest to make spectrum available for a variety of new and innovative wireless services has involved a variety of bodies, including this Commission, Federal Government stakeholders as represented through NTIA, and Congress.

2. In the Omnibus Budget Reconciliation Act of 1993 (''OBRA–93''), Congress directed the Secretary of Commerce to identify at least 200 megahertz of spectrum below 5 GHz for transfer to non-Federal Government services. NTIA identified 235 megahertz, including the bands 1710–1755 MHz and 2390–2400 MHz, for such transfer. At that time, the band 1710–1755 MHz, which was a Federal Government exclusive band, was to be reallocated as a mixed-use band. Specifically, Federal Government use of the band 1710–1755 MHz was to remain protected indefinitely at 333 fixed microwave stations used by Federal power agencies, as required by 47 U.S.C. 923(c)(4), and would additionally be protected indefinitely at 111 stations used for aviation-related safety communications and at 16 sites used by DOD for fixed point-to-point microwave, tactical radio relay, aeronautical mobile stations, etc.

3. The Report and Order accomplishes two main tasks. First, we allow Federal Government users access to new frequencies—generally grouped into frequencies in the band 2025–2110 MHz (''2 GHz'') and frequencies in the band 2360–2400 MHz—that will allow Federal users to relocate existing operations in such a way that will ultimately free spectrum for these users to relocate operations from the 1710–1755 MHz band. Second, we address the relocation procedures and policies that are necessary to make these relocations of Federal Government users possible.

4. Specifically, the 7th R&O adopts the following spectrum allocation decisions:

—We allow the U.S. Department of Defense (''DOD'') to use the band 2025–2110 MHz, on a co-equal, primary basis with non-Federal Government operations, for earth stations at 11 sites to support military space operations (also known as tracking, telemetry, and commanding or ''TT&C''). This will provide DOD with additional flexibility in the band 1755–1850 MHz to accommodate systems displaced from the band 1710–1755 MHz.

—We permit the DOD to operate stations in the fixed and mobile except aeronautical mobile services in the band 2025–2110 MHz on a secondary basis at six sites in the southwestern region of the United States.

—We rescind the recently established rules for the Wireless Communications Services (''WCS'') at 2385–2390 MHz and no longer make the band 2390–2400 MHz available for use by Unlicensed Personal Communications Services (''UPCS''). We also allow Federal and non-Federal Government flight test stations to operate in the band 2385–2395 MHz, which in turn will permit DOD to relocate all aeronautical mobile systems out of the band 1710–1755 MHz. In addition, these allocation changes provide needed replacement spectrum for use by DOD and commercial flight test stations, which recently lost access to 35 megahertz of spectrum at 1525–1535 MHz and 2320–2345 MHz.

The Band 2025–2110 MHz (2GHZ)

5. *DOD Co-Primary Use of 2 GHz Band.* We adopted, with minor changes, the proposals for the 2 GHz band set forth in the AWS Fourth NPRM. In so doing, we recognize the concerns of the broadcasting community that sharing of that band by TV Broadcast Auxiliary Service (''BAS'') stations and DOD TT&C uplink earth stations will be challenging in some instances. However, we are confident that such sharing is feasible and will promote the public interest, particularly in the ultimate provision of AWS to the public, provided that coordination procedures adequate to the protection of both incumbent BAS stations and DOD TT&C uplink earth stations are imposed. In this regard, we are maintaining in the 2 GHz band our longstanding policy that first-licensed facilities have the right of protection from later-licensed facilities operating in the same band. This means that a new DOD TT&C uplink earth station seeking to operate at 2 GHz must coordinate with all BAS stations that may be affected by the new earth station's operation. To ensure that the right of protection of first-licensed facilities is adequately maintained, we conclude that it is necessary to ensure that not too long a period of time elapses between the authorization and the commencement of operations of a DOD TT&C uplink earth station at 2 GHz. Thus, DOD must coordinate facilities at the 11 sites only when construction and/or implementation are anticipated, and prior to authorization. To ensure that such coordination occurs successfully, prior to authorization, DOD must coordinate the DOD TT&C uplink earth station with all potentially affected incumbent BAS, Cable Television Relay Service (''CARS''), and Local Television Transmission Service (''LTTS'') licensees of stations within the coordination contour of the earth station, consistent with Appendix 7 of the ITU Radio Regulations, and engage the local BAS frequency coordinator(s), where available, in support of achieving such coordination. DOD, at the time it submits its application for the authorization of a 2 GHz earth station to the Commission through NTIA's

Frequency Assignment Subcommittee (''FAS''), must provide, with its application, a list of the entities with which coordination was undertaken. For those rare situations where no reasonable coordination can be negotiated, the issue may be raised to the FCC and NTIA to jointly arbitrate resolution. We will not concur with authorizing operation of any 2 GHz DOD TT&C uplink earth station in the absence of successful coordination between DOD and the affected BAS incumbents. Once the DOD TT&C uplink earth station has begun coordination, new BAS, CARS, and LTTS stations for which coordination begins later must accept interference from the DOD earth station, as is normally the case for new stations sharing spectrum on a co-primary basis. Finally, to ensure that future BAS, CARS, and LTTS licensees have a means for coordinating their proposed operations with the DOD TT&C uplink earth station, DOD earth stations must maintain a point of contact for coordination.

6. Accordingly, we adopted revisions generally as proposed for footnote US346. Additionally, we have corrected some of the geographic coordinates for the 11 DOD earth stations, originally listed in proposed footnote US346, and we have made several editorial changes to the footnote.

7. We acknowledge that recent data supplied by the Society of Broadcast Engineers, Inc. (''SBE''), indicate that there may be a significant potential for interference from DOD TT&C earth stations at the 11 sites that may use the 2 GHz band into 2 GHz fixed receive-only receivers used in connection with BAS electronic newsgathering (''ENG'') mobile TV pick-ups (''TVPUs''). However, as indicated in the *AWS Fourth NPRM*, sharing techniques currently exist that should enable 2 GHz earth stations to be engineered into the 11 sites without harming existing BAS operations. We also acknowledge that some sharing situations will be difficult and may require more restrictive techniques, such as limiting power, limiting the pointing direction and elevation of the DOD earth station, constructing berms or installing RF shielding, arranging time-sharing agreements for DOD use during off-peak hours when TV BAS use is at a minimum, and other mitigation techniques. Nonetheless, because these techniques, together with coordination with potentially affected licensees, can facilitate implementation of the DOD TT&C earth stations at the 11 sites, we see no insurmountable technical obstacles that would prevent us from implementing the proposed 2 GHz allocation.

8. We also observe that, as noted by Motorola, interference to 2 GHz TV BAS stations from DOD earth stations will not be an immediate issue because DOD satellites incorporating those frequencies will not be available for at least several years. Further, to ensure mission success, NTIA anticipates that new satellites will be built with dual tracking and command frequencies, *i.e.*, in both the band 1761–1842 MHz and the 2 GHz band. As DOD gains experience with TT&C operations in the 2 GHz band, use of the band 1761–1842 MHz for TT&C is expected to be reduced, but DOD requirements in that band may exist until the year 2030. Therefore, initial DOD use of the 2 GHz band is not expected to involve either immediate or full relocation of the current systems. However, enabling relocation of DOD operation from the band 1761–1842 MHz to the 2 GHz band will over time allow DOD the flexibility to accommodate additional systems in the band 1755–1850 MHz. Finally, DOD may choose not to use the 2 GHz band for some of its 11 existing sites that currently operate in the band 1761–1842 MHz due to coordination difficulties with incumbent operations.

9. Additionally, we observe that, by the time DOD earth stations begin to use the 2 GHz band, total or near-total conversion to digital BAS operations is likely to have occurred. That conversion promises to significantly reduce the potential for interference to BAS receivers because the digital technology to be used for BAS is far more robust than analog technology against undesired signals. As noted by SBE, use of digital technology by BAS licensees may permit the BAS desired/undesired (''D/U'') ratio to be relaxed by several orders of magnitude in some cases. While it is not possible to precisely forecast when digital BAS operations will be used in a particular geographic area, it is also not possible to precisely forecast when a DOD earth station may begin to use 2 GHz frequencies in that area. Given the uncertain timeframe for DOD implementation of the 2 GHz allocation for the 11 sites, possibly extending many years into the future, it may be appropriate for us to establish the specifics of a coordination process that will accommodate future developments, such as the digital conversion of BAS operations.

10. With regard to the specific concern of Gannett Co., Inc. (''Gannett''), about the DOD site at Buckley AFB, CO, we will not impose *a priori* conditions that would restrict DOD's options at that site. We find that requiring coordination to protect incumbent operations and maintaining flexibility on specific technical requirements will allow the spectrum sharing situation to be customized to meet the requirements at the time when DOD needs to use this spectrum.

11. Regarding the technical characteristics of the DOD TT&C operations, we observe that NTIA has updated the *NTIA Manual* to require that DOD TT&C earth stations operating in the band 2025–2110 MHz conform to operational limits specified in the ITU *Radio Regulations* for that band. These limits require that an earth station not transmit until the mainbeam of its antenna is pointing at least 3° above the horizon, unless affected parties have agreed to a lower elevation angle. In addition, we observe that NTIA has adopted the ITU limit on the effective isotropic radiated power (''EIRP'') transmitted in any direction towards the horizon by an earth station. Specifically, these limits require that an earth station be:

(1) Limited to an EIRP of 40 dBW at a 0° elevation angle, in any 4 kHz band;

(2) Permitted to increase its EIRP to 40 dBW plus 3 times their elevation angle between 0–5°, in any 4 kHz band;

(3) Unlimited in EIRP at elevation angles above 5°; and

(4) Restricted from exceeding these EIRP limits by more than 10 dB.

While these technical characteristics give an idea of how DOD TT&C operations might operate if they were constructed today, the situation may change before the operations are ready to be constructed for the 2 GHz band. Therefore, we find that a flexible approach regarding technical requirements backed up with coordination to protect incumbent operations is the best approach to sharing the 2 GHz band. This will allow DOD to take advantage of the latest technological capabilities to achieve sharing with BAS operations and will allow them to consider any changes in BAS equipment or use that might occur between now and when DOD needs access to this spectrum.

12. *Adjacent Band Services.* We reject the suggestion of Cingular Wireless LLC (''Cingular'') that DOD operations be limited to the central portion of the 2 GHz band because we find that it is technically feasible for those operations to use the entire band without causing interference to adjacent band fixed and mobile services. In this regard, we find that techniques such as power control, operation of earth stations at higher elevation angles, baseband filtering, berms or RF shielding, and other

techniques, as well as frequency offsets, can mitigate interference from 2 GHz DOD earth stations to adjacent band fixed and mobile services at 1930–2025 MHz and 2110–2155 MHz. We also reject the recommendations of Motorola, Inc. (''Motorola''), that we add AWS in the upper adjacent band 2110–2120 MHz to the list of services that require coordination in footnote US346, or increase out-of-band emission (''OOBE'') limits for DOD 2 GHz earth stations. NTIA and DOD state that DOD 2 GHz earth stations' compliance with the OOBE limits in the *NTIA Manual* should provide adequate protection to out-of-band users. However, we recognize the likelihood that a variety of factors—such as high power operation on a frequency close to the adjacent band, combined with a momentarily low beam elevation angle to acquire or maintain communications with a non-geostationary satellite orbit (''NGSO'') satellite as it passes through elevation angles just above the horizon in a certain direction—may occur, increasing the potential for interference to AWS users in that direction. We accept NTIA's and DOD's position that additional measures will not generally be needed. However, we expect that DOD will be cognizant of the potential for interference into AWS operations in the adjacent band 2120–2155 MHz and take appropriate steps to control such interference for specific situations at DOD TT&C earth stations. In this regard, we note that the same measures exercised by the DOD 2 GHz earth station to protect BAS facilities, such as maintaining high elevation angles and erecting berms as described, should similarly mitigate against adjacent band interference with AWS operating in the same areas. We will address protection of new services in the lower adjacent band 2020–2025 MHz, which has been allocated for use by Fixed and Mobile services on a primary basis, in a future decision.

13. Finally, with regard to the potential for 2 GHz DOD earth stations to cause overload interference to adjacent band receivers, we recognize this potential but note that at present it is unclear what type of receivers will be used in these adjacent bands when DOD transmitters commence operations in several years. Further, as suggested by Cingular, the record in this proceeding is not sufficiently developed to warrant the adoption of receiver interference immunity standards at this time. However, we urge industry to contemplate the future development of such standards and will revisit this issue if the situation warrants.

14. *Secondary DOD Use of 2 GHz Band.* We find that permitting DOD to operate 2 GHz stations in the fixed and mobile except aeronautical mobile services on a secondary basis at six sites is in the public interest. These sites are all at remote locations in the southwestern United States and can operate without hindering 2 GHz BAS fixed and mobile operations. We are adopting Motorola's recommendation that we modify the wording of our proposed new footnote to clarify the status of the military operations and make some other minor editorial changes to the footnote.

15. *EESS Use of 2 GHz Band.* We are not requiring DOD to frequency coordinate its new 2 GHz uplink earth stations with existing 2 GHz EESS uplinks that operate under US347. While we concur with Space Imaging LLC that it and other commercial remote-sensing operators use the 2 GHz band for important purposes, their operations are on a non-interference basis, and such users of a frequency band do not have the right to be protected from interference caused by new, primary users of that same band. However, we urge DOD, prior to commencing 2 GHz operations, to consult with remote-sensing licensees that operate under US347. We observe that it is in DOD's self-interest to do so because these remote sensing licensees perform significant defense and intelligence work.

The Band 2360–2400 MHz

16. We are adopting our proposals for the band 2360–2400 MHz. Commenters generally support these proposals and we find that their adoption will play a major role in facilitating the introduction of AWS by permitting DOD to relocate essential aeronautical mobile systems to the band 2360–2395 MHz from the band 1710–1755 MHz. With regard to the concerns voiced by the Aerospace and Flight Test Radio Coordinating Council (''AFTRCC''), that new amateur use of the band 2390–2395 MHz should be precluded and existing amateur use of that band should be grandfathered, we decline to adopt such measures. We believe that shared use should not impose an undue constraint on either service. Amateur access to the band on a primary basis was established relatively recently—in 1995—and we note that amateur use of the band appears to be relatively light. Moreover, aeronautical mobile use of the band will likely be predominantly at remote facilities. We also will not impose coordination requirements between amateur and aeronautical flight testing operations. We observe that the potential for interference from amateur operations, even directional point-to-point operations, to flight testing operations, would be small, due to the high altitudes of aeronautical mobile flight testing transmitters, and the correspondingly high elevation and off-axis attenuation of high gain flight testing receive antennas on the ground. Although, as noted by AFTRCC, low antenna elevation angle and off-axis attenuation of flight testing receive antennas, and line-of-site conditions, could occur, and thus we cannot rule out the possibility of interference to flight testing from amateur operations, we believe the likelihood of such an occurrence is limited by the remoteness of flight testing facilities, and the relatively light use of the band 2390–2395 MHz band by amateurs. Also, as indicated by the current lack of agreement regarding coordination between the National Association for Amateur Radio (also known as the American Radio Relay League or ''ARRL'') and AFTRRC, and especially given the flexibility of amateurs to operate without specific station authorization or registration on the Commission's database, it appears impractical to establish an effective coordination requirement at this time. We also conclude that, because most flight testing is conducted at high altitudes with low output power at remote facilities, the reverse potential for interference from flight testing operations into amateur operations is also small. Therefore, we will not require that flight testing operations be coordinated with amateur operations. Recognizing that this is a unique approach to shared use of the band, in the unlikely event that interference occurs to either flight testing or amateur operations, we expect that both parties will work together to identify and resolve the interference or find a mutually acceptable solution. Should these efforts not succeed, the matter should be referred to the FCC or NTIA for resolution.

17. We decline to adopt the recommendation of Sirius Satellite Radio Inc. and XM Radio, Inc. (''Sirius/XM''), that all new Government and non-Government aeronautical mobile operators in the band 2360–2395 MHz meet the OOBE limits that apply to WCS licensees at 2305–2320/2345–2360 MHz to protect Satellite Digital Audio Radio Service (''DARS'') receivers in the band 2320–2345 MHz from interference. We find those limits to be inappropriate for aeronautical mobile services at 2360–2395 MHz. It is extremely unlikely that aeronautical mobile transmitters would

be in close enough proximity to Satellite DARS receivers so as to create a potential for harmful interference to those receivers. In this regard, we observe that aeronautical mobile operations will not be widespread and will often occur in the vicinity of test ranges. Thus, it is expected that there normally would be large separation distances between aeronautical mobile transmitters and Satellite DARS receivers. We also observe that Satellite DARS signal strength is generally sufficiently high to overcome potential interference from aeronautical mobile transmitters even in an unusual case where the DARS receiver is relatively close to the aeronautical transmitter. Further, Sirius/XM have provided no analysis or other information demonstrating that tighter emission limits are necessary to ensure that spurious emissions from aeronautical transmitters do not cause harmful interference to Satellite DARS receivers. We find that Sirius/XM have not established any basis or need for applying the WCS OOBE limits to aeronautical mobile services at 2360–2395 MHz. Accordingly, we will apply the OOBE limits specified in § 87.139 of our Rules to aeronautical mobile operations in the band 2360–2395 MHz.

18. Finally, no commenting party opposed the removal of the WCS from the band 2385–2390 MHz or UPCS from the band 2390–2400 MHz. Therefore, we adopt those proposals to help clear the spectrum for new uses.

19. Accordingly, as proposed in the *AWS Fourth NPRM*, we adopt footnote US276 to clearly indicate the allocations for the band 2360–2395 MHz.

20. In Appendix A to the *AWS Fourth NPRM*, we proposed changes to §§ 15.301, 15.303, 15.319, and 15.321 of our Rules. In those proposed rule sections, we erroneously deleted references to the asynchronous 1910–1920 MHz portion of the greater 1910–1930 MHz UPCS band. In the interim, in the *800 MHz/Nextel Order*, we have adopted rules redesignating the 1910–1915 MHz lower half of the 1910–1920 MHz band for Nextel. We have also adopted rules redesignating the 1915–1920 MHz upper half of the 1910–1920 MHz band, *See AWS 6th R&O*, 69 FR 62615, October 27, 2004. The UPCS rules we adopt reflect those decisions.

Final Regulatory Flexibility Analysis

21. As required by the Regulatory Flexibility Act (''RFA''),[1] an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *Fourth Notice of Proposed Rule Making* (''AWS Fourth NPRM'') in this proceeding. The Commission sought written comment on the proposals in the *AWS Fourth NPRM*, including comments on the IRFA.[2] The present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

A. Need for, and Objectives of, the Adopted Rules

22. In this Seventh Report and Order, we allow the Department of Defense (''DOD'') to use the band 2025–2110 MHz (''2 GHz'') on a co-equal, primary basis with non-Federal Government operations for DOD earth stations at 11 sites that support DOD space operations. DOD access to the 2 GHz band may make more spectrum available in the band 1755–1850 MHz for absorbing certain DOD systems displaced from the band 1710–1755 MHz. In addition, we permit the DOD to operate stations in the fixed and mobile services in the 2 GHz band on a secondary (non-interference) basis at six sites in the southwestern region of the United States.

23. We also make numerous allocation changes to the band 2360–2400 MHz, the most significant of which rescinds the recent establishment of Wireless Communications Services at 2385–2390 MHz, allows Federal and non-Federal Government flight test stations to operate in the band 2385–2395 MHz, and no longer permits the band 2390–2400 MHz to be used by Unlicensed Personal Communications Services (''UPCS'') applications. These allocation changes permit DOD to relocate all aeronautical mobile systems out of the band 1710–1755 MHz, which is a major objective for facilitating the introduction of Advanced Wireless Services (''AWS''). In addition, these allocation changes provide needed replacement spectrum for use by DOD and commercial flight test stations, which recently lost access to the 35 megahertz of spectrum at 1525–1535 MHz and 2320–2345 MHz. Thus, these actions are a significant step forward toward the introduction of AWS while ensuring that the provision of important military services is not compromised.

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

24. We received no comments directly in response to the IRFA. We did, however, consider the potential impact of the proposed rules on smaller entities, and conclude that any impact will not be adverse. While new DOD use of the 2 GHz band will require coordination between DOD and existing TV Broadcasting Auxiliary Services (''BAS'') licensees, the burden will be on DOD to demonstrate that its new use can be accomplished on a non-interference basis.

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

25. 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.'' [3] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[4] 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).[5]

26. A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' [6] Nationwide, there are approximately 1.6 million small organizations.[7] ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' [8] As of 1997, there were approximately 87,453 governmental entities in the United States.[9] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer then 50,000 and

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1966 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[2] AWS Fourth NPRM, 18 FCC Rcd 13235 (2003) ¶ 64 and Appendix B.

[3] 5 U.S.C. 601(6).

[4] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[5] 15 U.S.C. 632.

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

[7] Independent Sector, The New Nonprofit Almanac and Desk Reference (2002).

[8] 5 U.S.C. 601(5).

[9] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299–300, Tables 490 and 492.

1,498 have populations of 500,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be approximately 84,098 or fewer.

27. In the 2 GHz band, the rules adopted in this Report and Order affect licensees in the Television BAS, the Local Television Transmission Service (''LTTS''), and the Cable Television Relay Service (''CARS'').

BAS. This service uses a variety of transmitters to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the stations). There are approximately 712 TV BAS licensees in the 1990–2110 MHz band, and these licensees will ultimately be required to use only the 2 GHz portion of that band.[10] It is unclear how many of these will be affected by our new rules.

The Commission has not developed a definition of small entities specific to BAS licensees. The U.S. Small Business Administration (SBA) has developed small business size standards, as follows: For TV BAS, we use the size standard for Television Broadcasting, which consists of all such companies having annual receipts of no more than $12.0 million.[11] According to Census Bureau data for 1997, there were 906 Television Broadcasting firms, total that operated for the entire year.[12] Of this total, 734 firms had annual receipts of $9,999,999.00 or less and an additional 71 had receipts of $10 million to $24,999,999.00.[13] Thus, under this standard, the majority of firms can be considered small.

CARS. There are nine CARS mobile licensees in the 1990–2110 MHz band, and these licensees will ultimately be required to use only the 2 GHz portion of that band.[14] It is unclear how many of these will be affected by our new rules. The SBA has developed a small business size standard for Cable and other Program Distribution, which consists of all such companies having annual receipts of no more than $12.5 million.[15] According to Census Bureau data for 1997, there were 1,311 firms within the industry category Cable and Other Program Distribution, total, that operated for the entire year.[16] Of this total, 1,180 firms had annual receipts of $9,999,999.00 or less, and an additional 52 firms had receipts of $10 million to $24,999,999.00.[17] Thus, under this standard, the majority of firms can be considered small.

LTTS. There are 34 LTTS licensees in the 1990–2110 MHz band, and these licensees will ultimately be required to use only the 2 GHz portion of that band.[18] It is unclear how many of these will be affected by our new rules. The Commission has not yet defined a small business with respect to local television transmission services. For purposes of this FRFA, we will use the SBA's definition applicable to Cellular and Other Wireless Telecommunications—*i.e.*, an entity with no more than 1,500 persons.[19] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[20] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[21] Thus, under this size standard, the majority of firms can be considered small.

In the band 2360–2390 MHz, the rules adopted in this Report and Order are not expected to impact licensees of flight test stations, except to provide those licensees continued access to the sub-band 2385–2390 MHz. That is, Federal and non-Federal Government licensees of flight test stations have long shared the band 2360–2390 MHz and our new rules essentially return the sub-band 2385–2390 MHz to its state prior to reallocation. The additional flexibility given to Federal Government users is not expected to impact licensees of flight test stations because this use would be on a secondary basis.

In the band 2390–2400 MHz, the rules adopted in this Report and Order are not expected to greatly impact licensees in the amateur service. Federal and non-Federal Government use of the band 2390–2395 MHz is expected to occur at only a limited number of aeronautical telemetry ranges in remote areas. We have reviewed our files and have found that no unlicensed PCS device has been authorized in the band 2390–2400 MHz.

D. Description of Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

28. The new rules require that DOD coordinate a request for use of frequencies in the 2 GHz band prior to submitting an application to the Commission through the Frequency Assignment Subcommittee of the Interdepartment Radio Advisory Committee of the National Telecommunications and Information Administration. Commission licensees may choose to conduct studies or incur other expenses during the coordination process.[22] This will entail costs typically associated with the coordination process. In addition, we observe that DOD will be the party initiating coordination.

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

29. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[23]

30. We are requiring that the 11 DOD earth stations that will operate in the 2 GHz band prior coordinate their frequency use with existing TV BAS licensees. Such a requirement will ensure that these earth stations operate in a manner that minimizes the potential of causing harmful interference. This action is expected to protect incumbent BAS, LTTS, and CARS systems from service disruptions caused by receiving harmful interference. Some commenters recommended that we not relocate these

[10] The IRFA mistakenly listed the number of TV BAS licensees for the sub-band 1990–2025 MHz rather than for the entire band 1990–2110 MHz. There are approximately 144 more licensees in the entire band than in the sub-band.

[11] 13 CFR 121.201, NAICS code 515120.

[12] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Receipts Size of Firms Subject to Federal Income Tax; 1997,'' Table 4, NAICS code 515120 (issued Oct. 2000).

[13] *Id.* The census data do not provide a more precise estimate.

[14] The IRFA mistakenly listed the number of CARS licensees for the sub-band 1990–2025 MHz rather than for the entire band 1990–2110 MHz. However, the number of CARS licensees is the same in the sub-band as in the entire band.

[15] *Id.* at NAICS code 515120.

[16] *Id.*

[17] *Id.* The census data do not provide a more precise estimate.

[18] The IRFA mistakenly listed the number of LTTS licensees for the sub-band 1990–2025 MHz rather than for the entire band 1990–2110 MHz. However, the number of LTTS licensees in each band differs by only one.

[19] 13 CFR 121.201, NAICS code 517212.

[20] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Employment Size of Firms Subject to Federal Income Tax: 1997,'' Table 5, NAICS code 517212 (issued Oct. 2000).

[21] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1,000 employees or more.''

[22] *See* Seventh Report and Order ¶ 27.

[23] 5 U.S.C. 603(c).

earth stations to the 2 GHz band,[24] but we find that such relocation will not adversely impact incumbents and is essential to facilitate the introduction of AWS.

F. Report to Congress

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

Ordering Clauses

32. Pursuant to Sections 1, 4(i), 7(a), 302(a), 303(f), and 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 157(a), 302(a), 303(f), and 303(g), this Seventh Report and Order IS ADOPTED and that parts 1, 2, 15, 27, 87, and 97 of the Commission's Rules ARE AMENDED as specified in rules section, effective 30 days after publication in the **Federal Register.**

Congressional Review Act

33. The Commission will send a copy of the Seventh Report and Order including FRFA, in a report to be sent to Congress and the Government Accountability Office (GAO) pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Parts 1, 2, 15, 27, 87, and 97

Radio.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 2, 15, 27, 87, and 97 to read as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309, and 325(e).

§ 1.948 [Amended]

■ 2. Section 1.948 is amended by removing and reserving paragraph (j)(1)(xiv).

■ 3. Section 1.1307(b)(1) is amended by revising the entry for ''Wireless Communications Service (part 27)'' to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(b) * * *

(1) * * *

TABLE 1.—TRANSMITTERS, FACILITIES AND OPERATIONS SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION

Service (title 47 CFR rule part)	Evaluation requirement if:
* * * *	* * *
Wireless Communications Service (part 27)	(1) for the 1390–1392 MHz, 1392–1395 MHz, 1432–1435 MHz, and 1670–1675 MHz bands: *Non-building-mounted antennas:* height above ground level to lowest point of antenna < 10 m *and* total power of all channels > 2000 W ERP (3280 W EIRP). *Building-mounted antennas:* total power of all channels > 2000 W ERP (3280 W EIRP). (2) for the 746–764 MHz, 776–794 MHz, 2305–2320 MHz, and 2345–2360 MHz bands Total power of all channels > 1000 W ERP (1640 W EIRP).
* * * *	* * *

* * * * *

§ 1.9005 [Amended]

■ 4. Section 1.9005 is amended by removing and reserving paragraph (p).

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

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

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

■ 6. Section 2.106, the Table of Frequency Allocations, is amended as follows:

■ a. Revise pages 47, 48, 49 and 51.

■ b. In the list of United States (US) footnotes, revise footnotes US276 and US346, remove US363, and add footnote US393.

■ c. In the list of non-Federal Government (NG) footnotes, remove footnote NG174.

■ d. In the list of Federal Government (G) footnotes, revise footnotes G2, G120, and G122.

The revisions and additions read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

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[24] *See, e.g.*, comments of the Society of Broadcast Engineers, Inc., as described in the Seventh Report and Order ¶ 20.

1670-2110 MHz (UHF) Page 47

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
1670-1675 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE 5.380 5.341			1670-1675 5.341 US211 US362	1670-1675 FIXED MOBILE except aeronautical mobile 5.341 US211 US362	Wireless Communications (27)
1675-1690 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.341	1675-1690 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile MOBILE-SATELLITE (Earth-to-space) 5.341 5.377	1675-1690 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.341	1675-1700 METEOROLOGICAL AIDS (radiosonde) METEOROLOGICAL-SATELLITE (space-to-Earth)		
1690-1700 METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth) Fixed Mobile except aeronautical mobile 5.289 5.341 5.382	1690-1700 METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (Earth-to-space) 5.289 5.341 5.377 5.381	1690-1700 METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth) 5.289 5.341 5.381	 5.289 5.341 US211		
1700-1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.289 5.341	1700-1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile MOBILE-SATELLITE (Earth-to-space) 5.289 5.341 5.377	1700-1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.289 5.341 5.384	1700-1710 FIXED G118 METEOROLOGICAL-SATELLITE (space-to-Earth) 5.289 5.341	1700-1710 METEOROLOGICAL-SATELLITE (space-to-Earth) Fixed 5.289 5.341	
1710-1930 FIXED MOBILE 5.380 5.384A 5.388A			1710-1755 5.341 US311 US378	1710-1755 FIXED MOBILE 5.341 US311 US378 NG176	Wireless Communications (27)

			1755-1850 FIXED MOBILE G42	1755-1850	
5.149 5.341 5.385 5.386 5.387 5.388			1850-2025	1850-2000 FIXED MOBILE NG177	RF Devices (15) Personal Communications (24) Fixed Microwave (101)
1930-1970 FIXED MOBILE 5.388A 5.388	1930-1970 FIXED MOBILE 5.388A Mobile-satellite (Earth-to-space) 5.388	1930-1970 FIXED MOBILE 5.388A 5.388			
1970-1980 FIXED MOBILE 5.388A 5.388					
1980-2010 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.351A 5.388 5.389A 5.389B 5.389F				2000-2020 MOBILE-SATELLITE (Earth-to-space) US380 NG156	Satellite Communications (25)
2010-2025 FIXED MOBILE 5.388A 5.388	2010-2025 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.388 5.389C 5.389D 5.389E 5.390	2010-2025 FIXED MOBILE 5.388A 5.388		2020-2025 FIXED MOBILE NG177	
2025-2110 SPACE OPERATION (Earth-to-space) (space-to-space) EARTH EXPLORATION-SATELLITE (Earth-to-space) (space-to-space) FIXED MOBILE 5.391 SPACE RESEARCH (Earth-to-space) (space-to-space) 5.392			2025-2110 SPACE OPERATION (Earth-to-space) (space-to-space) EARTH EXPLORATION-SATELLITE (Earth-to-space) (space-to-space) SPACE RESEARCH (Earth-to-space) (space-to-space) 5.391 5.392 US90 US222 US346 US347 US393	2025-2110 FIXED NG118 MOBILE 5.391 5.392 US90 US222 US346 US347 US393	TV Auxiliary Broadcasting (74F) Cable TV Relay (78) Local TV Transmission (101J)

2110-2345 MHz (UHF) Page 49

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
2110-2120 FIXED MOBILE 5.388A SPACE RESEARCH (deep space) (Earth-to-space) 5.388			2110-2120 US252	2110-2155 FIXED MOBILE US252	Domestic Public Fixed (21) Public Mobile (22) Wireless Communications (27) Fixed Microwave (101)
2120-2160 FIXED MOBILE 5.388A 5.388	2120-2160 FIXED MOBILE 5.388A Mobile-satellite (space-to-Earth) 5.388	2120-2170 FIXED MOBILE 5.388A	2120-2200	2155-2160 FIXED	Domestic Public Fixed (21) Fixed Microwave (101)
2160-2170 FIXED MOBILE 5.388A 5.388 5.392A	2160-2170 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.388 5.389C 5.389D 5.389E 5.390	5.388		2160-2180 FIXED NG153 MOBILE NG178	Domestic Public Fixed (21) Public Mobile (22) Fixed Microwave (101)
2170-2200 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A 5.388 5.389A 5.389F 5.392A				2180-2200 MOBILE-SATELLITE (space-to-Earth) US380 NG168	Satellite Communications (25)
2200-2290 SPACE OPERATION (space-to-Earth) (space-to-space) EARTH EXPLORATION-SATELLITE (space-to-Earth) (space-to-space) FIXED MOBILE 5.391 SPACE RESEARCH (space-to-Earth) (space-to-space)			2200-2290 SPACE OPERATION (space-to-Earth) (space-to-space) EARTH EXPLORATION-SATELLITE (space-to-Earth) (space-to-space) FIXED (line-of-sight only)	2200-2290	

2345-2655 MHz (UHF) — Page 51

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 2300-2450 MHz			2345-2360 Fixed Mobile US339 Radiolocation G2 G120 US327	2345-2360 FIXED MOBILE US339 RADIOLOCATION BROADCASTING-SATELLITE 5.396 US327	Wireless Communications (27) Aviation (87)
			2360-2390 MOBILE US276 RADIOLOCATION G2 G120 Fixed	2360-2390 MOBILE US276	Aviation (87)
			2390-2395 MOBILE US276	2390-2395 MOBILE US276 AMATEUR	Aviation (87) Amateur (97)
			2395-2400 G122	2395-2400 AMATEUR	Amateur (97)
			2400-2402 5.150 G123	2400-2417 AMATEUR	ISM Equipment (18) Amateur (97)
			2402-2417 5.150 G122	5.150 5.282	
			2417-2450 Radiolocation G2 5.150 G124	2417-2450 Amateur 5.150 5.282	
2450-2483.5 FIXED MOBILE Radiolocation 5.150 5.397	2450-2483.5 FIXED MOBILE RADIOLOCATION 5.150 5.394		2450-2483.5 5.150 US41	2450-2483.5 FIXED MOBILE Radiolocation 5.150 US41	ISM Equipment (18) TV Auxiliary Broadcasting (74F) Private Land Mobile (90) Fixed Microwave (101)

United States (US) Footnotes

* * * * *

US276 Except as otherwise provided for herein, use of the band 2360–2395

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* * * * *

MHz by the mobile service is limited to aeronautical telemetering and associated telecommand operations for flight testing of aircraft, missiles or major components thereof. The following three frequencies are shared on a co-equal basis by Federal and non-Federal stations for telemetering and associated telecommand operations of expendable and reusable launch vehicles whether or not such operations involve flight testing: 2364.5 MHz, 2370.5 MHz, and 2382.5 MHz. All other mobile telemetering uses shall be secondary to the above uses.

* * * * *

US346 Except as provided for below and by footnote US222, Federal use of the band 2025–2110 MHz by the space operation service (Earth-to-space), Earth exploration-satellite service (Earth-to-space), and space research service (Earth-to-space) shall not constrain the deployment of the Television Broadcast Auxiliary Service, the Cable Television Relay Service, or the Local Television Transmission Service. To facilitate compatible operations between non-Federal terrestrial receiving stations at fixed sites and Federal earth station transmitters, coordination is required. To facilitate compatible operations between non-Federal terrestrial transmitting stations and Federal spacecraft receivers, the terrestrial transmitters in the band 2025–2110 MHz shall not be high-density systems (see Recommendations ITU–R SA.1154 and ITU–R F.1247). Military satellite control stations at the following sites shall operate on a co-equal, primary basis with non-Federal operations:

Facility	Coordinates
Naval Satellite Control Network, Prospect Harbor, ME.	44° 24′ 16″ N 068° 00′ 46″ W
New Hampshire Tracking Station, New Boston AFS, NH.	42° 56′ 52″ N 071° 37′ 36″ W
Eastern Vehicle Check-out Facility & GPS Ground Antenna & Monitoring Station, Cape Canaveral, FL.	28° 29′ 09″ N 080° 34′ 33″ W
Buckley AFB, CO	39° 42′ 55″ N 104° 46′ 36″ W
Colorado Tracking Station, Schriever AFB, CO.	38° 48′ 21″ N 104° 31′ 43″ W
Kirtland AFB, NM	34° 59′ 46″ N 106° 30′ 28″ W
Camp Parks Communications Annex, Pleasanton, CA.	37° 43′ 51″ N 121° 52′ 50″ W
Naval Satellite Control Network, Laguna Peak, CA.	34° 06′ 31″ N 119° 03′ 53″ W
Vandenberg Tracking Station, Vandenberg AFB, CA.	34° 41′ 21″ N 120° 30′ 07″ W
Hawaii Tracking Station, Kaena Pt, Oahu, HI.	21° 33′ 44″ N 158° 14′ 31″ W
Guam Tracking Stations, Anderson AFB, and Naval CTS, Guam.	13° 36′ 54″ N 144° 51′ 18″ E

* * * * *

US393 In the band 2025–2110 MHz, the military services may operate stations in the fixed and mobile except aeronautical mobile services on a secondary and coordinated basis at the following sites:

Site	Coordinates	Radius of operation (km)
Nellis AFB, NV	36° 14′ N 115° 02′ W	80
China Lake, CA.	35° 41′ N 117° 41′ W	50
Ft. Irwin, CA	35° 16′ N 116° 41′ W	50
Pacific Missile Test Range/Pt. Mugu, CA	34° 07′ N 119° 30′ W	80
Yuma, AZ	32° 32′ N 113° 58′ W	80
White Sands Missile Range, NM	33° 00′ N 106° 30′ W	80

* * * * *

Federal Government (G) Footnotes

* * * * *

G2 In the bands 216–225 MHz, 420–450 MHz (except as provided by US217 and G129), 890–902 MHz, 928–942 MHz, 1300–1390 MHz, 2310–2390 MHz, 2417–2450 MHz, 2700–2900 MHz, 5650–5925 MHz, and 9000–9200 MHz, the Federal radiolocation service is limited to the military services.

* * * * *

G120 Development of airborne primary radars in the band 2360–2390 MHz with peak transmitter power in excess of 250 watts for use in the United States is not permitted.

G122 In the bands 2395–2400 MHz, 2402–2417 MHz, and 4940–4990 MHz, Federal operations may be authorized on a non-interference basis to authorized non-Federal operations, but shall not hinder the implementation of any non-Federal operations.

* * * * *

PART 15—RADIO FREQUENCY DEVICES

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

Authority: 47 U.S.C. 154, 302a, 303, 304, 307, 336, and 544a.

■ 8. Section 15.301 is revised to read as follows:

§ 15.301 Scope.

This subpart sets out the regulations for unlicensed personal communications services (PCS) devices operating in the 1920–1930 MHz band.

■ 9. Section 15.303 is amended by revising paragraph (g) to read as follows:

§ 15.303 Definitions.

* * * * *

(g) *Personal Communications Services (PCS) Devices [Unlicensed].* Intentional radiators operating in the frequency band 1920–1930 MHz that provide a wide array of mobile and ancillary fixed communication services to individuals and businesses.

* * * * *

§ 15.319 [Amended]

■ 10. Section 15.319 is amended by removing and reserving paragraph (a).

§ 15.321 [Removed and Reserved]

■ 11. Section 15.321 is removed and reserved.

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

■ 12. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337, unless otherwise noted.

§ 27.1 [Amended]

■ 13. Section 27.1 is amended by removing and reserving paragraph (b)(7).

§ 27.5 [Amended]

■ 14. Section 27.5 is amended by removing and reserving paragraph (g).

§ 27.6 [Amended]

■ 15. Section 27.6 is amended by removing and reserving paragraph (g).

§ 27.11 [Amended]

■ 16. Section 27.11 is amended by removing and reserving paragraph (h).

§ 27.13 [Amended]

■ 17. Section 27.13 is amended by removing and reserving paragraph (f).

§ 27.50 [Amended]

■ 18. Section 27.50 is amended by removing and reserving paragraph (g).

§ 27.53 [Amended]

■ 19. Section 27.53 is amended by removing and reserving paragraph (k).

Subpart K—[Removed]

■ 20. Subpart K is removed and reserved.

PART 87—AVIATION SERVICES

■ 21. The authority citation for part 87 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307(e) unless otherwise noted.

■ 22. Section 87.173 is amended by revising the entry in the table in paragraph (b) for ''2310–2390 MHz'' to read as follows:

§ 87.173 Frequencies.

* * * * *

(b) Frequency table:

Frequency or frequency band	Subpart	Class of station	Remarks
* * * *		*	* *
2310–2395 MHz	J	MA,FAT	Aeronautical telemetry and telecommand operations.
* * * *		*	* *

■ 23. Section 87.303 is amended by revising paragraph (d)(1) to read as follows:

§ 87.303 Frequencies.

* * * * *

(d)(1) Frequencies in the bands 1435–1525 MHz and 2360–2395 MHz are assigned primarily for telemetry and telecommand operations associated with the flight testing of aircraft and missiles, or their major components. The bands 1525–1535 MHz and 2310–2360 MHz are also available for these purposes on a secondary basis. Permissible uses of these bands include telemetry and telecommand transmissions associated with the launching and reentry into the Earth's atmosphere, as well as any incidental orbiting prior to reentry, of objects undergoing flight tests. In the band 1435–1530 MHz, the following frequencies are shared with flight telemetry mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5, and 1525.5 MHz. In the band 2360–2390 MHz, the following frequencies may be assigned on a co-equal basis for telemetry and associated telecommand operations in fully operational or expendable and re-usable launch vehicles, whether or not such operations involve flight testing: 2364.5, 2370.5 and 2382.5 MHz. In the band 2360–2395 MHz, all other mobile telemetry uses are secondary to the above stated launch vehicle uses.

* * * * *

PART 97—AMATEUR RADIO SERVICE

■ 24. The authority citation for part 97 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609, unless otherwise noted.

■ 25. Section 97.303(j)(2)(iii) is revised to read as follows:

§ 97.303 Frequency sharing requirements.

* * * * *

(j) * * *

(2) * * *

(iii) The 2390–2417 MHz segment is allocated to the amateur service on a primary basis.

(A) The 2390–2395 MHz segment is shared with Federal and non-Federal Government mobile services on a co-equal basis. See 47 CFR 2.106, footnote US276.

(B) Amateur stations operating in the 2400–2417 MHz segment must accept harmful interference that may be caused by the proper operation of industrial, scientific and medical equipment.

* * * * *

[FR Doc. 04–28420 Filed 12–28–04; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket Nos. 01–338; CC Docket No. 96–98; CC Docket No. 98–147; FCC 04–248]

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) modifies certain of the unbundling obligations associated with fiber-to-the-curb (FTTC) architectures pursuant to section 251 of the Telecommunications Act of 1996 (1996 Act). Specifically, the Commission concludes that FTTC loops will be subject to the same, limited unbundling obligations governing fiber-to-the-home (FTTH) loops. The Commission further clarifies that incumbent LECs need not build time division multiplexing (TDM) capability into new packet-based networks or into existing packet-based networks that never had TDM capability. In addition, the Order also clarifies that where an incumbent LEC has deployed new FTTH or FTTC loops using packet-based equipment, and they nevertheless need to hand off a signal to some customers in TDM format in order

to be compatible with an end user's customer premises equipment, this ''TDM handoff'' does not change the scope of unbundling relief.

DATES: Effective January 28, 2005.

FOR FURTHER INFORMATION CONTACT: Marcus Maher, Attorney-Advisor, Competition Policy Division, Wireline Competition Bureau, at (202) 418–1580, or via the Internet at *marcus.maher@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration in CC Docket No. 01–338, CC Docket No. 96–98, and CC Docket No. 98–147; FCC 04–248, adopted October 14, 2004, and released October 18, 2004. The full text of this document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160, or via e-mail *http://www.bcpiweb.com*. It is also available on the Commission's website at *http://www.fcc.gov*. The complete text of this Order on Reconsideration is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. Further information may also be obtained by calling the Wireline Competition Bureau's TTY number: (202) 418–0484.

Synopsis of the Order on Reconsideration

1. In the *Triennial Review Order*, 68 FR 52276, September 2, 2003, the Commission adopted rules pursuant to section 251 of the 1996 Act, requiring incumbent local exchange carriers (LECs) to make elements of their local network available to competitors on an unbundled basis. The *Triennial Review Order* imposed only limited unbundling obligations with respect to incumbent LECs' broadband loops. In *USTA* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), the D.C. Circuit recently upheld these rules. The Commission granted the greatest unbundling relief for dark or lit fiber loops serving mass market customers that extend to the customer's premises (known as fiber-to-the-home or FTTH loops) in new build or ''greenfield'' situations. For those loops, the Commission determined that no unbundling is required. However, where a FTTH loop is deployed in overbuild, or ''brownfield,'' situations, the Commission determined that incumbent LECs must either provide unbundled access to a 64 kbps transmission path over the fiber loop or unbundled access to a spare copper loop.

2. In this Order, the Commission concludes that it is appropriate to apply the FTTH rules to FTTC loops, as well. With respect to new FTTC deployments (''greenfield'' deployments), the Commission finds that competitive LECs face similar barriers to deployment as incumbent LECs. In the *Triennial Review Order*, the Commission found that entry barriers for FTTH deployments were largely the same for incumbent and competitive carriers. The Commission finds that this conclusion remains valid regardless of the loop technology deployed, and thus equally applies to greenfield deployments of FTTC loops. However, the Commission also finds that just as overbuild FTTH deployments ''merit[] slightly different treatment than greenfield FTTH deployments,'' so, too, do overbuild FTTC deployments. Thus, in the overbuild context, the Commission finds that competitive LECs face impairment to a limited extent, and requires that competitive LECs should have continued access to either a copper loop or a 64 kbps transmission path in those situations.

3. Second, the Commission utilizes its discretion under the section 251(d)(2) ''at a minimum'' authority to consider the statutory goals of section 706 which requires the Commission to encourage the deployment of advanced telecommunications capability to all Americans. The Commission concludes that subjecting FTTC loops to the same unbundling framework adopted for FTTH loops furthers the goals of section 706. The Commission finds that the record in this case demonstrates that further reducing the unbundling obligations associated with FTTC loops would eliminate disincentives to invest in broadband facilities and, therefore, furthers section 706's goals. The Commission, therefore, reconsiders its determination in the *Triennial Review Order* that FTTC loops should be characterized as hybrid loop architecture for the purpose of the unbundling regulations, and revises its broadband loop unbundling rules to regulate FTTC loops in the same manner as adopted for FTTH loops in the *Triennial Review Order*.

4. This Order tailors unbundling relief by defining a FTTC loop as a fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises, and further specifying that the fiber transmission facility in a FTTC loop must connect to copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises.

5. Petitions by BellSouth and SureWest also sought clarification whether the Commission's existing unbundling rules require incumbent LECs to build time division multiplexing (TDM) capabilities into networks at the request of competitive LECs. Consequently, this Order clarifies that incumbent LECs are not required to add TDM capabilities into new packet-based networks or into existing packet-based networks that never had TDM capability. In addition, the Order also clarifies that where an incumbent LEC has deployed new FTTH or FTTC loops using packet-based equipment, and they nevertheless need to hand off a signal to some customers in TDM format in order to be compatible with an end user's customer premises equipment, this ''TDM handoff'' does not change the scope of unbundling relief.

Final Paperwork Reduction Act Analysis

6. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Supplemental Final Regulatory Flexibility Analysis

7. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM*. 67 FR 1947, January 15, 2002. The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. In the *Triennial Review Order*, the Commission issued a Final Regulatory Flexibility Analysis (FRFA) addressing comments submitted with regard to the IRFA. This present Order addresses issues raised by two petitions for reconsideration of the *Triennial Review Order*. Specifically, the Order modifies the unbundling rules governing fiber-to-the-curb (FTTC) loops in response to a petition from BellSouth. The Order also clarifies existing rules regarding network modifications in response to petitions from BellSouth and SureWest. This present Supplemental FRFA (Supplemental FRFA) conforms to the RFA.

8. *Need for, and Objectives of, the Rules*. In response to BellSouth's petition for reconsideration of the *Triennial Review Order*, this Order promotes investment in broadband facilities through the implementation of the unbundling requirements of section 251 of the Act. Specifically, the Order concludes that the fiber-to-the-home (FTTH) rules, which relieve the incumbent LECs from certain unbundling obligations, will also apply to FTTC loops. Specifically, a FTTC loop is a fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises. The Commission further specifies that the fiber transmission facility in a FTTC loop must connect to copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises. In the *Triennial Review Order* released last year, the Commission concluded that the broadband capabilities of FTTH loops would be relieved from unbundling under section 251 of the Act. Today's action builds on the broadband principles of the *Triennial Review Order* by further extending the unbundling relief to FTTC loops. In this Order, the Commission concludes that, as with FTTH, competitors are not impaired without access to FTTC loops in new build (''greenfield'') situations. While requesting carriers may face limited impairment in overbuild (''brownfield'') situations, that is addressed by requiring unbundled access to a 64 kbps channel or unbundled access to spare copper facilities. Based on this analysis of impairment and the section 706 balancing of investment incentives against the costs of unbundling for FTTC, the Commission concludes that FTTC loops should have the same unbundling relief as FTTH loops.

9. Petitions by BellSouth and SureWest also sought clarification whether the Commission's existing unbundling rules require incumbent LECs to build time division multiplexing (TDM) capabilities into networks at the request of competitive LECs. Consequently, this Order clarifies that incumbent LECs are not required to add TDM capabilities into new packetized transmission facilities. In addition, the Order also clarifies that where an incumbent LEC has deployed FTTH or FTTC loops using packet-based equipment, and they nevertheless need to hand off a signal to some customers in TDM format in order to be compatible with an end user's customer premises equipment, this ''TDM handoff'' does not change the scope of unbundling relief.

10. *Summary of Significant Issues Raised by the Public*. The subject petitions for reconsideration were not submitted in response to the previous FRFA, and did not address the FRFA.

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

12. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the revised rule adopted in this Order. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report. The SBA has developed small business size standards for wireline small businesses within the commercial census category of Wired Telecommunications Carriers. Under this category, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

13. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, 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.

14. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year. Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more. Thus, under this size standard, the majority of firms can be considered small.

15. *Incumbent Local Exchange Carriers*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,337 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

16. *Cable and Other Program Distribution*. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

17. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities*: In this Order, we conclude that FTTC loops will be subject to the same unbundling obligations as FTTH loops. This rule modification will relieve the providers of such broadband loops from unbundling obligations under section 251 of the Act. This relieved a section

251 unbundling requirement currently placed on such providers.

18. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*: The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

19. In this Order, we conclude that FTTC loops should be governed by the FTTH loop rules. The Order considered, and rejected, the alternative of retaining the existing unbundling obligations for FTTC. The Order reached this conclusion by applying principles established in the *Triennial Review Order* to more precisely calibrate the Commission's policy for broadband loops. In response to petitions for reconsideration requesting that the Commission look more closely at the unbundling requirements for FTTC loops, the Order considers potential impairment faced by requesting carriers and weighs section 706's broadband deployment goals, and concludes that the record demonstrates that FTTC loops should have the same unbundling relief as FTTH loops. Although this rule will deny unbundling to competitive carriers seeking to serve customers served by FTTC loops, the Commission concluded that requesting carriers face no impairment in greenfield situations and only limited impairment in brownfield situations, which is addressed through access to a 64 kbps channel or a spare copper facility. Further, such unbundling relief was necessary to remove disincentives for incumbent LECs to deploy FTTC facilities. Alternatives considered, including the denial of such unbundling relief to FTTC, were not adopted because they do not accomplish the Commission's objectives in this proceeding of promoting broadband deployment.

20. *Report to Congress*: The Commission will send a copy of the Order, including this Supplemental 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 Order, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and Supplemental FRFA (or summaries thereof) will also be published in the **Federal Register**.

Ordering Clauses

21. *It is ordered* that, pursuant to the authority contained in sections 2, 4(i)–4(j), 10(d), 201, 251, 303(r), and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 152, 154(i)–4(j), 160(d), 201, 251, 303(r), 706 this Order on Reconsideration *is adopted*, and that part 51 of the Commission's rules, 47 CFR part 51, is amended as set forth in Appendix B of the Order. The requirements of this Order shall become effective 30 days after publication in the **Federal Register**.

22. *It is further ordered* that, pursuant to the authority contained in sections 2, 4(i)–4(j), 10(d), 201, 251, 303(r), and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 152, 154(i)–4(j), 160(d), 201, 251, 303(r), and 706, the petitions for reconsideration filed by BellSouth and SureWest *are granted in part.*

23. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Order, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 51

Interconnection, Unbundling Requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 51 as follows:

PART 51—INTERCONNECTION

■ 1. The authority citation for part 51 continues to read:

Authority: Sections 1–5, 7, 201–05, 207–09, 218, 225–27, 251–54, 256, 271, 303(r), 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151–55, 157, 201–05, 207–09, 218, 225–27, 251–54, 256, 271, 303(r), 332, 47 U.S.C. 157 note, unless otherwise noted.

■ 2. Section 51.319 is amended by revising paragraph (a)(3) to read as follows:

§ 51.319 Specific unbundling requirements.

(a) * * *

(3) *Fiber loops.* (i) *Definitions.* (A) *Fiber-to-the-home loops.* A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE).

(B) *Fiber-to-the-curb loops.* A fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises.

(ii) *New builds.* An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility.

(iii) *Overbuilds.* An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility, except that:

(A) The incumbent LEC must maintain the existing copper loop connected to the particular customer premises after deploying the fiber-to-the-home loop or the fiber-to-the-curb loop and provide nondiscriminatory access to that copper loop on an unbundled basis unless the incumbent LEC retires the copper loops pursuant to paragraph (a)(3)(iv) of this section.

(B) An incumbent LEC that maintains the existing copper loops pursuant to paragraph (a)(3)(iii)(A) of this section need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access pursuant to that paragraph, in which case the incumbent LEC shall restore the copper loop to serviceable condition upon request.

(C) An incumbent LEC that retires the copper loop pursuant to paragraph (a)(3)(iv) of this section shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the

fiber-to-the-home loop or fiber-to-the-curb loop on an unbundled basis.

(iv) Retirement of copper loops or copper subloops. Prior to retiring any copper loop or copper subloop that has been replaced with a fiber-to-the-home loop or a fiber-to-the-curb loop, an incumbent LEC must comply with:

(A) The network disclosure requirements set forth in section 251(c)(5) of the Act and in § 51.325 through § 51.335; and

(B) Any applicable state requirements.

* * * * *

■ 3. Section 51.325 is amended by revising paragraph (a)(4) to read as follows:

§ 51.325 Notice of network changes: Public notice requirement.

(a) * * *

(4) Will result in the retirement of copper loops or copper subloops, and the replacement of such loops with fiber-to-the-home loops or fiber-to-the-curb loops, as those terms are defined in § 51.319(a)(3).

* * * * *

■ 4. Section 51.331 is amended by revising paragraph (c) to read as follows:

§ 51.331 Notice of network changes: Timing of notice.

* * * * *

(c) Competing service providers may object to incumbent LEC notice of retirement of copper loops or copper subloops and replacement with fiber-to-the-home loops or fiber-to-the-curb loops in the manner set forth in § 51.333(c).

■ 5. Section 51.333 is amended by revising paragraphs (b) and (c) introductory text, and by revising paragraph (f) to read as follows:

§ 51.333 Notice of Network Changes: Short term notice, objections thereto and objections to retirement of copper loops or copper subloops.

* * * * *

(b) *Implementation date.* The Commission will release a public notice of filings of such short term notices or notices of replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops. The effective date of the network changes referenced in those filings shall be subject to the following requirements:

(1) *Short term notice.* Short term notices shall be deemed final on the tenth business day after the release of the Commission's public notice, unless an objection is filed pursuant to paragraph (c) of this section.

(2) *Replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops.* Notices of replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops shall be deemed approved on the 90th day after the release of the Commission's public notice of the filing, unless an objection is filed pursuant to paragraph (c) of this section. Incumbent LEC notice of intent to retire any copper loops or copper subloops and replace such loops or subloops with fiber-to-the-home loops or fiber-to-the-curb loops shall be subject to the short term notice provisions of this section, but under no circumstances may an incumbent LEC provide less than 90 days notice of such a change.

(c) *Objection procedures for short term notice and notices of replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops.* An objection to an incumbent LEC's short term notice or to its notice that it intends to retire copper loops or copper subloops and replace such loops or subloops with fiber-to-the-home loops or fiber-to-the-curb loops may be filed by an information service provider or telecommunications service provider that directly interconnects with the incumbent LEC's network. Such objections must be filed with the Commission, and served on the incumbent LEC, no later than the ninth business day following the release of the Commission's public notice. All objections filed under this section must:

* * * * *

(f) *Resolution of objections to replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops.* An objection to a notice that an incumbent LEC intends to retire any copper loops or copper subloops and replace such loops or subloops with fiber-to-the-home loops or fiber-to-the-curb loops shall be deemed denied 90 days after the date on which the Commission releases public notice of the incumbent LEC filing, unless the Commission rules otherwise within that time. Until the Commission has either ruled on an objection or the 90-day period for the Commission's consideration has expired, an incumbent LEC may not retire those copper loops or copper subloops at issue for replacement with fiber-to-the-home loops or fiber-to-the-curb loops.

[FR Doc. 04–28531 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3821, MB Docket No. 04–31, RM–10852]

Television Broadcast Service; Gainesville, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Gainesville Channel 61 Associates, LLC, substitutes channel 29 for channel 61+ at Gainesville. *See* 69 FR 9791, March 2, 2004. TV channel 29 can be allotted to Gainesville with a zero offset consistent with the principle community coverage requirements of Section 73.610 at coordinates 29–37–47 N. and 82–34–24 W. With this action, this proceeding is terminated.

DATES: Effective January 28, 2005.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–31, adopted December 2, 2004, and released December 14, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW, Room CY–B402, Washington, DC, 20554, telephone 301–816–2820, facsimile 301–816–0169, or via-e-mail *joshir@erols.com.*

This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new ore modified ''information collection burden for small business concerns with fewer that 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. 107–198, *see* 44 U.S.C. 3506(c)(4).

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

List of Subjects in 47 CFR Part 73

Television broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

■ 1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.606 [Amended]

■ 2. Section 73.606(b), the Table of Television Allotments under Florida, is amended by removing TV channel 61+ and adding TV channel 29 at Gainesville.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 04–28425 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 021122284–2323–02; I.D. 122204G]

Atlantic Bluefish Fishery

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

ACTION: Commercial quota transfer.

SUMMARY: NMFS announces that the commercial quotas for Atlantic bluefish are adjusted to reflect transfers made by several states. By this action, NMFS adjusts the quotas and announces the revised commercial bluefish quota for each state involved.

DATES: Effective December 23, 2004, through December 31, 2004.

FOR FURTHER INFORMATION CONTACT: Don Frei, Fishery Management Specialist, (978) 281–9221, FAX (978) 281–9135, or *Don.Frei@noaa.gov*.

SUPPLEMENTARY INFORMATION: Regulations governing the bluefish 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 final rule implementing Amendment 1 to the FMP (65 FR 45844, July 26, 2000) provided a mechanism for bluefish quota to be transferred from one state to another. The FMP allows two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), to transfer or combine part or all of their annual commercial quota. The Regional Administrator must consider the criteria set forth in § 648.160 (f)(1) in the evaluation of requests for quota transfers or combinations.

The initial total commercial quota for bluefish for the 2004 calendar year was set equal to 10,500,014 lb (4,762,729 kg). The percent allocated to vessels landing bluefish in Maine was 0.6685 percent; Virginia, 11.8795 percent; New York, 10.3851 percent; North Carolina, 33.0608 percent. This resulted in an initial commercial quota for Maine of 70,193 lb (31,839 kg); Virginia, 1,247,348 lb (565,7931 kg); New York, 1,090,436 lb (494,619 kg); and North Carolina, 3,366,384 (1,526,982 kg) (69 FR 47798, August 4, 2004). The 2004 bluefish allocation for Maine was further reduced to 69,536 lb (31,541 kg); Virginia, to 1,235,687 lb (560,498 kg); New York, to 1,080,242 lb (489,990 kg); and North Carolina, to 3,334,913 lb (1,512,691 kg), due to quota allocation to support research projects through a research set-aside.

Virginia has agreed to transfer 300,000 lb (136,077 kg) and Maine has agreed to transfer 69,000 lb (31,297 kg) of their 2004 commercial bluefish quota to North Carolina. Virginia also has agreed to transfer 250,000 lb (113,398 kg) of bluefish quota to New York. The revised quotas for the calendar year 2004 are: Virginia, 685, 687 lb (560,498 kg); Maine, 536 lb (243 kg); New York, 1,330,242 lb (603,387 kg); and North Carolina, 3,703,913 lb (1,680,065 kg).

The Regional Administrator has determined that the criteria set forth in § 648.160(f)(1) have been met. This action does not alter any of the conclusions reached in the environmental assessment for the 2004 specifications for the Atlantic bluefish fishery. This is a routine administrative action that reallocates commercial quota within the scope of previously published environmental analyses.

Classification

This action is taken under 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: December 22, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–28513 Filed 12–23–04; 2:20 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 249
Wednesday, December 29, 2004

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

NUCLEAR WASTE TECHNICAL REVIEW BOARD

10 CFR Part 1303

Rule Implementing the Freedom of Information Act

AGENCY: U.S. Nuclear Waste Technical Review Board.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Waste Technical Review Board (Board) is proposing to implement a set of procedural regulations under the Freedom of Information act (FOIA) in accordance with 5 U.S.C. 552, the Freedom of Information Act, and Public Law 104–231, the Electronic Freedom of Information Act Amendments of 1996. These proposed regulations have been written to conform to the statutory provisions in the Acts, to expedite the processing of FOIA requests received by the Board, and to ensure the proper dissemination of information to the public.

DATES: Comments on the proposed rule should be submitted no later than February 11, 2005.

ADDRESSES: Comments on this proposed rule may be submitted:

By Mail or Hand Delivery: Joyce M. Dory, Director of Administration, U.S. Nuclear Waste Technical Review Board, 2300 Clarendon Blvd., Suite 1300, Arlington, VA 22201;

By Fax: 703–235–4495;

To the Federal eRulemaking Portal: http://www.regulations.gov; or

By E-mail to the Board. *foia@nwtrb.gov*.

All comments on this proposed FOIA rule should be clearly identified as such.

FOR FURTHER INFORMATION CONTACT: Victoria Reich, 703–235–4473.

SUPPLEMENTARY INFORMATION: This proposed rule is intended to set forth the procedures for members of the public to request records from the U.S. Nuclear Waste Technical Review Board under both the Freedom of Information Act and the Electronic Freedom of Information Act amendments of 1996. The rule also sets forth the procedures that the Board will use when responding to such requests. It sets up the time frames for responses and the current fee schedule for any applicable charges for information. The rule also supplies information about Board materials available to the public through both the Board's reading room and its Web site.

Executive Order No. 12866

These proposed regulations do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, review by the Office of Management and Budget is not required.

Regulatory Flexibility Act

These proposed regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis as provided by the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed regulations impose no additional reporting and recordkeeping requirements. Therefore, clearance by the Office of Management and Budget is not required.

List of Subjects in 10 CFR Part 1303

Administrative practice and procedure; Freedom of Information; Reporting and recordkeeping requirements.

Therefore, the Board proposes to add part 1303 to Title 10 of the Code of Federal Regulations, to read as follows:

PART 1303—PUBLIC INFORMATION AND REQUESTS

Sec.

1303.101 Scope.
1303.102 Definitions.
1303.103 Public reading area.
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1303.105 Requests for Board records.
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1303.112 Denials.
1303.113 Business information.
1303.114 Appeals.
1303.115 Preservation of records.
1303.116 Other rights and services.

Authority: 5 U.S.C. 301, 5 U.S.C. 552 as amended; Executive Order 12600, 3 CFR, 1988 Comp., p. 235.

§ 1303.101 Scope.

This part sets forth the policies and procedures of the U.S. Nuclear Waste Technical Review Board (Board) regarding public access to documents under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The provisions in the Act shall take precedence over any part of the Board's regulations in conflict with the Act. This part gives the procedures the public may use to inspect and obtain copies of Board records under the FOIA, including administrative procedures which must be exhausted before a requestor invokes the jurisdiction of an appropriate United States District Court for the Board's failure to respond to a proper request within the statutory time limits, for a denial of Board records or challenges to the adequacy of a search, or for denial of fee waiver.

§ 1303.102 Definitions.

For words used in this document, unless the context indicates otherwise, singular includes the plural, plural includes the singular, present tense includes the future tense, and words of one gender include the other gender.

(a)(1) *Agency records*—Include materials that are in the control of the Board and associated with Board business, as follows:

(i) Materials produced by the Board.

(ii) Materials produced by a consultant for the Board.

(iii) Materials distributed by presenters at a Board meeting.

(2) All references to records, include both the entire record, or any part of the record.

(b) *Board*—The U.S. Nuclear Waste Technical review Board.

(c) *Chairman*—The Chairman of the Board as designated by the President.

(d) *Designated FOIA Officer*—The person named by the Board to administer the Board's activities in regard to the regulations in this part. The FOIA Officer also shall be:

(1) The Board officer having custody of, or responsibility for, agency records in the possession of the Board.

(2) The Board officer having responsibility for authorizing or denying

production of records from requests filed under the Freedom of Information Act.

(e) *Executive Director*—The chief operating officer of the Board.

(f) *Member*—An individual appointed to serve on the Board by the President of the United States.

(g) *Days*—Standard working days, excluding weekends and Federal holidays.

§ 1303.103 Public reading area.

(a) A public reading area is available at the Board office located at 2300 Clarendon Blvd., Suite 1300, Arlington, Virginia 22201. To use the reading area, contact the Director of Administration by:

(1) Letter to the address in this paragraph (a);

(2) Telephone: 703–235–4473;

(3) A request at the Board's Web site at *http://www.nwtrb.gov*; or.

(4) Fax: 703–532–4495.

(b) Documents also may be requested through the Board's Web site or by letter or fax. Please ensure that the records sought are clearly described. Materials produced by the Board are in the public domain unless otherwise noted.

(c) Many Board records are available electronically at the Board's Web site (*http://www.nwtrb.gov*).

(d) Records of the Board available for inspection and copying include:

(1) The rules and regulations of the Board.

(2) Statements of policy adopted by the Board.

(3) Board reports to the U.S. Congress and the U.S. Secretary of Energy.

(4) Board correspondence with Congress and the Department of Energy (DOE).

(5) Transcripts of Board meetings.

(6) Biographical information about current Board members.

(7) Copies of records released in response to FOIA requests.

(e) The cost of copying information available in the Board office shall be imposed in accordance with the provisions of § 1303.108.

§ 1303.104 Board records exempt from public disclosure.

5 U.S.C. 552 provides that the requirements of the FOIA do not apply to matters that are:

(a) Specifically authorized under the criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and in fact are properly classified pursuant to such an executive order.

(b) Related solely to the internal personnel rules and practices of the Board.

(c) Specifically exempted from disclosure by another Federal statute, provided that such statute:

(1) Requires that records withheld from the public in such a manner that leaves no discretion on the issue; or

(2) Establishes criteria for withholding or refers to particular types of matters to be withheld.

(d) Trade secrets, and commercial or financial information obtained from a person and privileged or confidential.

(e) Interagency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the Board.

(f) Personnel, medical, or similar files that disclosing would constitute a clearly unwarranted invasion of personal privacy.

(g) Records or information complied for law enforcement purposes. But only to extent that the production of such law enforcement records of information:

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of any confidential source, including a State, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and in the case of a record or information complied by a criminal law enforcement agency in the course of a criminal investigation or by an agency conducting a lawful security intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(h) Contained in or related to examination, operating, or condition reports, prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(i) Geological and geophysical information and data, including maps, concerning wells.

§ 1303.105 Requests for Board records.

(a) A written FOIA request must be submitted. You may:

(1) Write: NWTRB Designated FOIA Officer, 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201;

(2) Send a request via the Board's Web site at *http://www.nwtrb.gov*; or

(3) Fax: 703–235–4495.

(b) When making a request for records about a person, Privacy Act regulations also may apply. Please check the regulations for additional requirements before submitting a request. When making a request for records about someone other than yourself, you must include either:

(1) Written authorization signed by the person permitting you to see the records; or

(2) Proof that the individual is deceased (*e.g.*, a death certificate or an obituary).

(c) A request will be considered received for purposes of § 1303.107 on the date that it is received by the Board's FOIA office. For prompt handling, write ''Freedom of Information Act Request'' on the letter and envelope or in the subject line of the Web request or fax.

(d) Each request must clearly describe the desired records in sufficient detail to enable Board personnel to locate them with reasonable effort. Response to requests may be delayed if the records are not clearly described.

(e) Whenever possible, requests should include specific information about each record sought, such as date, title or name, author, recipient, and subject.

(f) If the FOIA Officer determines that the request does not clearly describe the records sought, he or she will either advise you of the additional information needed to locate the record or otherwise state why the request is insufficient. The requestor will then be given the opportunity to provide additional information or to modify their request.

(g) Submitting a FOIA request shall be considered a commitment by the requestor to pay applicable fees required under § 1303.108 unless the requestor seeks a waiver of fees. When making a request, you may specify a willingness to pay fees up to a specific amount.

(h) The FOIA does not require the Board to:

(1) Compile or create records solely for the purpose of satisfying a request for records.

(2) Provide records not yet in existence, even if such records may be expected to come into existence at some time in the future.

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requestor that the records have been destroyed or otherwise disposed of.

§ 1303.106 Responsibility, form, and content of responses.

The Board's Executive Director or his/her designated FOIA Officer is authorized to grant or deny any request for a record and determine appropriate fees. When determining which records are responsive to a request, the Board will include only records in its possession as of the date of the request.

(a) If no records are responsive to the request, the FOIA Officer will notify the requestor in writing.

(b) When a FOIA Officer denies a request in whole or in part he/she will notify the requestor in writing. The response will be signed by the FOIA Officer and will include:

(1) The name and title or position of the person making the denial;

(2) A brief statement of the reasons for the denial, including the FOIA exemption(s) that the FOIA Officer has relied on in denying the request; and

(3) A statement that the denial may be appealed under § 1303.114 and a description of the requirements of that section.

(c) *Consultations and referrals.* When a request for a record not produced by the Board is received, the Board shall refer the requestor to the issuing agency in writing.

(d) *Notice of referral.* When the Board refers all or part of a request to another agency, it shall give the requestor the address of the agency contact and the section(s) referred.

(e) *Timing of responses to requests sent to other agencies.* The Board shall provide, within the FOIA deadline, responses only to those parts of the request not referred. Requests will be referred to other agencies and the requestor notified as soon as it is determined that a referral is appropriate.

(f) *Agreements on consultations and referrals.* The Board may make agreements with other agencies to eliminate the need for consultations or referrals for particular types of records.

§ 1303.107 Timing of responses to requests.

(a) *General.* The Board shall normally respond to requests in the order of their receipt.

(b) *Acknowledgment of requests.* On receipt of a request, the Board shall send an acknowledgement letter or an e-mail confirming the requestor's agreement to pay fees under § 1303.108 and providing a request number for further reference.

(c) *Granting requests.* The Board shall have 20 business days from when a request is received to determine whether to grant or deny it. Once the Board determines whether it can grant a request entirely or in part, it shall notify the requestor in writing. The Board shall advise the requestor of any fees to be charged under § 1303.108 and shall disclose records promptly on payment of the fees. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also shall be indicated on the record when technically feasible.

(d) *Unusual circumstances.* (1) If the statutory time limits for processing a request cannot be met because of ''unusual circumstances'' as defined in the FOIA, the Board shall promptly notify the requestor in writing, explaining the circumstances and giving the date by which the request can be completed or if the Board cannot complete the request. If the extension is for more than 10 working days, the Board shall provide the requestor with an opportunity either to:

(i) Modify the request so that it can be processed within the time limits; or

(ii) Arrange an alternative time period for processing the original request.

(2) If the Board believes that multiple requests submitted by a requestor or by requestors acting in concert constitute a single request that would otherwise involve unusual circumstances, and if the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated.

(e) *Expedited processing.* (1) Requests and appeals shall be taken out of order and given expedited processing whenever it is determined that they involve:

(i) Circumstances that could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged activity if made by a person primarily engaged in disseminating information.

(2) Requests for expedited processing may be made either at the time of the initial request or at a later time.

(3) Requests for expedited processing must include a statement explaining in detail the basis for requesting expedited processing. For example, a requestor under § 1303.108 must establish that his/her professional activity is news reporting, although it need not be their sole occupation. The requester also must establish a particular urgency to inform the public about government activity involved in the request, beyond the public's right to know about government activity generally.

(4) Within 10 calendar days of receipt of a request for expedited processing, the Board shall decide whether to grant the request and notify the requestor of its decision. If a request for expedited treatment is granted, the request shall be processed as soon as practicable. If a request for expedited processing is denied, an appeal of that decision shall be acted on expeditiously.

§ 1303.108 Fees.

(a) *General.* The Board shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under § 1303.109 or where a waiver or reduction of fees is granted under § 1303.111. Fees must be paid before the copies of records are sent. Fees may be paid by check or money order payable to the Treasury of the United States.

(b) *Definitions for this section.* (1) Commercial use request—A request from, or on behalf of, a person who seeks information for a purpose that furthers their commercial, trade, or profit interests including furthering those interests through litigation. The Board shall try to determine the use to which a record will be put. When the Board believes that a request is for commercial use either because of the nature of the request or because the Board has cause to doubt the stated use, the Board shall ask the requestor for clarification.

(2) Direct costs—Expenses that the Board incurs in searching for, duplicating, and, for some requests, reviewing records in response to a FOIA. Direct costs include the full salary of the employee performing the work and the cost of duplication of the records. Overhead expenses, such as the costs of space, heating, and lighting, are not included.

(3) Duplication—Making a copy of a record or the information in the record, to respond to a FOIA. Copies can be in paper, microform, electronic, or other format. The Board shall honor a requestor's preference for format if the record is readily reproducible in that format at a reasonable cost.

(4) Educational institution—A public or private school, an undergraduate, graduate, professional or vocational school, that has a program of scholarly research. For a request to be in this category, a requestor must show that request is authorized by and made under the auspices of the qualifying institution and that the records will be used for scholarly research.

(5) Noncommercial scientific institution—An institution that is not operated on a commercial basis, as defined in paragraph (b)(1) of this section and is operated solely for conducting scientific research that does

not promote any particular product or industry. For a request to be in this category, the requestor must show that the request is authorized and made under the auspices of the qualifying institution and that the records will be used to further scientific research.

(6) Representative of the new media—Any person actively reporting for an entity that provides news to the public. The term ''news'' means information about current events or of current interest to the public. Examples include: television and radio stations broadcasting to the public; and publishers of periodicals who make their news products available to the general public. For freelance journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. The Board may use a publication contract or past publication records to make this determination. The requestor must not be seeking records for a commercial use; however, a request solely supporting the news-dissemination function is not considered a commercial use.

(7) Review—Examining a record to determine whether any part of it is exempt from disclosure, and processing a record for disclosure. Review costs are recoverable even if a record is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter under paragraph (c)(3) of this section but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) Search—The process of looking for and retrieving records, including page-by-page or line-by-line identification of information within records and reasonable efforts to locate and retrieve information from records maintained in electronic form. The Board shall ensure that searches are done in the most efficient and least expensive way that is reasonably possible.

(c) *Fees.* In responding to FOIA requests, the Board shall charge the following fees unless a waiver or a reduction of fees has been granted under § 1303.111:

(1) *Search.* (i) Search fees shall be charged for all requests subject to the limitations of § 1303.109. The Board may charge for time spent searching even if no responsive record is located, or if the record(s) located are withheld as exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be $5. If a search and retrieval requires the use of professional personnel the fee will be $8 for each quarter hour. If the time of managerial personnel is required, the fee will be $10 for each quarter hour.

(iii) For computer searches of records, requestors will be charged the direct costs of conducting the search, although certain requestors (*see* § 1303.109(a)) will be charged no search fee and certain other requestors (*see* § 1303.109(b)) will be entitled to two hours of manual search time without charge. Direct costs include the cost of operating a computer for the search time for requested records and the operator salary for the search.

(2) *Duplication.* Duplication fees for paper copies of a record will be 10 cents per page for black and white and 20 cents per page for color. For all other forms of duplication, the Board shall charge the direct costs of producing the copy. All charges are subject to the limitations of §§ 1303.109 and 1303.111.

(3) *Review.* When a commercial-use request is made, review fees shall be charged as stated in paragraph (c)(1) of this section. These fees apply only to the initial record review, when the Board determines whether an exemption applies to a particular record. Charges shall not be imposed for review at the administrative appeal level if an exemption is applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies. The costs of that review shall be charged. All review fees shall be charged at the same rates as those charged in paragraph (c)(1) of this section.

§ 1303.109 Restrictions on charging fees.

(a) When determining search or review fees:

(1) No search fee shall be charged for requests by educational institutions, noncommercial scientific institutions, and representatives of the news media.

(2) The Board shall provide without charge, to all but commercial users:

(i) The first 100 pages of black and white duplication (or the cost equivalent); and

(ii) The first two hours of search by a clerical staff member (or the cost equivalent).

(3) When the total fee for a request will be $14.00 or less for any request, no fee shall be charged.

(b) The provisions of paragraphs (a)(2) and (a)(3) of this section work together. All requestors seeking records for a non-commercial use shall not be charged unless the total cost for the request exceeds by more than $14.00, the cost of a two hour clerical search, plus the cost of duplication over the 100 page exemption.

§ 1303.110 Notice of anticipated fees.

(a) *General.* The Board shall advise the requestor in writing of any applicable fees. If only a part of the fee can be estimated readily, the Board shall advise the requestor that this may be only a part of the total fee. After the requestor has been sent a fee estimate, the request shall not be considered received until the requestor makes a firm commitment to pay the anticipiated total fee. Any such agreement must be made by the requestor in writing and must be received within 60 days of the Board's notice. If the requestor does not provide a firm commitment to pay the anticipiated fee within 60 days of the notice, the request shall be closed. The requestor may be given an opportunity to work with the Board to change the request and lower the cost.

(b) *Charges for other services.* When the Board chooses as a matter of administrative discretion to provide a special service, such as certifying that records are true copies or sending them by other than ordinary mail, the Board shall pay the costs of providing the service unless previous arrangements have been made with the requestor.

(c) *Charging interest.* The Board may charge interest on any unpaid bill starting on the 31st day following the date of billing. Interest charges shall be assessed as the rate provided in 31 U.S.C. 3717 and shall accrue from the date of the billing until payment is received by the Board. The Board shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended.

(d) *Aggregating requests.* If the Board reasonably believes that a requestor or a group of requestors acting together is trying to divide a request into a series of smaller requests for the purpose of avoiding fees, the Board may aggregate the requests and charge accordingly. The Board shall assume that multiple requests of the same type made within a 30-day period have been made in order to avoid fees. If requests are separated by a longer period, the Board shall aggregate them only if there is a solid basis for determining that aggregation is warranted. Multiple requests involving unrelated matters shall not be aggregated.

(e) *Advance payments.* When a requestor has previously failed to pay promptly a properly charged FOIA fee to the Board or another agency, the Board shall require proof that full payment has been made to that agency before it begins to process that requestor's FOIA. The Board shall also

require advance payment of the full amount of the anticipated fee. When advance payment is required, the request is not considered received until payment has been made.

§ 1303.111 Requirements for waiver or reduction of fees.

(a) Records shall be furnished without charge or at a reduced charge if the Board determines that:

(1) Disclosure is in the public interest and the information is likely to contribute significantly to public understanding of the activities of the government; and

(2) Disclosure is not primarily in the commercial interest of the requestor.

(b) In determining whether the first requirement is met, the Board shall consider:

(1) Subject: Do the requested records concern identifiable activities of the federal government?

(2) Informative value: Will the disclosure contribute to an understanding of government activities? Do records contain information on activities ''likely to contribute'' to an increased public understanding? If the information or similar information is already in the public domain, the record(s) would not increase the public's understanding.

(3) Would the disclosure contribute to the understanding of a reasonably broad audience, as opposed to the individual understanding of the requestor? A requestor's expertise in the subject and intention to convey information to the public shall be considered. Being a valid representative of the news media shall satisfy this consideration.

(4) Is the disclosure likely to contribute significantly to public understanding of government activities? The level of understanding after the disclosure versus that before the disclosure must be enhanced to a significant extent. However, the Board shall not make value judgments about whether information contributing to public understanding of government activities is important enough to release.

(c) In determining whether the second requirement is met, the Board shall consider:

(1) The existence and extent of the commercial interest: Would a commercial interest be substantially furthered by the disclosure? The Board shall consider the commercial interest (*see* paragraph (a)(2) of this section) of either the requestor or of any person on whose behalf they may be acting that would be furthered by the disclosure. During the administrative process, requestors shall be given an opportunity to provide additional information about this concern.

(2) The primary interest for disclosure: Whether the commercial interest of the requestor is sufficiently large in comparison to the public interest, that disclosure is ''primarily in the commercial interest of the requestor.'' A fee waiver is justified if the public interest standard under paragraph (b) of this section is satisfied and if that public interest is greater than any commercial interest. The Board shall presume that when news media requestors satisfy this standard, primarily the public interest is served.

(d) If only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted only for those records.

(e) Requests for a waiver or a reduction of fees must address the factors listed in paragraphs (a) and (b) of this section only as they apply to each request. The Board also shall consider their administrative resources when responding to requests and may negotiate with the requestor to find the best way to optimize their resources in responding to the request when deciding whether to grant waivers or reductions of fees.

§ 1303.112 Denials.

(a) When denying a request in any respect, the Board shall notify the requestor of that determination in writing. The types of denials include:

(1) Denials of requests, consisting of a determination:

(i) To withhold any requested record in whole or in part;

(ii) That a requested record does not exist or cannot be located;

(iii) That a record is not readily reproducible in the form or format sought;

(iv) That what has been requested is not a record subject to the FOIA; and

(v) That the material requested is not a Board record (*e.g.,* material produced by another agency or organization).

(2) A determination on any disputed fee matter, including a denial of a request for a fee waiver.

(3) A denial of a request for expedited processing.

(b) The denial letter shall be signed by the Director of Administration, the Deputy Director, or their designee, and shall include all of the following:

(1) The name and title of the person responsible for the denial.

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied in denying the request.

(3) An estimate of the volume of records withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if it would harm an interest protected by an applicable exemption.

(4) A statement that the denial may be appealed under § 1303.114 and a description of the requirements of § 1303.114.

§ 1303.113 Business information.

(a) *In general.* Business information obtained by the Board from a submitter shall be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section:

(1) Business information—commercial or financial records obtained by the Board that may be protected from disclosure under Exemption 4 of the Freedom of Information Act (FOIA).

(2) Submitter—any person or entity from which the Board obtains business records, either directly or indirectly. The term includes, but is not limited to, corporations, and state, local, tribal, and foreign governments.

(c) *Designation of business information.* Submitters of business information shall designate any part of the record considered to be protected from disclosure under Exemption 4 of the FOIA by appropriately marking the material. This may be done either at the time the record is submitted or at a reasonable time thereafter. This designation lasts for 10 years after submittal unless the submitter requests and provides justification for a longer period.

(d) *Notice to submitters.* The Board shall provide a business submitter with prompt written notice of any FOIA request or appeal that seeks its business information under paragraph (e) of this section, except as provided in paragraph (h) of this section, to give the submitter an opportunity to object to that disclosure under paragraph (f) of this section. The notice shall either describe the records requested or include copies of the records.

(e) *Required notice.* Notice shall be given to a submitter when:

(1) The submitter has designated that the information is considered protected from disclosure under Exemption 4 of the FOIA; or

(2) The Board has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

(f)(1) *Objecting to disclosure.* A submitter shall have 30 days to respond to the notice described in paragraph (d) of this section. If a submitter has an objection to disclosure, they are

required to submit a detailed written statement including:

(i) All grounds for withholding any of the information under any exemption of the FOIA, and

(ii) In the case of Exemption 4, the reason why the information is a trade secret, commercial, or financial information that is privileged or confidential.

(2) If a submitter fails to respond to the notice in paragraph (d) of the section within 30 days, the Board shall assume that the submitter has no objection to disclosure. The Board shall not consider information not received by the Board until after a disclosure decision has been made. Information provided by a submitter under this paragraph might itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* The Board shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the business records. Whenever the Board decides to disclose business records over the objection of a submitter, it shall give the submitter written notice, that will include:

(1) A statement of the reason(s) the submitter's objections were not sustained;

(2) A description of the business records to be disclosed; and

(3) A specified disclosure date at a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements in paragraphs (d) and (g) of this section shall not apply if:

(1) The Board determines that the information should not be disclosed;

(2) The information has been published legally or has been officially made available to the public;

(3) Disclosure of the information is required by another statute or by a regulation issued in accordance with Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(4) The objection made by the submitter under paragraph (f) of this section appears frivolous. In such a case, the Board shall promptly notify the submitter of its decision using the guidelines in paragraph (g) of this section.

(i) *Notice of FOIA lawsuit.* When a requestor files a lawsuit seeking to compel the disclosure of business information, the Board shall promptly notify the submitter.

(j) *Corresponding notice to requestors.* When the Board provides a submitter with either notice and an opportunity to object to disclosure under paragraph (d) of this section or with its intent to disclose requested information under paragraph (g) of this section, the Board also shall notify the requestor(s). When a submitter files a lawsuit seeking to prevent the disclosure of business information, the Board shall notify the requestor(s).

§ 1303.114 Appeals.

(a)(1) *Appeals of adverse determinations.* If you are dissatisfied with the Board's response to your request, you may appeal to the Board's Executive Director:

(i) By mail to: U.S. Nuclear Waste Technical Review Board, 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201;

(ii) By e-mail to: *FOIA@nwtrb.gov*; or

(iii) By fax to: 703–235–4495.

(2) The appeal must be in writing and must be received within 30 days of the date of the Board's response. The appeal letter, e-mail, or fax may include as much or as little related information as you wish, as long as it clearly identifies the Board determination that you are appealing, including the assigned request number, if known. For prompt handling, please mark your appeal ''Freedom of Information Act Appeal.''

(b) *Responses to appeals.* Requestors shall be notified in writing of the decision on the appeal. A decision affirming an adverse determination shall include a statement of the reason(s) for the affirmation, including any FOIA exemption(s) applied, and shall include the FOIA provisions for court review of the decision. If the adverse determination is reversed or modified on appeal, the request shall be reprocessed in accordance with that appeal decision.

(c) *When appeal is required.* If a review by a court of any adverse determination is desired, the determination must first be appealed under this section.

(d) *Denial of appeal.* An adverse determination by the Executive Director shall be the final action of the Board.

(e) *Unacceptable appeals.* An appeal will not be acted on if the request becomes a matter of FOIA litigation.

§ 1303.115 Preservation of records.

The Board shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit.

§ 1303.116 Other rights and services.

Nothing in this part shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is entitled under the FOIA.

Dated: December 21, 2004.

William D. Barnard,

Executive Director, U.S. Nuclear Waste Technical Review Board.

[FR Doc. 04–28342 Filed 12–28–04; 8:45 am]

BILLING CODE 6820–AM–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19955; Directorate Identifier 2004–NE–17–AD]

RIN 2120–AA64

Airworthiness Directives; Hartzell Propeller Inc. Propellers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Hartzell Propeller Inc. propellers. This proposed AD would require inspecting the propeller blades and other critical propeller parts for corrosion and mechanical damage. This proposed AD results from two events where a ''Z-shank'' blade failed and separated and the results of teardown inspections that detected corrosion in the blade bore. We are proposing this AD to detect corrosion and mechanical damage that can cause failure of a propeller, which could result in loss of control of the airplane.

DATES: We must receive any comments on this proposed AD by February 28, 2005.

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

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

• *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You can get the service information identified in this proposed AD from Hartzell Propeller Inc. Technical Publications Department, One Propeller Place, Piqua, OH 45356; telephone (937) 778–4200; fax (937) 778–4391.

You may examine the comments on this proposed AD in the AD docket on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Tomaso DiPaolo, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Small Airplane Directorate, 2300 East Devon Avenue, Des Plaines, IL 60018–4696; telephone (847) 294–7031; fax (847) 294–7834.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2004–19955; Directorate Identifier 2004–NE–17–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Examining the AD Docket

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

Discussion

On January 25, 2003, a Beech 95 airplane lost control after takeoff when a 2.5-foot section of a Hartzell HC–92ZK–2/8447 propeller blade separated. Examination of the fracture surfaces revealed the blade failed because of fatigue cracking. The cracking began at corrosion pits on the internal surface of the blade bore. On July 23, 2001, a Beech 95A airplane suffered severe engine damage after a Hartzell HC–92ZK–2B/8447 blade separated. Examination of the fracture surfaces revealed the blade failed from fatigue cracks that started in an area that had scratches and a gouge on the internal surface of the blade bore.

The ''Z'' shank design propellers are often installed on airplanes that do not have a mandatory periodic propeller maintenance program and as a result, some propellers have not been maintained as specified in the manufacturers instructions. Many of the propeller models have been in service for more than 40 years. If they are not serviced to a recent maintenance document, like that required by Hartzell Service Bulletin 136, revisions G, H, or I, those propellers are likely to contain corrosion or mechanical damage in the blade bore.

After the event on January 24, 2003, the National Transportation Safety Board (NTSB) issued a recommendation to require repetitive inspections on all ''Z'' shank propellers at the time-between-overhaul interval recommended by Hartzell Propeller Inc. Because most ''Z'' shank propellers are installed on airplanes that do not have mandatory periodic maintenance, we are proposing a onetime inspection of ''Z'' shank propellers. We are also proposing a onetime inspection of ''P,'' ''R,'' and ''W'' shank propellers because of their similarities to the ''Z'' shank propellers. This condition, if not corrected, could result in failure and separation of a propeller blade, which could result in loss of control of the airplane. In addition, while the propeller is disassembled for the blade bore inspection, we are taking this significant opportunity to also inspect and remove corrosion and damaged areas in other critical propeller parts.

We are also proposing requirement to report the inspection findings. The affected propellers are aging and there is no regulatory requirement for any type of repetitive safety inspections. We have been reviewing service difficulty information gathered over the past ten years and have received reports of ''old'' propellers (some over forty years of age), which have not had an overhaul, that are corroded, cracked, or beyond airworthy limits.

Relevant Service Information

We have reviewed and approved the technical contents of Hartzell Propeller Inc. Service Bulletin (SB) 136, Revision G, dated November 15, 1991; Revision H, dated March 12, 1993; and Revision I, dated April 25, 2003. Those SBs describe procedures for disassembling, cleaning, inspecting, and reworking the propeller blades. We have also reviewed the applicable Hartzell overhaul manuals that we reference for the various additional inspections.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require a onetime inspection of the bore of the propeller blade and other critical propeller parts, and if necessary, removing any corrosion or mechanical damage:

- Within 12 months after the effective date of the proposed AD, if the propeller was not overhauled within the past 25 years.
- Within 18 months after the effective date of the proposed AD, if the propeller was not overhauled within the past 20 years.
- Within 24 months after the effective date of the proposed AD, if the propeller was not overhauled within the past 15 years.
- Within 36 months after the effective date of the proposed AD, if the propeller was not overhauled within the past 10 years.

The proposed AD would require you to use the service information described previously to perform these actions.

Costs of Compliance

There are about 1,700 Hartzell propeller assemblies of the affected design in the worldwide fleet. We estimate that 1,200 propeller assemblies installed on airplanes of U.S. registry would be affected by this proposed AD. We also estimate that it would take about 20 work hours per propeller assembly to perform the proposed actions, and that the average labor rate is $65 per work hour. Required parts would cost about $450 per propeller assembly. Based on these figures, we

estimate the total cost of the proposed AD to U.S. operators to be $2,100,000.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Hartzell Propeller, Inc.: Docket No. FAA–2004–19955; Directorate Identifier 2004–NE–17–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by February 28, 2005.

Affected ADs

(b) None.

Applicability: (c) This AD applies to Hartzell propeller assemblies with hub model part number (P/N) series specified in Table 1 of this AD. These propellers are installed on, but not limited to, the aircraft listed in Table 2 of this AD.

TABLE 1.—LIST OF APPLICABLE PROPELLER ASSEMBLIES BY HUB MODEL P/N SERIES

HC–92W Series.
BHC–92W Series.
HC–92Z Series.
BHC–92Z Series.
HC–B3P Series.
HC–B3R Series.
HC–B3W Series.
BHC–B3W Series.
HA–B3Z Series.
HC–B3Z Series.

TABLE 2.—LIST OF AIRPLANES THAT MIGHT USE AN AFFECTED PROPELLER ASSEMBLY

Aircraft manufacturer	Aircraft model
AERMACCHI (AERONAUTICA MACCHI)	AM–3C
AERO COMMANDER	560–F680, 680E, 680F, 680FL, 680FLP, 720
AEROSPATIALE (MORANE SAULNIER)	733
AEROSTAR AIRCRAFT CORP.	360
AEROTEK II, INC. (CALLAIR)	B1A (CALLAIR)
AIR & SPACE	18, 18A
BEECH	18 Series
	C45
	35 Series
	A65, 65, 65–80, 65–A80, 65–B80, 65–88
	95, B95, B95A, D95A, E95 70
	C18S [(C–45(A, F), UC–45(B, F), AT–7 (A, B, C), JRB–(1, 2, 3, 4), SNB–2(C)]
	C18S, AT–11
	C–45G,C–45H; TC–45G,H,J; RC–45J
	D18S,E18S, G18S, H18; 3N, 3NM, 3TM
	E50, F50, G50, H50, J50
BUSHMASTER AIRCRAFT CORP.	BUSHMASTER 2000
CESSNA	172
	175, 175A
	190, 195, A, B
	421, 421A
	A185E, A185F (SEAPLANES ONLY)
CESSNA	T50
DE HAVILLAND CANADA	DHC–2 MKI
DORNIER	DO28D, DO28D–1
FOUND BROTHERS	100
FOUND BROTHERS	FBA–2C
GOODYEAR (LOCKHEED MARTIN)	GZ20, GZ20A
GRUMMAN (GULFSTREAM AERO.)	G44, G44A
GRUMMAN (MCKINNON)	G21A

TABLE 2.—LIST OF AIRPLANES THAT MIGHT USE AN AFFECTED PROPELLER ASSEMBLY—Continued

Aircraft manufacturer	Aircraft model
HELIO	H–250
	H–295, HT–295 (U–10D)
	H–395 (L–28A, U–10B)
	H–500
ICA (ROMANIA)	IAR–831
JOBMASTER	DGA–15P
KWAD	SUPER–V
LAKE (REVO)	LA–4
LOCKHEED	12A
MESSERSCHMITT	207
MOONEY	M20A
NAVY	N3N–3
NORD	3400, 3402
PACIFIC AEROSPACE (FLETCHER)	FU–24, FU–24A
PIAGGIO	P–166B, C
PILATUS	PC–6/350; PC–6/350–H1, –H2
PIPER	PA–23
	PA–24
	PA–25
PROCAER	F15/B
REVO (COLONIAL)	C–2
SAAB	91D SAFIR
SCHWEIZER (GRUMMAN)	G–164
SIMMERING GRAZ PAUKER A.G.	SGP222
SPARTON	7W
UTVA	66
WDL AVIATION (formerly WDL FLUGDIENST)	An Airship
WEATHERLY	201B, 201C, 620, 620A, 620C

Unsafe Condition

(d) This AD results from two events where a ''Z-shank'' blade failed and separated and the results of teardown inspections that detected corrosion in the blade bore. We are issuing this AD to detect corrosion and mechanical damage that can cause failure of a propeller, which could result in loss of control of the airplane.

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

Aircraft With Experimental Type Certificates

(f) We recommend that you comply with the inspection requirements of this AD, if you have an aircraft with an experimental type certificate, and you have a propeller hub model listed in this AD installed on that aircraft.

Inspection of the Propeller

(g) If the time-since-overhaul (TSO) of the propeller is 10 years or fewer on the effective date of this AD, no further action is required.

(h) If the propeller assembly was inspected using Hartzell Service Bulletin (SB) No. 136, Revision I, dated April 25, 2003; Revision H, dated March 12, 1993; or Revision G, dated November 15, 1991; no further action is required.

(i) If the TSO of the propeller assembly is more than 10 years on the effective date of this AD, or if the TSO is unknown, or if the propeller has not complied with Hartzell SBs HC–SB–61–136, Revision I, dated April 25, 2003; or Service Bulletin 136, Revision H, dated March 12, 1993; or Revision G, dated November 15, 1991; perform the actions specified in Table 3 of this AD. Use the compliance times specified in Table 3 of this AD. Information on inspecting the propeller assembly for cracks, corrosion or pits, nicks, scratches, wear, blade minimum dimensions, and damage in the blade balance bore can be found in the applicable Hartzell overhaul manual.

TABLE 3.—COMPLIANCE TIMES FOR ONETIME INSPECTION

If the TSO of the propeller assembly on the effective date of this AD is . . .	Then . . .	Perform the inspection . . .
(1) More than 25 years or the TSO is not known.	(a) Disassemble and clean the propeller assembly.. (b) Inspect for cracks, corrosion or pits, nicks, scratches, wear, blade minimum dimensions, and damage in the blade balance hole.. (c) Inspect and rework the propeller blade bore. Use 3.A. of the Accomplishment instructions of Hartzell SB No. 136, Revision I, dated April 26, 2003. (d) Repair and replace with serviceable parts, as necessary. (e) Reassemble and test.	Within 12 months after the effective date of this AD.

TABLE 3.—COMPLIANCE TIMES FOR ONETIME INSPECTION—Continued

If the TSO of the propeller assembly on the effective date of this AD is . . .	Then . . .	Perform the inspection . . .
(2) Twenty-one to 25 years	(a) Disassemble and clean the propeller assembly. (b) Inspect for cracks, corrosion or pits, nicks, scratches, wear, blade minimum dimensions, and damage in the blade balance hole. (c) Inspect and rework the propeller blade bore. Use 3.A. of the Accomplishment instructions of Hartzell SB No. 136, Revision I, dated April 26, 2003. (d) Repair and replace with serviceable parts, as necessary. (e) Reassemble and test.	Within 18 months after the effective date of this AD.
(3) Sixteen to 20 years.	(a) Disassemble and clean the propeller assembly. (b) Inspect for cracks, corrosion or pits, nicks, scratches, wear, blade minimum dimensions, and damage in the blade balance hole. (c) Inspect and rework the propeller blade bore. Use 3.A. of the Accomplishment instructions of Hartzell SB No. 136, Revision I, dated April 26, 2003. (d) Repair and replace with serviceable parts, as necessary. (e) Reassemble and test.	Within 24 months after the effective date of this AD.
(4) Eleven to 15 years	(a) Disassemble and clean the propeller assembly.. (b) Inspect for the following conditions: cracks, corrosion or pits, nicks, scratches, wear, blade minimum dimensions, and damage in the blade balance hole. (c) Inspect and rework the propeller blade bore. Use 3.A. of the Accomplishment instructions of Hartzell SB No. 136, Revision I, dated April 26, 2003. (d) Repair and replace with serviceable parts, as necessary. (e) Reassemble and test.	Within 36 months after the effective date of this AD.

Propeller Overhaul

(j) Performing an overhaul of the propeller assembly after the effective date of this AD constitutes compliance with the requirements specified in this AD. The latest applicable Overhaul Manual issued by Hartzell Propeller Inc. contains information on overhauling a propeller assembly.

(k) The TSO only changes if you overhaul the propeller assembly while performing the requirements specified in this AD.

Reporting Requirements

(l) Report inspection results to the Manager, Chicago Aircraft Certification Office, FAA, Small Airplane Directorate, 2300 East Devon Ave., Des Plaines, IL 60018, within 15 working days of the inspection. The Office of Management and Budget (OMB) approved the reporting requirements assigned OMB control number 2120–0056.

Alternative Methods of Compliance (AMOCs)

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

Related Information

(n) None.

Issued in Burlington, Massachusetts, on December 21, 2004.

Francis A. Favara,

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

[FR Doc. 04–28492 Filed 12–28–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

[OK–031–FOR]

Oklahoma Abandoned Mine Land Reclamation Plan

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Oklahoma abandoned mine land reclamation plan (Oklahoma plan) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Oklahoma is proposing revisions to its plan concerning project ranking and selection procedures, the State Reclamation Committee, and the public participation policies. Oklahoma intends to improve operational efficiency.

This document gives the times and locations that the Oklahoma plan and the amendment to that plan are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that

will be followed for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., c.s.t., January 28, 2005. If requested, we will hold a public hearing on the amendment on January 24, 2005. We will accept requests to speak at a hearing until 4 p.m., c.s.t. on January 13, 2005.

ADDRESSES: You may submit comments, identified by Docket No. OK–031–FOR, by any of the following methods:

- *E-mail: mwolfrom@osmre.gov.* Include ''Docket No. OK–031–FOR'' in the subject line of the message.
- *Mail/Hand Delivery:* Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547.
- *Fax:* (918) 581–6419.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Oklahoma plan, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Tulsa Field Office: Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135–6547, Telephone: (918) 581–6430, E-mail: *mwolfrom@osmre.gov.*

In addition, you may review a copy of the amendment during regular business hours at the following location: Oklahoma Department of Mines, 4040 N. Lincoln Blvd., Suite 107, Oklahoma City, Oklahoma 73105, Telephone: (405) 521–3859.

FOR FURTHER INFORMATION CONTACT: Michael C. Wolfrom, Director, Tulsa Field Office. Telephone: (918) 581–6430. E-mail: *mwolfrom@osmre.gov*.

SUPPLEMENTARY INFORMATION:

I. Background on the Oklahoma Plan
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Oklahoma Plan

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. The program is funded by a reclamation fee collected on each ton of coal that is produced. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian Tribes to assume exclusive responsibility for reclamation activity within the State or on Indian lands if they develop and submit to the Secretary of the Interior for approval, a program (often referred to as a plan) for the reclamation of abandoned coal mines. On the basis of these criteria, the Secretary of the Interior approved the Oklahoma plan on January 21, 1982. You can find background information on the Oklahoma plan, including the Secretary's findings, the disposition of comments, and the approval of the plan in the January 21, 1982, **Federal Register** (47 FR 2989). You can find later actions concerning the Oklahoma plan and amendments to the plan at 30 CFR 936.25.

II. Description of the Proposed Amendment

By letter dated November 1, 2004 (Administrative Record No. OK–994), Oklahoma sent us a proposed amendment to its plan under SMCRA (30 U.S.C. 1201 *et seq.*). Oklahoma sent the amendment at its own initiative. Oklahoma proposes to amend the Oklahoma plan. Below is a summary of the changes proposed by Oklahoma. The full text of the amendment is available for your inspection at the locations listed above under **ADDRESSES.**

Specifically, Oklahoma proposes to make the following revisions to its plan.

A. Section 884.13(c)2—Project Ranking and Selection Procedure

1. Under the section titled ''Site Selection,'' Oklahoma proposes to revise the introductory paragraph to read as follows:

> In the spring of each year the Oklahoma Conservation Commission's AML staff evaluates abandoned mine sites for the purpose of selecting future reclamation projects. As part of the AML project selection process, a public notice will be published annually in cities/towns within the abandoned coal mine region in eastern Oklahoma. The notices will ask the public to contact the Oklahoma Conservation Commission if they believe they have an AML site that poses a dangerous health and/or safety problem. The public notices will include the address of the Conservation Commission. A team of three staff members [will] conduct a field investigation of the sites. There are four ways in which sites are chosen for field evaluation:

2. Oklahoma proposes to revise ''Table 3 Project Ranking and Selection Procedure'' by eliminating regional meetings that the general public may attend to voice concerns regarding identifying abandoned mine land and water that poses a threat to health and/or safety. The general public will still be able to send written concerns to the Oklahoma Conservation Commission (OCC).

Oklahoma also proposes to revise the language in Table 3 under the heading ''State Reclamation Committee'' to read as follows:

> Review reclamation projects submitted by the OCC and make suggestions concerning these projects. After projects have been selected for reclamation, OCC will prepare and submit project applications to OSM.

B. Section 884.13(c)3.A.—State Reclamation Committee

1. The State Reclamation Committee is composed of members from various agencies or organizations. Oklahoma has a list of these agencies or organizations from which this committee's membership comes. Oklahoma proposes to revise this list by removing the following agencies or organizations from the list: Bureau of Land Management, Department of Environmental Quality, Natural Resources Conservation Service, Oklahoma Association of Conservation Districts, Oklahoma Biological Survey, Oklahoma Department of Agriculture: Forestry Division, Oklahoma Geological Survey, Oklahoma Wildlife Conservation Federation, U.S. Geological Survey and Wildlife Conservation Commission. Also, Oklahoma proposes to add the following agencies or organizations to the list: U.S. Fish and Wildlife Services and Applicable Tribal Entity.

2. Oklahoma proposes to revise the purpose of the State Reclamation Commission to read as follows:

> 1. Review the reclamation projects submitted by the Oklahoma Conservation Commission and provide to the OCC comments concerning the projects.
>
> 2. Coordinate the reclamation activities taking place in the State—*i.e.* coordinate active mining activities and the State Abandoned Mine Land Program to avoid duplication of effort.
>
> 3. The committee will also serve in an advisory capacity providing informational and educational services.

C. Section 884.13(c)7—Public Participation Policies

1. Oklahoma proposes to revise the introductory paragraph to read as follows:

Public participation in this program will be encouraged throughout the period in which the State Reclamation Plan is being developed and/or amended. Public participation will also be incorporated by utilizing public notices in several newspapers in the AML area.

2. Oklahoma proposes to revise paragraphs 884.13(c)7(2) and (3) to read as follows:

(2) Public participation in the annual grant application process

Before the OCC submits the annual grant application, a public notice is printed in one of the major newspapers requesting input on the grant application. The public notice gives the purpose of the grant, where it can be reviewed, where written comments may be sent, and the comment deadline date.

(3) Public participation in the project selection and submission process

As part of the AML project selection process, the general public is provided an opportunity to identify AML projects for possible reclamation.

Before the OCC submits a project for reclamation, a public notice is printed in the local newspaper requesting input on the need for the proposed project, how the project should be carried out, and what the post-reclamation use of the project should be. The public notice also requests suggestions for other possible reclamation of surface coal mine strip pits, underground coal mine open shafts or mine portals, and any other hazards associated with past coal mining that pose a threat to the health and safety of the general public. The public notice provides the contact person and address at the OCC.

Public notices will also be printed annually in the following newspapers seeking public input on possible hazardous AML sites: Tulsa, Muskogee, McAlester, Claremore, Sallisaw, Poteau, and Vinita.

III. Public Comment Procedures

Under the provisions of 30 CFR 884.15(a), we are requesting comments on whether the amendment satisfies the applicable State reclamation plan approval criteria of 30 CFR 884.14. If we approve the amendment, it will become part of the Oklahoma plan.

Written Comments

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (*see* **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Tulsa Field Office may not be logged in.

Electronic Comments

Please submit e-mail comments as an ASCII or Word file, avoiding the use of special characters and any form of encryption. Please also include ''Attn: OK–031-FOR'' and your name and return address in your e-mail message. If you do not receive a confirmation that we have received your e-mail message, contact the Tulsa Field Office at (918) 581–6430.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., c.s.t. on January 13, 2005. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES.** We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent required by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State and Tribal abandoned mine land reclamation plans and plan amendments because each program is drafted and promulgated by a specific State or Tribe, not by OSM. Decisions on proposed abandoned mine land reclamation plans and plan amendments submitted by a State or Tribe are based solely on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231–1243) and 30 CFR part 884 of the Federal regulations.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of abandoned mine reclamation programs. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 405(d) of SMCRA requires State abandoned mine land reclamation programs to be in compliance with the procedures,

guidelines, and requirements established under SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects 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. This determination is based on the fact that Oklahoma does not provide for reclamation and restoration of land and water resources adversely affected by past coal mining on Indian lands. Therefore, the Oklahoma plan has no effect on Federally-recognized Indian tribes.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because agency decisions on proposed State and Tribal abandoned mine land reclamation plans and plan amendments are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4332) by the Manual of the Department of the Interior (516 DM 6, appendix 8, paragraph 8.4B(29)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 936

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 30, 2004.

Charles E. Sandberg,

Regional Director, Mid-Continent Regional Coordinating Center.

[FR Doc. 04–28485 Filed 12–28–04; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF EDUCATION

34 CFR Parts 300 and 303

Individuals With Disabilities Education Act, as Amended by the Individuals With Disabilities Education Improvement Act of 2004

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of request for comments and recommendations on regulatory issues under the Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act of 2004.

SUMMARY: The Secretary of Education solicits comments and recommendations from the public prior to developing and publishing proposed regulations under 34 CFR parts 300 and 303 to implement programs under the recently amended IDEA. The Secretary also announces plans to hold informal public meetings to seek further input about those regulations in light of the statutory amendments.

DATES: In order to be assured of consideration as we develop proposed regulations, comments and recommendations should be received on or before February 28, 2005.

ADDRESSES: Address all comments and recommendations to: Office of Special Education and Rehabilitative Services, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, room 5126, Washington, DC 20202–2641. If you prefer to send your comments through the Internet, you may address them to us at the U.S. Government Web site: *http://www.regulations.gov.*

Or you may send your Internet comments to us at the following address: *comments@ed.gov.*

You must include the term ''Comments on IDEA–2004'' in the subject line of your electronic message. (Note that the term in the preceding sentence means comments submitted in response to changes made to the IDEA by the Individuals with Disabilities Education Improvement Act of 2004.)

Please submit your comments only one time, in order to ensure that we do not receive duplicate copies.

FOR FURTHER INFORMATION CONTACT: Troy R. Justesen. Telephone: (202) 245–7468.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) 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) by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Background

On December 3, 2004, the President signed into law Pub. L. 108–446, 118 Stat. 2647, the Individuals with Disabilities Education Improvement Act of 2004, amending the IDEA. Copies of the new law may be obtained at the following Web site: *http://www.gpoaccess.gov/plaws/index.html.*

Enactment of the new law provides an opportunity to consider improvements in the regulations implementing the IDEA in 34 CFR parts 300 and 303 that would strengthen the Federal effort to ensure the provision of early intervention services to infants and toddlers with disabilities and their families and ensure every child with a disability has available a free appropriate public education that: (1) Is of high quality, and (2) is designed to achieve the high standards reflected in the No Child Left Behind Act of 2001.

Invitation To Comment

We invite you to submit comments and recommendations regarding changes to 34 CFR parts 300 and 303 that you believe are needed, particularly to clarify a provision in the new law or to facilitate its implementation. We encourage you to make your comments as specific as possible regarding the nature and scope of regulatory action necessary to achieve the objective you are seeking. Also, if appropriate to your comments, please identify the specific part and section (or subsection) of the amended IDEA that is the subject of your recommendations, and specify how a proposed change to a given provision in the regulations will clarify or help to improve implementation of the new statutory provision.

Please include the following with your comments and recommendations: A description of the area of your involvement in special education, regular education or early intervention, as well as your role, if any, in that area (*e.g.*, parent, teacher, student, service provider, administrator, or researcher).

During and after the comment period, you may inspect all public comments about this notice in room 5126, Potomac Center Plaza, 550 12th Street, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Comments

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments and recommendations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Announcement of Public Meetings

The following is a preliminary announcement of our plans to hold a series of informal meetings during the first few months of calendar year 2005, to seek comments and recommendations for developing regulations, as needed, based on the Individuals with Disabilities Education Improvement Act of 2004. The meetings will be in the following locations:

- Atlanta, GA;
- Newark, NJ;
- Boston, MA;
- Columbus, OH;
- San Diego, CA;
- Laramie, WY; and
- Washington, DC.

We will notify you through notices published in the **Federal Register** of the specific dates and locations of each of these meetings, as well as other relevant information.

Electronic Access to This Document: You may view this document, as well as all other Department of Education documents 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.*

Program Authority: 20 U.S.C. 1400 *et. seq.*; Pub. L. 108–446, 118 Stat. 2647.

Troy R. Justesen,

Acting Deputy Assistant, Secretary for Special Education and Rehabilitative Services.

[FR Doc. 04–28503 Filed 12–28–04; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–VA–0005; FRL–7853–8]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Approval of the Control of VOC Emissions From Municipal Solid Waste Landfills in Northern Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia to control of emissions of volatile organic compounds (VOC) from municipal solid waste landfills located in the Northern Virginia portion of the Metropolitan Washington, DC Ozone Nonattainment Area (Northern Virginia). In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by January 28, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2004–VA–0005 by one of the following methods:

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

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

C. E-mail: *Morris.Makeba@epa.gov.*

D. Mail: R03–OAR–2004–VA–0005, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency,

Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to RME ID No. R03-OAR–2004–VA–0005. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov Web sites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Janice Lewis, (215) 814–2185, or by e-mail at *lewis.janice@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule, pertaining to control of emissions of volatile organic compound (VOC) from municipal solid waste landfills located in Northern Virginia, and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 04–28352 Filed 12–28–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–DC–0004; FRL–7853–6]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; VOC Emission Standards for Portable Fuel Containers and Spouts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the District of Columbia for the purpose of establishing a regulation to control volatile organic compound (VOC) emissions from portable fuel containers and spouts. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by January 28, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0004 by one of the following methods:

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

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

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

D. Mail: R03–OAR–2004–DC–0004, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to RME ID No. R03-OAR–2004-DC–0004. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov Web sites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM

you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of Public Health, Air Quality Division, 51 N Street, NE., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by e-mail at *powers.marilyn@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 04–28354 Filed 12–28–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–DC–0005; FRL–7853–4]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; VOC Emission Standards for Solvent Cleaning

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the District of Columbia establishing regulations for the control of volatile organic compound (VOC) emissions from solvent cleaning operations in the District of Columbia. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by January 28, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0005 by one of the following methods:

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

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

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

D. *Mail:* R03–OAR–2004–DC–0005, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to RME ID No. R03–OAR–2004–DC–0005. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov Web sites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the District of Columbia Department of Public Health, Air Quality Division, 51 N Street, NE., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814–2308, or by e-mail at *powers.marilyn@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be

severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 04–28356 Filed 12–28–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–VA–0004; FRL–7853–2]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Excess Volatile Organic Compound and Nitrogen Oxides Emissions Fee Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia (Virginia) for the purpose of establishing a fee on major VOC (volatile organic compound) and NO_X (nitrogen oxides) sources in the Virginia portion of the Metropolitan Washington D.C. Severe Ozone Nonattainment Area. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by January 28, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2004–VA–0004 by one of the following methods:

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

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

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

D. Mail: R03–OAR–2004–VA–0004, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to RME ID No. R03–OAR–2004–VA–0004. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov websites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Catherine L. Magliocchetti, (215) 814–2174, or by e-mail at *magliocchetti.catherine@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, entitled, ''Approval and Promulgation of Air Quality Implementation Plans; Virginia; Excess Volatile Organic Compound and Nitrogen Oxides Emissions Fee Rule,'' that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Dated: December 14, 2004.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 04–28358 Filed 12–28–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 136

[Docket Number OW–2004–0041; FRL–7855–9]

Stakeholder Process for Detection and Quantitation Procedures; Notice of Public Meeting and Request for Nominations to a Federal Advisory Committee on Detection and Quantitation Procedures and Uses in Clean Water Act (CWA) Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: There will be a half-day public meeting on January 26, 2005, to present the findings and recommendations in the Situation Assessment Report on Detection and Quantitation Approaches and Uses in Clean Water Act (CWA) Programs (Situation Assessment Report). In addition, USEPA invites nominations of qualified candidates to be considered for appointment to the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in

Clean Water Act (CWA) Programs. The purpose of this committee will be to reach agreement and provide advice on: A common set of terms and concepts; one or more specific approaches and/or procedures for detection and quantitation for use in Clean Water Act programs; and interpretation and uses of the numbers that result from the testing procedures.

DATES: The meeting will be held on Tuesday, January 26, 2005, from 1:30 p.m. until approximately 4:30 p.m., Eastern Standard Time. Nominations for the committee will be accepted until 5 p.m. on February 9, 2005.

ADDRESSES: The meeting will be held at the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Ariel Rios South Building, NETI Conference Room 6226. Nominations may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in III. Composition and Organization. To protect personal information from disclosure to the public, do not submit nomination material to the docket of the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act (CWA) Programs or through any online commenting system. Submit nomination materials to: Mary T. Smith, Director, Engineering and Analysis Division, MC 4303T, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, T: 202–566–1000, F: 202–566–1053, e-mail *Smith.Maryt@EPA.GOV.*

FOR FURTHER INFORMATION CONTACT: Marion Kelly, Engineering and Analysis Division, MC4303T, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; Telephone number: (202) 566–1045; Fax number: (202) 566–1053; E-mail address: *Kelly.Marion@EPA.GOV.*

SUPPLEMENTARY INFORMATION:

I. General Information

On September 15, 2004, EPA announced its intention to have a neutral third party conduct a situation assessment to determine whether a stakeholder process for detection and quantitation procedures should proceed and, if so, how that process should be designed. 69 FR 55547. The neutral third party has conducted the situation assessment with affected stakeholders and has solicited their ideas for the design of multi-party discussions on the policy and technical issues surrounding the development of detection and quantitation procedures and uses of those procedures in Clean Water Act (CWA) programs. The neutral third party has presented its recommendations to the Agency in a document entitled *Situation Assessment Report on Detection and Quantitation Approaches and Uses in Clean Water Act (CWA) Programs.* The recommendations contained in the report will be the primary topic of discussion at the public meeting.

II. Request for Nominations

The Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act (CWA) Programs (hereinafter referred to as the Detection and Quantitation Advisory Committee) is being established under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 (Public Law 92–463), and copies of the Committee Charter will be filed with the appropriate committees of Congress and the Library of Congress. The Detection and Quantitation Advisory Committee will provide advice and recommendations to the Agency regarding the detection and quantitation procedures used in Clean Water Act programs. The Detection and Quantitation Advisory Committee will hold meetings, analyze issues, conduct reviews, produce reports, make necessary recommendations, and undertake other activities necessary to meet its responsibilities. The objectives of the Committee are to provide advice and recommendations to EPA in areas such as: a common set of terms and concepts; one or more specific approaches and procedures for detection and quantitation for use in Clean Water Act programs; and interpretation and uses of the numbers that result from detection and quantitation procedures.

III. Composition and Organization

The Committee will be composed of approximately 20 members. EPA will have a balanced representation of members in terms of points of view represented and the scope of the activities of the Committee. An EPA employee will act as the Designated Federal Official (DFO) who will be responsible for providing the necessary staffing, operations, and support for the Committee. The agency is seeking qualified senior-level professionals from diverse sectors throughout the United States to be considered for membership on the Committee. The Agency is seeking representation from among, but not limited to, the groups listed below. Please indicate in your submittal the sector with which the nominee is most closely associated and the organization, group or perspective the nominee would represent: State government; environmental professionals; regulated industry; environmental laboratories; Publicly Owned Treatment Works; and the environmental community. Establishing a balance and diversity of technical and policy experience, knowledge, and judgement, will be important considerations in the selection of members. EPA also plans to use technical experts who will be available to help the Committee understand technical concepts and provide technical assistance to the Committee. Such experts will not be members of the Committee and will not participate in the Committee's deliberations.

All Committee meetings will be called, announced, and held in accordance with FACA requirements, including public notice of meetings in the **Federal Register**, open meetings, and an opportunity for interested persons to file comments before or after meetings, or to make statements during the public meetings to the extent time permits. The U.S. Environmental Protection Agency (EPA) invites nominations of qualified candidates to be considered for appointments to the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act (CWA) Programs. Representatives from State governments, industry, wastewater treatment plants, environmental laboratories and the environmental community are especially encouraged to apply. EPA may use additional avenues and resources to solicit nominees. In particular, the Agency will consider the recommendations contained in the document, *Situation Assessment Report on Detection and Quantitation Approaches and Uses in Clean Water Act (CWA) Programs*, which is available on the Internet at *http://www.epa.gov/waterscience/methods/det/.*

The deadline for EPA to receive nominations is February 9, 2005. Appointments will be made by the Deputy Administrator of the U.S. Environmental Protection Agency. Appointments are expected to be announced in March 2005. Nominations for membership must include a resume describing the professional and educational qualifications of the nominee and the group or interest the person would represent. Contact details should include full name and title, business mailing address, telephone, fax, and e-mail address. A supporting letter of endorsement is also recommended.

IV. Does the Public Meeting Apply to Me?

The meeting on January 26, 2005, is open to the general public, and may be of interest to persons who are or may be required to perform analytical test measurements for reporting and compliance under the National Pollutant Discharge Elimination System (NPDES) under the CWA, including regulated industry, environmental groups, State governments, publicly owned treatment works (POTWs) and environmental laboratories. Since various individuals or groups may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding this meeting, please consult the individual identified under **FOR FURTHER INFORMATION CONTACT**.

V. How Can I Get Copies of This Document and Other Related

Information?

You may access this **Federal Register** document electronically through the Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. You may obtain an electronic copy of the *Situation Assessment Report on Detection and Quantitation Approaches and Uses in Clean Water Act (CWA) Programs* on the Internet at *http://www.epa.gov/waterscience/methods/det/*. This document will be available as soon as possible, but no later than January 4, 2005. The docket number is OW–2004–0041. If you require a printed copy of the report, contact the individual identified under **FOR FURTHER INFORMATION CONTACT.**

VI. How May I Participate in This Meeting?

Members of the general public are encouraged to attend this meeting in person. Anyone wishing to participate via teleconference should contact the individual listed under **FOR FURTHER INFORMATION CONTACT** at least 5 business days prior to the meeting so that appropriate arrangements can be made. Members of the general public are invited to pose questions on the Situation Assessment Report. Each individual or group wishing to make prepared comments should submit their request to the individual listed under **FOR FURTHER INFORMATION CONTACT** before the date of the meeting in order to be included in the meeting agenda. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (*e.g.*, overhead projector, 35mm projector, chalkboard). Each speaker should bring 30 copies of his or her comments and presentation slides for distribution at the meeting. Other interested persons who did not pre-register may also present prepared comments at the meeting if time permits. Seating at the meeting will be on a first-come, first-served basis. Individuals requiring special accommodations at this meeting, including wheelchair access and assistance for the hearing impaired, should contact the individual listed under **FOR FURTHER INFORMATION CONTACT** at least 5 business days prior to the meeting so that appropriate arrangements can be made.

List of Subjects in 40 CFR Part 136

Environmental protection, Analytical methods, Wastewater, NPDES, FACA.

Dated: December 22, 2004.

Geoffrey H. Grubbs,

Director, Office of Science and Technology.

[FR Doc. 04–28497 Filed 12–28–04; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 105

[GSPMR 2004–105–1]

General Services Administration Property Management Regulations; Privacy Act of 1974; New System of Records Exemption

AGENCY: Office of Inspector General, General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: The GSA Office of Inspector General (OIG) proposes to amend the General Services Administration Property Management Regulation (GSPMR) to exempt the new system of records for which a Privacy Act notice is being published concurrently with this notice in the **Federal Register**. The proposed new system of records consists of the investigatory files of the OIG's Office of Internal Evaluation. Due to the law enforcement nature of the records, a proposed rule amendment is required in order to invoke the relevant exemptions under the Privacy Act of 1974, as amended (5 U.S.C 552a). By relieving the OIG of certain information disclosure provisions, the exemption will help ensure that the OIG may efficiently and effectively perform internal investigations and other authorized duties and activities.

DATES: Interested parties should submit comments in writing on or before January 28, 2005 to be considered in the formulation of a final rule.

ADDRESSES: Comments should be submitted to the Office of Counsel to the Inspector General (JC), Office of Inspector General, General Services Administration, 1800 F Street, NW., Washington, DC 20405. Please refer to GSPMR case 2004–105–1 in any correspondence relating to this rule amendment. Comments also may be submitted through the Federal eRulemaking Portal, *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: GSA Privacy Act Officer, General Services Administration, Office of the Chief People Officer, 1800 F Street, NW., Washington, DC 20405; telephone (202) 501–1452.

SUPPLEMENTARY INFORMATION:

A. Background

Elsewhere in today's **Federal Register**, an OIG notice is published proposing the establishment of the new system of records ''Internal Evaluation Case Files,'' (GSA/ADM–25), under the Privacy Act, as amended, 5 U.S.C. 552a. This proposed amendment of 41 CFR 105–64.6 is necessary to exempt the new system of records from the provisions of the Act that require, among other things, that the OIG provide notice when collecting information, account for certain disclosures, permit individuals access to their records, and allow them to request that the records be amended. These provisions would interfere with the conduct of OIG internal investigations if applied to the OIG's maintenance of the proposed system of records.

Accordingly, the OIG proposes to exempt the system of records under sections (j)(2) and (k)(2) of the Privacy Act. Section (j)(2), 5 U.S.C. 552a(j)(2), exempts a system of records maintained by ''the agency or component thereof which performs as its principal function any activity pertaining to enforcement of criminal laws * * *.'' Section (k)(2), 5 U.S.C. 552a(k)(2), exempts a system of records consisting of ''investigatory materials compiled for law enforcement purposes,'' where such materials are not within the scope of the (j)(2) exemption pertaining to criminal law enforcement.

Where applicable, section (j)(2) may be invoked to exempt a system of records from any Privacy Act provision except: 5 U.S.C. 552a(b) (conditions of disclosure); (c)(1) and (2) (accounting of disclosures and retention of accounting, respectively); (e)(4)(A) through (F) (system notice requirements); (e)(6), (7), (9), (10), and (11) (certain agency requirements relating to system

maintenance); and (i) (criminal penalties). Section (k)(2) may be invoked to exempt a system of records from 5 U.S.C. 552a(c)(3) (making accounting of disclosures available to the subject individual); (d) (access to records); (e)(1) (G), (H) and (I) (notice of certain procedures); and (f) (promulgation of certain Privacy Act rules).

The proposed system of records consists of information covered by the (j)(2) and (k)(2) exemptions. The OIG internal evaluation case files are maintained pursuant to official investigatory and law enforcement functions of the OIG under the authority of the Inspector General Act of 1978, Public Law 95–452, 5 U.S.C. App. 3 (1978). Furthermore, the OIG constitutes a GSA component that performs as one of its principal functions activities pertaining to the enforcement of criminal laws, see 5 U.S.C. 552a(j)(2). Information covered under the (j)(2) exemption includes, but is not limited to, information compiled for the purpose of identifying criminal offenders and alleged offenders and consisting of identifying data and notations of arrests, and the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; information compiled for the purpose of a criminal investigation, including reports of informants and investigators, that is associated with an identifiable individual; or reports of enforcement of the criminal laws from arrest or indictment through release from supervision. Information contained in OIG complaint and investigative files under the (k)(2) exemption relates to non-criminal law enforcement matters, such as information pertaining to the investigation of civil, administrative, or regulatory violations and similar wrongdoing.

Access by subject individuals, among others, to this system of records, including the names of persons or agencies to whom the information has been transmitted, would substantially compromise the effectiveness of OIG investigations. Knowledge of such investigations could enable suspects to take action to prevent detection of unlawful activities, conceal or destroy evidence, or escape prosecution. Disclosure of this information could lead to the intimidation of, or harm to, informants, witnesses, and their families and could jeopardize the safety and well being of investigative and related personnel and their families. The imposition of certain restrictions on the manner in which investigative information is collected, verified, or retained would significantly impede the effectiveness of OIG investigatory activities and, in addition, could preclude the apprehension and successful prosecution or discipline of persons engaged in fraud or other illegal activity.

For the above reasons, the OIG proposes to exempt the proposed system of records containing the OIG internal evaluation case files under exemptions (j)(2) and (k)(2) of the Privacy Act by amending 41 CFR 105–64.6, as provided below. Under this rule, the GSA and the OIG specify their systems of records that are exempt from the Privacy Act.

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

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the GSA certifies that the proposed amendment to its regulations, if adopted, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The purpose of that amendment, which is proposed pursuant to the Privacy Act, is solely to exempt from disclosure certain files of the GSA's OIG that would be kept in a new system of records within the GSA OIG. The proposed amendment imposes no new regulatory requirements either directly or indirectly on anyone, including small entities.

C. Paperwork Reduction Act

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

D. Energy and Environment Considerations

We preliminarily conclude that this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 41 CFR Part 105–64

Privacy.

Dated: December 17, 2004.

June V. Huber,

Director, Office of Information Management, Office of the Chief People Officer.

Therefore, GSA proposes amending 41 CFR part 105–64 as set forth below:

PART 105–64—REGULATIONS IMPLEMENTING THE PRIVACY ACT OF 1974

1. The authority citation for 41 CFR 105–64 is amended to read as follows:

Authority: The authority provided by Pub. L. 152, Ch. 288, 63 Stat 377 (codified as amended in scattered section of 40 U.S.C. and 41 U.S.C.).

2. Amend section 105–64.601 by adding paragraph (c); and in the undesignated paragraph following new paragraph (c) by removing ''and GSA/ADM–24'' and adding '', GSA/ADM–24, and GSA/ADM–25'' in its place. The added text reads as follows:

§105–64.601 General exemptions.

* * * * *

(c) Internal Evaluation Case Files, GSA/ADM–25.

* * * * *

2. Amend section 105–64.602 by adding paragraph (d); and in the second sentence of the undesignated paragraph following new paragraph (d) by removing the words ''identify'' and ''which'' and adding ''identity'' and ''where'', respectively, in their place; and revising the last sentence. The added and revised text reads as follows:

§105–64.602 Specific exemptions.

* * * * *

(d) Internal Evaluation Case Files, GSA/ADM–25.

* * * The systems are exempted to maintain the effectiveness and integrity of investigations conducted as part of the Federal Protective Service, Office of Inspector General, and internal security law enforcement duties or responsibilities in the areas of Federal employment, Government contracts, and access to security classified information.

[FR Doc. 04–28182 Filed 12–23–04; 8:45 am]

BILLING CODE 6820–34–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3702; MB Docket No. 04–431, RM–11115]

Radio Broadcasting Services; Hermitage, AR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division requests comments on a petition filed by Charles Crawford proposing the allotment of

Channel 300A at Hermitage, Arkansas, as the community's first local aural transmission service. Channel 300A can be allotted to Hermitage in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.8 kilometers (6.1 miles) east to avoid a short-spacing to the construction permit site for Station KLAL(FM), Channel 299C1, Wrightsville, Arkansas. The coordinates for Channel 300A at Hermitage are 33–25–00 North Latitude and 92–04–30 West Longitude.

DATES: Comments must be filed on or before January 31, 2005, reply comments on or before February 15, 2005.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Charles Crawford, 4553 Bordeaux Ave., Dallas, Texas 75205 (Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 04–431, adopted December 8, 2004, and released December 10, 2004. 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, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *www.BCPIWEB.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte contacts.* For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

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 Arkansas, is amended by adding Hermitage, Channel 300A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–28424 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3806, MB Docket No. 04–426, RM–11125]

Radio Broadcasting Services; Beaumont and Mont Belvieu, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document seeks comment on a petition for rulemaking filed by Cumulus Licensing, LLC, licensee of Station KRWP(FM), Beaumont, Texas, proposing the reallotment of Channel 248C from Beaumont to Mont Belvieu, Texas, as the community's first local aural transmission service, and the modification of the license for Station KRWP(FM) to reflect the changes. Channel 248C has been proposed to be reallotted at Mont Belvieu at a site 50.1 kilometers (31.1 miles) east of the community at coordinates 29–41–52 NL and 94–24–09 WL.

DATES: Comments or counterproposals must be filed on or before January 31, 2005, and reply comments must be filed on or before February 15, 2005.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Mark N. Lipp, Esq., Scott Woodworth, Esq., Vinson & Elkins LLP, 1455 Pennsylvania Ave., NW., Washington, DC 20004–1008.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking,* MB Docket No. 04–426, adopted December 8, 2004, and released December 10, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC, 20054, telephone 800–378–3160 or *www.BCPIWEB.com.*

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 Texas, is amended by removing Channel 248C1 at Beaumont and adding Mont Belvieu, Channel 248C.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–28423 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3703; MB Docket No. 04–432, RM–11121; MB Docket No. 04–433 RM–11122]

Radio Broadcasting Services; Grand Portage, MN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth two proposals 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 Cook County Broadcasting of Minnesota. Petitioner proposes the allotment of Channel 274C at Grand Portage, Minnesota, as a second local service. Channel 274C can be allotted at Grand Portage in compliance with the Commission's minimum distance separation requirements at center city coordinates without site restriction. The proposed coordinates for Channel 274C at Grand Portage are 47–57–50 North Latitude and 89–41–05 West Longitude. The proposed allotment is located within 320 kilometers (199 miles) of the United States-Canada border, so it will be necessary to obtain concurrence in the allotment from the Government of Canada. *See* **SUPPLEMENTARY INFORMATION** *infra.*

DATES: Comments must be filed on or before January 31, 2005, and reply comments on or before February 15, 2005.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the petitioner as follows: David G. O'Neil, Rini Coran, PC, 1501 M Street, NW., Suite 1150, Washington, DC 20005.

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 Nos. 04–432 and 04–433, adopted December 8, 2004, and released December 10, 2004. 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, Best Copy and Printing, Inc., 445 12th Street, SW, Room CY–B402, Washington, DC, 20554, (800) 378–3160, or via the company's Web site, *www.bcpiweb.com.*

The Commission further requests comment on a petition filed by Cook County Broadcasting of Minnesota. Petitioner proposes the allotment of Channel 245C0 at Grand Portage, Minnesota, as a first local service. Channel 245C0 can be allotted at Grand Portage in compliance with the Commission's minimum distance separation requirements at center city coordinates without site restriction. The proposed coordinates for Channel 245C0 at Grand Portage are 47–57–50 North Latitude and 89–41–05 West Longitude. The proposed allotment is located within 320 kilometers (199 miles) of the United States-Canada border, so it will be necessary to obtain concurrence in the allotment from the Government of Canada.

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 Minnesota, is amended by adding Grand Portage, Channel 224C and Channel 274C.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–28422 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3807; MB Docket No. 04–429, RM–11120]

Radio Broadcasting Services; Burlington and Cary, NC

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments, § 73.202(b) of the Commission's rules, 47 CFR 73.202(b). The Commission requests comment on a petition filed by Capstar TX Limited Partnership, licensee of Station WRSN–FM, Channel 230C, Burlington, North Carolina. Petitioner proposes the deletion of Channel 230C at Burlington, North Carolina, and the addition of Channel 230C at Cary, North Carolina, as a first local service. Channel 230C can be allotted at Cary in compliance with the Commission's minimum distance separation requirements with a site restriction of 35.4 kilometers (22.0 miles) from Cary. The proposed coordinates for Channel 230C at Cary are 35–52–15 North Latitude and 79–09–40 West Longitude. *See* **SUPPLEMENTARY INFORMATION** *infra.*

DATES: Comments must be filed on or before January 31, 2005, and reply comments on or before February 15, 2005.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the petitioner as follows: Mark N. Lipp, Esq. and J. Thomas Nolan, Esq., 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. 04–429, adopted December 8, 2004, and released December 10, 2004. 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, Best Copy and Printing, Inc., 445 12th Street, SW, Room CY–B402, Washington, DC, 20554, (800) 378–3160,

or via the company's Web site, *www.bcpiweb.com.*

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 North Carolina, is amended by removing Channel 230C at Burlington, and by adding Cary, Channel 230C.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–28416 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 69, No. 249
Wednesday, December 29, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of intent to issue exemption regarding the Interstate Highway System.

SUMMARY: The Advisory Council on Historic Preservation (''ACHP'') proposes an exemption that would relieve Federal agencies from the requirement of taking into account the effects of their undertakings on the Interstate Highway System, except with regard to certain individual elements or structures that are part of the system. The public is invited to comment on the exemption before it is finalized and submitted for adoption by the ACHP.

DATES: Submit comments on or before January 28, 2005.

ADDRESSES: Address all comments concerning this exemption to Carol Legard, Federal Highway Administration (''FHWA'') Liaison, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004. Fax (202) 606–5072. You may submit electronic comments to: *clegard@achp.gov.*

FOR FURTHER INFORMATION CONTACT: Carol Legard, 202–606–8522.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, requires Federal agencies to consider the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation (''ACHP'') a reasonable opportunity to comment with regard to such undertakings. Historic properties are those that are listed on the National Register of Historic Places (''National Register'') or eligible for such listing.

Section 214 of the National Historic Preservation Act (''NHPA'') authorizes the ACHP, with the concurrence of the National Park Service, to promulgate regulations for exempting undertakings ''from any or all of the requirements of'' the NHPA. 16 U.S.C. 470v. The Section 106 regulations, found at 36 CFR part 800, detail the process for the approval of such exemptions. 36 CFR 800.14(c).

In accordance with the Section 106 regulations, the ACHP may approve an exemption for an undertaking if it finds that: (i) The actions within the program or category would otherwise qualify as ''undertakings'' as defined in 36 CFR 800.16; (ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and (iii) exemption of the program or category is consistent with the purposes of the NHPA.

I. Background

As the fiftieth anniversary in 2006 of the designation of the Dwight D. Eisenhower National System of Interstate and Defense Highways (''Interstate System'') nears, resolving the question of how the Interstate System will be treated under the NHPA has taken on increased urgency. Since the year 2001, when parts of the Interstate System were first suggested as potentially eligible for inclusion in the National Register, the Federal Highway Administration (''FHWA'') has been considering how best to deal with the historic preservation implications of managing the Interstate System. FHWA and State Departments of Transportation (''State DOTs'') were concerned that without appropriate provisions in place, such a designation could present an inordinate administrative burden under the provisions of Section 106 of the NHPA and Section 4(f) of the Department of Transportation Act (''Section 4(f)''). Section 4(f) prohibits transportation agencies from approving a project that uses land from, among other things, historic properties unless there is no prudent and feasible alternative to using the property and the project includes all possible planning to minimize the harm resulting from the use of the property.

FHWA initially worked with an ad hoc task force representing FHWA divisions, State DOTs, State Historic Preservation Officers (''SHPOs''), the National Register, and the ACHP to develop a strategy to address the historic preservation issues. All agreed that a nationally coordinated approach was needed. The FHWA, in consultation with the ACHP and the National Conference of State Historic Preservation Officers (''NCSHPO''), determined that this nationwide approach should acknowledge the importance of the Interstate System in American history, but also recognize that ongoing maintenance, improvements, and upgrades are necessary to allow the system to continue to serve the transportation needs of the nation. ACHP and FHWA staff developed a draft Programmatic Agreement (''PA''), which was circulated for comment among the ad hoc task force members, FHWA Divisions, the American Association of State Highway and Transportation Officials (''AASHTO''), NCSHPO, and SHPOs. A PA is an alternative that Federal agencies can use to better tailor the Section 106 review process to their programs and needs. In most cases where there is a finding of No Adverse Effect for historic transportation facilities under the Section 106 process, the Section 4(f) process is not invoked under the Section 4(f) regulations. Accordingly, the PA addressed the Section 106 process directly and the Section 4(f) requirements by implication.

Comments received on the draft PA, and the proposed approach, varied. Some FHWA divisions and AASHTO objected to the approach taken in the PA, primarily due to the statement in that document that the entire 46,700 mile long Interstate System would be treated as if eligible for inclusion in the National Register. Many FHWA divisions were also concerned with the expectation that each State would be responsible for identifying sections of the Interstate System within that State having national (as opposed to State or local) significance and then requiring consideration of such sections under Section 106. AASHTO urged FHWA and the ACHP to consider developing an exemption instead. ACHP staff met with FHWA in August, 2004, agreed on a revised set of principles and concepts for an administrative approach and set out to look at the possible use of an exemption. As consultation continued,

an administrative exemption, as authorized by Section 214 of the NHPA, was determined to be the most appropriate approach to resolving all parties' concerns.

II. Exemption Concept

The proposed exemption contained herein would release all Federal agencies from the Section 106 requirement of having to consider the effects of their undertakings on the Interstate System, except for a limited number of individual elements associated with the system. The exemption embodies the view that the Interstate System is historically important, but only certain particularly important components of that system, as noted below, warrant consideration under Section 106 of the NHPA and would, therefore, be excluded from the exemption.

Those exclusions would be limited to: (a) Elements that are at least 50 years old, possess national significance, and meet the National Register eligibility criteria (36 CFR part 63); (b) elements that are less than 50 years old, possess national significance, meet the National Register eligibility criteria, and are of exceptional importance; and (c) elements that were listed in the National Register, or determined eligible for the National Register by the Keeper pursuant to 36 CFR part 63, prior to the effective date of the exemption. FHWA, at the headquarters level, in consultation with stakeholders, would make the determination of which elements of the system meet these criteria. Additionally, FHWA may exclude historic bridges, tunnels, and rest areas of State or local significance, provided they meet the National Register eligibility criteria, were constructed prior to 1956, and were later incorporated into the Interstate System.

The exemption concerns only the effects of Federal undertakings on the Interstate System and does not alter the Section 106 review obligations for other types of historic properties that may be affected by an undertaking. Each Federal agency would remain responsible for considering the effects of its undertakings on other historic properties that are not components of the Interstate System. For example, Federal agencies would still have to take appropriate actions to identify and consider archaeological sites that may be affected by ground disturbing activities, historic properties of religious and cultural significance to Indian tribes that may be impacted, and historic buildings or districts located within the area of potential effect of a proposed Federal undertaking in accordance with subpart B of the Section 106 regulations.

III. Exemption Criteria

Pursuant to 36 CFR 800.14(c)(1), Section 106 exemptions must meet certain criteria. Only actions that qualify as undertakings, as defined in 36 CFR 800.16, may be considered for exemption, and the exemption itself must be consistent with the purposes of NHPA. Furthermore, in order to be considered exempted, the potential effects on historic properties of those undertakings should be ''foreseeable and likely to be minimal or not adverse.'' The ACHP believes that the proposed exemption meets these conditions. Federal funding, permits, or approvals for actions required for maintenance, alterations, or improvements to the Interstate System meet the definition of ''undertaking.''

The exemption was originally drafted to cover actions carried out under FHWA's Federal-aid program. It was later expanded to ensure that other federal actions constituting undertakings affecting interstate highway projects were subject to the same requirements as FHWA (*e.g.*, issuance of a permit under Section 404 of the Clean Water Act for a project on the Interstate System).

The Interstate System is comprised of 46,700 miles of roadway forming a web across the intercontinental United States. The scale of this system and its attendant impact to social, commercial, and transportation history of the second half of the twentieth century make the construction of this system an extremely important event in American history. The integrity of the system depends on continuing maintenance and upgrades so that it can continue to move traffic efficiently across great distances. Actions carried out by Federal agencies to maintain or improve the Interstate System will, over time, alter various segments of the system, but such changes are considered to be minimal or not adverse when viewing the system as a whole. The exemption does not apply to certain historically important elements of the system. By excluding these elements from the exemption, the ACHP and FHWA ensure that the important character-defining features of the Interstate System are considered through the normal Section 106 review process.

IV. Public Participation

In accordance with 36 CFR 800.14(c)(2), public participation must be arranged on a level commensurate with the subject and scope of the exemption. This notice is intended to meet the requirement for public participation in the development of this exemption. In developing the draft PA and this exemption, the ACHP and FHWA have also consulted directly with SHPOs, all FHWA Division, State DOTs, AASHTO, NCSHPO, and the National Trust for Historic Preservation.

Neither the ACHP nor the FHWA have engaged in consultation with Indian tribes and Native Hawaiian organizations pursuant to 36 CFR 800.14(c)(4), since the exemption is limited to effects on the Interstate System itself, which does not qualify as a property of cultural and religious significance to such tribes and organizations. Also, the exemption will not apply on tribal lands.

V. Text of the Exemption

The full text of the proposed exemption is reproduced below:

Section 106 Exemption Regarding Effects to the Interstate Highway System

I. Exemption From Section 106 Requirements

Except as noted in Sections II and III, all Federal agencies are exempt from the Section 106 requirement of taking into account the effects of their undertakings on the Interstate Highway System.

This exemption concerns solely the effects of Federal undertakings on the Interstate Highway System. Each Federal agency remains responsible for considering the effects of its undertakings on other historic properties that are not components of the Interstate Highway System (*e.g.*, adjacent historic properties or archaeological sites that may lie within undisturbed areas of the right of way) in accordance with subpart B of the Section 106 regulations or according to an applicable program alternative executed pursuant to 36 CFR 800.14.

II. Process for Designating Individual Elements Requiring Section 106 Review

By June 30, 2006, the Federal Highway Administration shall designate individual elements of the Interstate System that are to be excluded from this exemption. The Federal Highway Administration headquarters shall make the designations, following consultation with the relevant State Transportation Agencies, Federal Highway Administration Divisions, State Historic Preservation Officers, the Advisory Council on Historic Preservation, and the public. The Federal Highway Administration headquarters may, as needed, consult the Keeper of the National Register to resolve questions or

disagreements about the National Register eligibility of certain elements.

III. Individual Elements Excluded From Exemption

(a) The following elements of the Interstate Highway System shall be excluded from the scope of this exemption, and therefore shall require Section 106 review:

(i) Elements that are at least 50 years old, possess national significance, and meet the National Register eligibility criteria (36 CFR part 63), as determined pursuant to Section II;

(ii) Elements that are less than 50 years old, possess national significance, meet the National Register eligibility criteria, and are of exceptional importance (and therefore meet criteria consideration G for properties that have achieved significance within the last fifty years), as determined pursuant to Section II; and

(iii) Elements that were listed in the National Register, or determined eligible for the National Register by the Keeper pursuant to 36 CFR part 63, prior to the effective date of this exemption.

(b) The following elements of the Interstate Highway System may be excluded from the exemption, at the discretion of the Federal Highway Administration: bridges, tunnels, and rest areas that were constructed prior to June 30, 1956, were later incorporated into the Interstate Highway System, possess State or local significance, and meet the National Register eligibility criteria, as determined pursuant to Section II.

IV. Interpretation and Commemoration

The Federal Highway Administration will recognize, interpret, and commemorate the public history of the Interstate Highway System as it shaped the latter half of the twentieth century. Available for broad public use, this effort shall include the completion of a popular publication and/or development of a web site providing information and educational material about the Interstate Highway System and its role in American history.

V. Potential for Termination

The Advisory Council on Historic Preservation may terminate this exemption in accordance with 36 CFR 800.14(c)(7) if it determines that the purposes of Section 106 are not being adequately met.

VI. Definitions

The following definitions shall apply to this exemption:

(a) ''Section 106'' means Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, and its implementing regulations, found under 36 CFR part 800.

(b) ''Undertaking'' means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(c) ''Interstate Highway System'' shall be defined as the Dwight D. Eisenhower National System of Interstate and Defense Highways as set forth in 23 U.S.C. 103(c), that being commonly understood to be the facilities within the rights-of-way of those highways carrying the official Interstate System shield, including but not limited to the road bed, engineering features, bridges, tunnels, rest stops, interchanges, off-ramps, and on-ramps.

Authority: 16 U.S.C. 470v; 36 CFR 800.14(c).

Dated: December 22, 2004.

John M. Fowler,

Executive Director.

[FR Doc. 04–28483 Filed 12–28–04; 8:45 am]

BILLING CODE 4310–10–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 04–048N]

Codex Alimentarius Commission: Thirty-third Session of the Codex Committee on Food Labelling

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public meeting, request for comments.

SUMMARY: The Office of the Under Secretary for Food Safety, United States Department of Agriculture (USDA), and the Food and Drug Administration (FDA), United States Department of Health and Human Services, are sponsoring a public meeting on January 19, 2005, to provide information and receive public comments on certain agenda items that will be discussed at the Thirty-third Session of the Codex Committee on Food Labelling (CCFL) of the Codex Alimentarius Commission (Codex). The 33rd Session of the CCFL will be held in Kota Kinabalu, Malaysia, May 9–13, 2005. The Under Secretary and FDA recognize the importance of providing interested parties the opportunity to obtain background information on the agenda items that will be discussed at this forthcoming session of the CCFL.

DATES: The public meeting is scheduled for Wednesday, January 19, 2005 from 1 p.m. to 4 p.m.

ADDRESSES: The public meeting will be held in the Auditorium (Room 1A–003), Harvey W. Wiley Federal Building, 5100 Paint Branch Parkway, College Park, MD. Documents related to the 33rd Session of the CCFL will be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp.*

FSIS invites interested persons to submit comments on this notice. Comments may be submitted by any of the following methods:

- Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items: Send to the FSIS Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 300 12th Street, SW., Room 102, Cotton Annex, Washington DC 20730. All comments received must include the Agency name and docket number 04–048N.

All comments submitted in response to this notice, will be available for public inspection in the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday. The comments also will be posted on the Agency's Web site at *http://www.fsis.usda.gov/regulations/2004_Notices_Index/index.asp*

Participation by Conference Call: A call-in number has been arranged: 1–877–322–9654, participant code 920770.

FOR FURTHER INFORMATION ABOUT THE 33RD SESSION OF THE CCFL CONTACT: U.S. Delegate, Leslye Fraser, J.D. Director, Office of Regulations and Policy, Center for Food Safety and Applied Nutrition, FDA. 5100 Paint Branch Parkway (HFS–004), College Park, MD 20740. Phone: (301) 436–2378 Fax: (301) 436–2637, E-mail: *leslye.fraser@fda.hhs.gov.*

FOR FURTHER INFORMATION ABOUT THE PUBLIC MEETING CONTACT: Ellen Matten, International Issues Analyst, U.S. Codex Office, FSIS, Room 4861, South Building, 1400 Independence Avenue SW., Washington, DC 20250–3700, Phone: (202) 205–7760, Fax: (202) 720–3157.

SUPPLEMENTARY INFORMATION:

Background

The Codex Alimentarius Commission (Codex) was established in 1962 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Codex is the major international standard-setting organization for

protecting the health and economic interests of consumers and encouraging fair international trade in food. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to ensure that the world's food supply is sound, wholesome, free from adulteration, and correctly labeled. In the United States, USDA, FDA, and the Environmental Protection Agency (EPA) manage and carry out U.S. Codex activities.

The Codex Committee on Food Labelling (CCFL) drafts provisions on labelling applicable to all foods; considers, amends if necessary, and endorses specific provisions on labelling of draft standards, codes of practice, and guidelines prepared by other Codex committees; studies specific labelling problems assigned to it by the Commission; and studies problems associated with the advertisement of food with particular reference to claims and misleading descriptions. The Committee is chaired by Canada.

Issues To Be Discussed at the Public Meeting

The following items on the agenda for the 33rd Session of CCFL will be discussed during the public meeting:

1. Proposed Draft Guidelines for the Labelling of Foods Obtained Through Certain Techniques of Genetic Modification/Genetic Engineering: Labelling Provisions and Definitions.
2. Country of Origin Labelling: Response to CL 2004/56–FL.
3. Discussion Paper on Advertising: Response to CL 2004/54–FL.
4. Proposed Draft Amendment to the General Standard for the Labelling of Prepackaged Foods (Quantitative Ingredient Declaration).

Each issue listed will be fully described in documents distributed, or to be distributed, by the Canadian Secretariat to the Meeting. Members of the public may access copies of these documents (*see* **ADDRESSES**).

Public Meeting

At the January 19, 2005 public meeting, these agenda items will be described, discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the U.S. Delegate, for the 33rd Session of the CCFL, Leslye Fraser (*See* **ADDRESSES**). Written comments should state that they relate to activities of the 33rd Session of the CCFL.

Additional Public Information

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that the public and in particular minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2004_Notices_Index/index.asp*.

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meeting, recalls, and other types of information that could affect or would be of interest to our constituents and stakeholders. The update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The update is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience.

Done at Washington, DC, on December 23, 2004.

F. Edward Scarbrough,

U.S. Manager for Codex Alimentarius.

[FR Doc. 04–28465 Filed 12–28–04; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Lake Tahoe Basin Federal Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Lake Tahoe Basin Federal Advisory Committee will hold a meeting on February 2, 2005, at the US Forest Service Office, 35 College Drive, South Lake Tahoe, CA, 96150. This Committee, established by the Secretary of Agriculture on December 15, 1998 (64 FR 2876), is chartered to provide advice to the Secretary on implementing the terms of the Federal Interagency Partnership on the Lake Tahoe Region and other matters raised by the Secretary.

DATES: The meeting will be held February 2, 2005, beginning at 1 p.m. and ending at 4:30 p.m.

ADDRESSES: The meeting will be held at the US Forest Service Office, 35 College Drive, South Lake Tahoe, CA, 96150.

FOR FURTHER INFORMATION CONTACT: Maribeth Gustafson or Gloria Trahey, Lake Tahoe Basin Management Unit, Forest Service 35 College Drive, South Lake Tahoe, CA 96150, (530) 543–2643.

SUPPLEMENTARY INFORMATION: The committee will meet jointly with the Lake Tahoe Basin Executives Committee. Items to be covered on the agenda include: (1) Tahoe Working Group Report; (2) Update on the Southern Nevada Public Land Management Act; and (3) Public Comment. All Lake Tahoe Basin Federal Advisory Committee meetings are open to the public. Interested citizens are encouraged to attend at the above address. Issues may be brought to the attention of the Committee during the open public comment period at the meeting or by filing written statements with the secretary for the Committee before or after the meeting. Please refer any written comments to the Lake Tahoe Basin Management Unit at the contact address stated above.

Dated: December 20, 2004.

Maribeth Gustafson,

Forest Supervisor.

[FR Doc. 04–28489 Filed 12–28–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

[I.D. 122304C]

Submission for OMB Review; Comment Request

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

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Alaska License Limitation Program for Groundfish, Crab, and Scallops.

Form Number(s): None.

OMB Approval Number: 0648–0334.

Type of Request: Regular submission.

Burden Hours: 544.

Number of Respondents: 144.

Average Hours Per Response: One hour for application, and four hours for appeal.

Needs and Uses: The National Oceanic and Atmospheric Administration is seeking renewed Paperwork Reduction Act clearance for requirements currently cleared under

OMB Number 0648–0334 (groundfish, crab, and scallops). This collection now supports License Limitation Permit transfer activities for crab, scallops, and groundfish, and any appeals resulting from denied actions. The information is submitted to respond to requirements set forth in regulations at 50 CFR part 679.4.

Affected Public: Business or other for-profit organizations; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

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

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

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

Dated: December 21, 2004.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–28541 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

[I.D. 122304B]

Submission for OMB Review; Comment Request

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

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Cooperative Charting Programs.

Form Number(s): NOAA Form 77–5.

OMB Approval Number: 0648–0022.

Type of Request: Regular submission.

Burden Hours: 8,200.

Number of Respondents: 1,800.

Average Hours Per Response: Two hours for web response, three hours for paper response.

Needs and Uses: U.S. Coast Guard Auxiliary members report observations of changes that require additions, corrections, or revisions to nautical charts on the NOAA Form 77–5. The U.S. Power Squadrons use a website to report the same. The information provided is used by NOS cartographers to maintain and prepare new additions of nautical charts that are used nationwide by commercial and recreational navigators.

Affected Public: Individuals or households; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

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

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

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

Dated: December 21, 2004.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–28542 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–JE–S

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Producing Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration (EDA), Commerce.

ACTION: To give all interested parties an opportunity to comment.

Petitions have been accepted for filing on the dates indicated from the firms listed below.

LIST OF PETITION ACTION BY TRADE ADJUSTMENT ASSISTANCE FOR PERIOD NOVEMBER 29, 2004–DECEMBER 17, 2004

Firm name	Address	Date petition accepted	Product
Artstones, Inc. d.b.a. Heavenly Delights.	14358 Highway 43 South, Greensburg, LA 70441.	12/3/2004	Home décor.
Assem-Tech, Inc	1600 Kooiman Avenue, Grand Haven, MI 49417.	12/7/2004	Electrical assemblies, i.e., printed circuit assemblies, telephone and telegraph connecting articles and printed circuit.
Aurident, Inc	P.O. Box 7200, Fullerton, CA 92830.	12/7/2004	Ingots of gold and ceramic alloys for denture production.
Bierson Corporation	386 Bateman Drive, Central Point, OR 97502.	12/7/2004	Television cabinet parts.
Fletcher Rugs, Inc	701 Oriole Drive, Hendersonville, NC 28792.	12/7/2004	Textile floor covering.
Kantronics Co., Inc	1202 East 23rd Street, Lawrence, KS 66046.	12/9/2004	Printed circuit assemblies/paging devices.
Trio Tool Company	34401 Schoolcraft Road, Livonia, MI 48150.	12/9/2004	Automotive maintenance machinery, i.e., testing, gauging and assembly machines.
American Leather Products, LLC	565 Barry Street, Bronx, NY 10474	12/13/2004	Leather headband, visors and straps for hats and caps.
Persimmon Hill Farm	367 Persimmon Hill Farm Lane, Lampe, MO 65681.	12/16/2004	Muffins and shiitake mushrooms.
Southern Standard Molds, Inc	18098 Linden Drive, Neosho, MO 64850.	12/16/2004	Cement and concrete ornamental product molds.

The petitions were submitted pursuant to Section 251 of the Trade Act of 1974 (19 U.S.C. 2341). Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm. Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by Trade Adjustment Assistance, Room 7315, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than the close of business of the tenth calendar day following the publication of this notice. The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: December 22, 2004.

Anthony J. Meyer,

Senior Program Analyst, Office of Strategic Initiatives.

[FR Doc. 04–28490 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 58–2004]

Foreign-Trade Zone 222—Montgomery, AL; Request for Manufacturing Authority, Mobis Alabama, LLC (Automotive Components and Subassemblies)

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Montgomery Area Chamber of Commerce, grantee of FTZ 222, pursuant to section 400.32(b)(1) of the Board's regulations (15 CFR part 400), requesting authority on behalf of Mobis Alabama, LLC (Mobis) (a subsidiary of Hyundai Mobis Company, of South Korea), to manufacture automotive components and subassemblies under FTZ procedures within FTZ 222. It was formally filed on December 15, 2004.

Mobis operates a facility (600,000 sq.ft./400 employees) within the proposed new Site 3 of FTZ 222 (expansion application pending; Doc. 57–2004; 69 FR 74492, 12–14–2004) located at 1395 Mitchell Young Road, Airport Industrial Park, in Montgomery, Alabama. The plant is used to produce automotive components and subassemblies for passenger vehicles, including: Chassis, bodies, body stampings, doors, transmissions, axles, spindles, half/drive shafts, hubs, universal joints, suspension parts, steering components, steering wheels, bumpers, airbag inflators, and brake hoses, for the U.S. market and export. The proposed manufacturing activity would involve the use of foreign-sourced components (initially representing about 60% of finished product value), including: Plastic tubes/pipe/fittings, sheets/film/foil/tape of plastic, plates/sheets/film/foil/strip of plastic and textile materials (items under Category 229 will be admitted under privileged foreign status—19 CFR 146.41), flexible rubber tubes/hoses, self-adhesive plastic or polyurethane sheets/foil/film, labels, rubber belts, rubber sheets/strips/rods/profiles/plates, seats, seat belts, safety glass, mirrors, flat-rolled steel (will be admitted under privileged foreign status), stranded wire of steel and copper, pins, fasteners, cotter pins, parts of steering systems, half shafts, transmissions and parts of transmissions, gears, flywheels, torque converters, ball/roller screws, clutches, universal/CV joints, sprockets helical springs, brake cables, hangers, bearings, cylinder heads, connecting rods, compasses, thermometers, hydrometers, pyrometers, hygrometer, motors, batteries, ignition parts, lighting equipment, horns, windshield defrosters, audio (radio/CD/tape) components, antennas, alarm systems, electronic switches, automatic regulators, wiring harnesses, plastic handles/knobs, plastic gaskets/seals/belts/fasteners, clasps, buckles, hooks, carpet sets, airbag modules/inflators, brake components, wheels, shock absorbers, radiators, exhaust systems, hinges, pneumatic cylinders/dampeners/regulators, speedometers, tachometers, catalysts of platinum, locks, hinges, composite gaskets, springs, valves, compressors, pumps, air conditioners, relays, boards, panels, consoles, clocks, glass lenses, lighters, and switches (duty rate range: free—8.8%). The application states that the level of Mobis' domestic sourcing will increase in the future.

FTZ procedures would exempt Mobis from Customs duty payments on the foreign components used in production for export to non-NAFTA countries. On shipments for U.S. consumption and to NAFTA markets, the company would be able to elect the finished automotive components and subassembly duty rates (2.5%) for the foreign components listed above that have higher individual rates. The auto duty rate (2.5%) would apply if the finished components and subassemblies are shipped via zone-to-zone transfer to U.S. motor vehicle assembly plants with subzone status. The application indicates that the savings from FTZ procedures would help improve the facility's international competitiveness.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the address below. The closing date for their receipt is February 28, 2005. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period March 14, 2005.

A copy of the application will be available for public inspection at the following location: Office of the Executive Secretary, Foreign-Trade Zones Board, Franklin Court Building—Rm. 4100W, U.S. Department of Commerce, 1099 14th Street, NW., Washington, DC 20005.

Dated: December 15, 2004.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–28433 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 59–2004]

Foreign-Trade Zone 40—Cleveland, OH, Area Application for Expansion

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board), by the Cleveland-Cuyahoga County Port Authority, grantee of Foreign-Trade Zone 40, requesting authority to expand its zone in the Cleveland, Ohio, area, within the Cleveland Customs port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on December 17, 2004.

FTZ 40 was approved on September 29, 1978 (Board Order 135, 43 FR 46886, 10/11/78) and expanded in June 1982 (Board Order 194, 47 FR 27579, 6/25/82); April 1992 (Board Order 574, 57 FR 13694, 4/17/92); February 1997 (Board Order 870, 62 FR 7750, 2/20/97); June 1999 (Board Order 1040, 64 FR 33242,

6/22/99); April 2002 (Board Order 1224, 67 FR 20087, 4/15/02); August 2003 (Board Order 1289, 68 FR 52384, 9/3/03; Board Order 1290, 68 FR 52384, 9/3/03; and, Board Order 1295, 68 FR 52383, 9/3/03); March 2004 (Board Order 1320, 69 FR 13283, 3/22/04 and Board Order 1322, 69 FR 17642, 4/5/04); and, September 2004 (Board Order 1351, 69 FR 56038, 9/17/04).

The general-purpose zone project currently consists of the following sites in the Cleveland, Ohio, area: *Site 1* consists of 1,339 acres in Cleveland, which includes the Port of Cleveland complex (Site 1A–94 acres), the Cleveland Bulk Terminal (Site 1B–45 acres), and the Tow Path Valley Business Park (Site 1C–1,200 acres); *Site 2* (175 acres)—the IX Center in Brook Park, adjacent to Cleveland Hopkins International Airport; *Site 3* consists of 2,263 acres, which includes the Cleveland Hopkins International Airport Complex (Site 3A–1,727 acres), the Snow Road Industrial Park in Brook Park (Site 3B–42 acres), and the Brook Park Road Industrial Park (Site 3C–322 acres) in Brook Park, and the Cleveland Business Park (Site 3D–172 acres) in Cleveland; *Site 4* (450 acres)—Burke Lakefront Airport, 1501 North Marginal Road, Cleveland; *Site 5* (298 acres)—Emerald Valley Business Park, Cochran Road and Beaver Meadow Parkway, Glenwillow; *Site 6* (17 acres)—within the Collinwood Industrial Park, South Waterloo (South Marginal) Road and East 152nd Street, Cleveland; *Site 7* consists of 193 acres in Strongsville, which includes the Strongsville Industrial Park (Site 7A–174 acres) and the Progress Drive Business Park (Site 7B–19 acres); *Site 8* (13 acres)—East 40th Street between Kelley & Perkins Avenues (3830 Kelley Avenue), Cleveland; *Site 9* (4 acres)—within the Frane Properties Industrial Park, 2399 Forman Road, Morgan Township; *Site 10* (60 acres)—within the Solon Business Park, Solon; *Site 11* (170 acres, 2 parcels)—within the 800-acre Harbour Point Business Park, Baumhart Road, at the intersections of U.S. Route 6 and Ohio Route 2, Vermilion; and, *Temporary Site* (11 acres)—3 warehouse locations: 29500 Solon Road (250,000 sq. ft.), 30400 Solon Road (110,000 sq. ft.), and 31400 Aurora Road (117,375 sq. ft.) located within the Solon Business Park in Solon (expires 4/1/05). Several applications are currently pending with the Board to expand FTZ 40: Dockets 19–04, 20–04 and 25–04.

The applicant is now requesting authority to expand the general-purpose zone to include an additional site in the area: *Proposed Site 13* (29 acres)—Ashtabula Distribution Center, LLC, facility located at 1527 Cook Road in Ashtabula Township (County of Ashtabula). The site is owned by the Ashtabula Distribution Center, LLC, and will be used for general warehousing and distribution activities. A pending application to reorganize FTZ 40 (Docket 20–2004) proposes to consolidate and renumber the FTZ sites, and under this plan the Ashtabula Distribution Center, LLC, would become proposed Site 11.

No specific manufacturing authority is being requested at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at one of the following addresses:

1. *Submissions via Express/Package Delivery Services:* 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:* Foreign-Trade Zones Board, U.S. Department of Commerce, FCB-Suite 4100W, 1401 Constitution Avenue, NW., Washington, DC 20230.

The closing period for their receipt is February 28, 2005. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to March 14, 2005).

A copy of the application and accompanying exhibits will be available during this time for public inspection at address Number 1 listed above, and at the U.S. Department of Commerce Export Assistance Center, 600 Superior Avenue East, Suite 700, Cleveland, OH 44114.

Dated: December 20, 2004.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–28431 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 60–2004]

Proposed Foreign-Trade Zone—Washington County, OH, Application and Public Hearing

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Southeastern Ohio Port Authority, an Ohio public corporation, to establish a general-purpose foreign-trade zone at sites in Washington County, Ohio, adjacent to the Charleston, West Virginia, Customs port of entry. The FTZ application was submitted pursuant to the provisions of the FTZ Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on December 17, 2004. The applicant is authorized to make the proposal under Ohio Revised Code Section 1743.11.

The proposed zone would be the second general-purpose zone in the Charleston, West Virginia, Customs port of entry area. The existing zone is as follows: FTZ 229, Charleston,West Virginia (Grantee: West Virginia Economic Development Authority, Board Order 954, 02/13/98).

The proposed zone consists of 5 sites (340 acres), located in Washington County, Ohio. They are as follows: *Site 1* (147 acres)—Wetz Warehousing, Inc., at the intersection of State Route #7 and Ohio County Road #10, Marietta; *Site 2* (17 acres)—Marietta Industrial Park, 117 Industry Road, Marietta; *Site 3* (13 acres)—Two Rivers Corporation property, 900–1100 Green Street, Marietta; *Site 4* (20 acres)—Cytec Industries, Inc. property, 1405 Green Street, Marietta; and, *Site 5* (143 acres)—Reno Industrial Complex, 27823 State Route #7, Marietta. The majority of sites are owned by Wetz Investment, LLC, Alliance Industries, Inc., and Cytec Industries, Inc.

The application indicates a need for zone services in the Washington County, Ohio, area. Several firms have indicated an interest in using zone procedures for warehousing/distribution activities. Specific manufacturing approvals are not being sought at this time. Requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

As part of the investigation, the Commerce examiner will hold a public hearing on January 25, 2005, at 11 a.m.,

at the Washington State Community College, Community Room, 710 Colegate Drive, Marietta, Ohio 45750.

Public comment on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at one of the following addresses below:

1. *Submissions via Express/Package Delivery Services:* 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 U.S. Postal Service:* Foreign-Trade Zones Board, U.S. Department of Commerce, FCB–4100W, 1401 Constitution Avenue, NW., Washington, DC 20230.

The closing period for their receipt is February 28, 2005. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to March 14, 2005).

A copy of the application will be available for public inspection at the Office of the Foreign-Trade Zones Board's Executive Secretary at address No. 1 listed above and the Office of the Southeastern Ohio Port Authority, 205 Putnam Street, Marietta, Ohio 45750.

Dated: December 20, 2004.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–28432 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1362]

Grant of Authority for Subzone Status, Mitsubishi Electric Power Products, Inc., (Circuit Breakers), Warrendale and Freedom, PA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for ''* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board (the Board) to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Regional Industrial Development Corporation of Southwestern Pennsylvania, grantee of Foreign-Trade Zone 33, has made application for authority to establish special-purpose subzone status at the circuit breaker manufacturing facilities of Mitsubishi Electric Power Products, Inc. (MEPPI), located in Warrendale and Freedom, Pennsylvania (FTZ Docket 35–2003, filed 7–16–2003);

Whereas, the application was amended on January 20, 2004, to expand the list of foreign-sourced components to be included within the scope of authority;

Whereas, notice inviting public comment was given in the **Federal Register** (68 FR 44281, 7–28–2003; 69 FR 8379, 2–24–2004); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that approval of the application, as amended, is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status at the circuit breaker manufacturing facilities of Mitsubishi Electric Power Products, Inc., located in Warrendale and Freedom, Pennsylvania (Subzone 33D), at the locations described in the application, subject to the FTZ Act and the Board's regulations, including section 400.28.

Signed in Washington, DC, this 15th day of December, 2004.

James J. Jochum,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–28435 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 46–2004]

ExxonMobil Corporation—Expansion of Manufacturing Authority; Extension of Comment Period

The comment period for the application submitted by the Port of Houston Authority on behalf of ExxonMobil Corporation (ExxonMobil), to expand the scope of manufacturing activity conducted under zone procedures within Subzone 84O at the ExxonMobil oil refinery complex in Baytown, Texas (69 FR 64026, 11/3/04), is being extended to January 18, 2005, to allow interested parties additional time in which to comment. Rebuttal comments may be submitted during the subsequent 15-day period, until February 2, 2005. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at one of the following addresses:

1. Submissions Via Express/Package Delivery Services: Foreign-Trade-Zones Board, U.S. Department of Commerce, Franklin Court Building—Suite 4100W, 1099 14th St., NW., Washington, DC 20005; or

2. Submissions Via the U.S. Postal Service: Foreign-Trade-Zones Board, U.S. Department of Commerce, FCB—Suite 4100W, 1401 Constitution Ave., NW., Washington, DC 20230.

Dated: December 16, 2004.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–28434 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

Review of Oil/Petrochemical Refinery Subzone Activity

Background. The Foreign-Trade Zones Board (the Board) has authorized 81 refinery/petrochemical complexes to conduct crude oil/petrochemical product refining activity under FTZ procedures. In 2000, active refinery/petrochemical subzones requested and were approved an indefinite extension of their NPF authority, which initially had been granted for a five-year period (Board Order 1116, 65 FR 52696, 8/30/2000). NPF authority involves full access to FTZ procedures for export activity and, with regard to products sold in the U.S., the ability to choose the Customs duty rates that apply to certain petrochemical products and refinery by-products (duty-free), by admitting incoming foreign inputs, such as crude oil, in non-privileged foreign status. Such petrochemicals and by-products account for about 20 to 25 percent of refinery activity, on average. [NPF authority does not apply to the foreign inputs used to produce other refinery products, such as gasoline, jet fuel, and heating oil (some 75–80% of output); they would continue to be subject to their normal duty rates.] The extension

case involved a comprehensive assessment of zone use by the refinery subzones considering their economic and regulatory circumstances. When the Board extended NPF authority for refinery subzones in September 2000, it noted that the FTZ staff would conduct periodic reviews, as part of its zone monitoring program.

Summary. The industry review will involve an overall industry-wide evaluation of the economic effects of the oil refining industry's use of FTZ procedures. It will address the role zone procedures play in helping the refineries and the industry to improve their international competitive situation, and in encouraging investment in the United States that might otherwise be done abroad.

Public comment on the review is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at one of the following addresses:

1. Submissions Via Express/Package Delivery Services: Foreign-Trade-Zones Board, U.S. Department of Commerce, Franklin Court Building—Suite 4100W, 1099 14th St. NW., Washington, DC 20005; or

2. Submissions Via the U.S. Postal Service: Foreign-Trade-Zones Board, U.S. Department of Commerce, FCB—Suite 4100W, 1401 Constitution Ave. NW., Washington, DC 20230.

The closing period for their receipt is March 21, 2005.

Dated: December 21, 2004.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–28436 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–892]

Antidumping Duty Order: Carbazole Violet Pigment 23 From the People's Republic of China

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

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Tisha Loeper-Viti or Marin Weaver at (202) 482–7425 and (202) 482–2336, respectively; AD/CVD Enforcement, China/NME Group, Office 8, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On November 17, 2004, the Department of Commerce (the Department) published its final determination in the antidumping duty investigation of carbazole violet pigment 23 (CVP–23) From the People's Republic of China (PRC). *See Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 From the People's Republic of China,* 69 FR 67304 (November 17, 2004) (*Final Determination*).

Scope of Order

The merchandise covered by this order is carbazole violet pigment 23 identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of diindolo [3,2-b:3′,2′-m]triphenodioxazine, 8,18-dichloro-5, 15-diethy-5,15-dihydro-, and molecular formula of $C_{34}H_{22}Cl_2N_4O_2$.[1] The subject merchandise includes the crude pigment in any form (*e.g.,* dry powder, paste, wet cake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.,* pigments dispersed in oleoresins, flammable solvents, water) are not included within the scope of the order.

The merchandise subject to this order is classifiable under subheading 3204.17.9040 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise covered by this order is dispositive.

Antidumping Duty Order

On December 22, 2004, in accordance with section 735(d) of the Tariff Act of 1930, as amended, (the Act), the International Trade Commission (ITC) notified the Department of its final determination that the industry in the United States producing CVP–23 is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act by reason of imports of the subject merchandise from the PRC.

In addition, the ITC notified the Department of its final determination that critical circumstances do not exist with respect to imports of subject merchandise from all producers and exporters. Therefore, we will instruct U.S. Customs and Border Protection (CBP) to lift suspension and to release any bond or other security, and refund any cash deposit made, to secure the payment of antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption prior to the date of publication of the preliminary determination in the **Federal Register.** *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Carbazole Violet Pigment 23 From the People's Republic of China,* 69 FR 35287 (June 24, 2004).

In accordance with section 736(a)(1) of the Act, the Department will direct CBP to assess, upon further advice by the Department, antidumping duties equal to the amount by which the normal value of the subject merchandise exceeds the export price or constructed export price of the subject merchandise for all relevant entries of CVP–23 from the PRC. The antidumping duties will be assessed on all (1) unliquidated entries of CVP–23 subject to this order, entered, or withdrawn from warehouse, for consumption on or after June 24, 2004, the date of publication of the Department's preliminary determination in the **Federal Register,** and before December 21, 2004; and (2) merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination in the **Federal Register.** The Department terminated the suspension of liquidation for entries of subject merchandise, pursuant to section 733(d) of the Act, on December 21, 2004. Entries of CVP–23 from the PRC made between December 21, 2004, and the day preceding the publication of the ITC's notice of final determination in the **Federal Register** are not liable for the assessment of antidumping duties.

On or after the date of publication of the ITC's notice of final determination in the **Federal Register,** the CBP will require, at the same time as importers would normally deposit estimated duties, a cash deposit equal to the estimated weighted-average antidumping duty margins as noted below. The ''PRC-Wide Rate'' applies to all exporters of subject merchandise not specifically listed. The weighted-average dumping margins are as follows:

Manufacturer/exporter [1]	Weighted-average margin (percent)
GoldLink Industries Co., Ltd	5.51
Nantong Haidi Chemical Co., Ltd	44.50
Trust Chem Co., Ltd	27.19

[1] Please note that the bracketed section of the product description, [3,2-b:3′,2′-m], is not business proprietary information. In this case, the brackets are simply part of the chemical nomenclature. *See* December 4, 2003, amendment to petition at 8.

Manufacturer/exporter [1]	Weighted-average margin (percent)
PRC-Wide Rate	217.94

[1] Tianjin Hanchem International Trading Co. (Hanchem) was inadvertently identified separately as an exporter in the ''Final Determination of Investigation'' section of the *Final Determination* with a rate of 217.94%. Instead, Hanchem should have been included in the PRC entity and assigned the PRC-wide rate of 217.94%.

This notice constitutes the antidumping duty order with respect to CVP–23 from the PRC, pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room B–099 of the Main Commerce Building, for copies of an updated list of antidumping duty orders currently in effect.

This order is issued and published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: December 22, 2004.

Holly A. Kuga,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–28520 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No. A–533–838]

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbazole Violet Pigment 23 From India

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

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Lyn Johnson or Susan Lehman, AD/CVD Operations, Office 5, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5287 or (202) 482–0180.

SUPPLEMENTARY INFORMATION:

Scope of Order

The merchandise subject to this antidumping duty order is carbazole violet pigment 23 (CVP–23) identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of diindolo [3,2–b:3′,2′–m] triphenodioxazine, 8,18-dichloro-5, 15-diethy-5, 15-dihydro-, and molecular formula of $C_{34}H_{22}C1_2N_4O_2$.[1] The subject merchandise includes the crude pigment in any form (*e.g.,* dry powder, paste, wet cake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.,* pigment dispersed in oleoresins, flammable solvents, water) are not included within the scope of the investigation.

The merchandise subject to this antidumping duty order is classifiable under subheading 3204.17.9040 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.

Amendment To Final Determination

In accordance with sections 735(d) and 771(i) of the Tariff Act of 1930, as amended (the Act), on November 17, 2004, the Department of Commerce (the Department) published its notice of final determination of sales at less than fair value for the antidumping duty investigation of CVP–23 from India. See *Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from India,* 69 FR 67306 (November 17, 2004) (*Final Determination*). We received a timely ministerial-error allegation from Pidilite Industries Limited (Pidilite) pursuant to 19 CFR 351.224(c)(2). No other party alleged ministerial errors or submitted comments.

After analyzing the submission, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), that a ministerial error was made by not deducting certain early payment discounts from the price of home-market sales. We have corrected this error. For a more detailed discussion, see the December 9, 2004, memorandum from Susan Lehman to the file entitled ''Amended Final Determination Analysis Memorandum for Pidilite Industries Limited.''

Pursuant to section 751(h) of the Act and 19 CFR 351.224(e), we are amending the *Final Determination* for Pidilite. This also results in a change to the ''All Others'' rate as indicated below. For calculation of the ''All Others'' rate, see the December 9, 2004, memorandum from Susan Lehman to the File entitled ''Amended All-Others Rate Calculation Memorandum for the Final Determination of the Antidumping Duty Investigation on Carbazole Violet Pigment 23.''

Antidumping Duty Order

On December 22, 2004, pursuant to section 735(d) of the Act, the International Trade Commission (ITC) notified the Department of its final determination that the industry in the United States producing CVP–23 is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act by reason of less-than-fair-value imports of subject merchandise from India. Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct U.S. Customs and Border Protection (CBP) to assess, upon further advice by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the U.S. price of the merchandise for all relevant entries of CVP–23 from India. These antidumping duties will be assessed on all unliquidated entries of CVP–23 from India that are entered, or withdrawn from the warehouse, for consumption on or after June 24, 2004, the date on which the Department published its *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Carbazole Violet Pigment 23 from India,* 69 FR 35293 (June 24, 2004).

Section 733(d) of the Act states that instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months except where exporters representing a significant proportion of exports of the subject merchandise request the Department to extend that four-month period to not more than six months. At the request of exporters, Alpanil Industries (Alpanil) and Pidilite, we extended the four-month period to not more than six months. *See* 69 FR at 35293. In this investigation, the six-month period began on the date of the publication of the preliminary determination and ends on December 21, 2004. Therefore, in accordance with section 733(d) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of CVP–23 from India entered, or withdrawn from warehouse, for consumption on or after December 21, 2004, and before the date of publication of the ITC's final injury determination in the **Federal Register**. Suspension of liquidation will continue on or after this date.

On or after the date of publication of the ITC's notice of final determination in the **Federal Register**, CBP will

[1] The bracketed section of the product description, [3,2–b:3′,2′–m], is not business proprietary information. In this case, the brackets are simply part of the chemical nomenclature. See December 4, 2003, amendment to petition at 8.

require, at the same time as importers would normally deposit estimated duties on this merchandise, cash deposits for the subject merchandise equal to the estimated weighted-average antidumping margins listed below, adjusted for export subsidies found in the final determination of the companion countervailing duty investigation of this merchandise. Specifically, for cash deposit purposes, we are subtracting from the applicable cash deposit rate that portion of the rate attributable to the export subsidies found in the affirmative countervailing duty determination for each respondent (*i.e.,* 17.57 percent for Alpanil, 17.02 percent for Pidilite).

The weighted-average margins and cash deposit rates are as follows:

Producer or exporter	Weighted-average margin (percent)	Cash deposit rate (percent)
Alpanil Industries	27.23	9.66.
Pidilite Industries Ltd.	66.59 (Amended)	49.57 (Amended).
All Others	44.80 (Amended)	27.48 (Amended).

The ''All Others'' rate applies to all entries of the subject merchandise except for entries from the companies that are identified individually above.

This notice constitutes the antidumping duty order with respect to CVP–23 from India, pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room B–099 of the main Department building, for copies of an updated list of antidumping duty orders currently in effect.

The amended final determination is published pursuant to sections 735(d) and 777(i)(1) of the Act. The order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: December 22, 2004.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–28521 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

(A–201–802)

Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review

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

SUMMARY: On June 22, 2004, the Department of Commerce published the preliminary results of administrative review of the antidumping duty order on gray portland cement and clinker from Mexico. The review covers one manufacturer/exporter, CEMEX, S.A. de C.V., and its affiliate, GCC Cemento, S.A. de C.V. The period of review is August 1, 2002, through July 31, 2003.

Based on our analysis of the comments received, we have made changes in the margin calculations. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margin is listed below in the ''Final Results of Review'' section of this notice.

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Hermes Pinilla or Jeffrey Frank, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3477 or (202) 482–0090, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 22, 2004, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on gray portland cement and clinker from Mexico. *See Preliminary Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico,* 69 FR 34647 (*Preliminary Results*).

We invited parties to comment on the *Preliminary Results*. On July 22, 2004, we received case briefs from the petitioner, the Southern Tier Cement Committee, and from the respondents, CEMEX, S.A. de C.V. (CEMEX), and GCC Cemento, S.A. de C.V. (GCCC). On July 30, 2004, we received rebuttal briefs from the petitioner, CEMEX and GCCC.[1] On October 22, 2004, the Department published a notice extending the date for issuing the final results of this review. *See Gray Portland Cement and Clinker From Mexico: Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review,* 69 FR 62026 (October 22, 2004).

The Department has conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of Order

The products covered by this order include gray portland cement and clinker. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material product produced when manufacturing cement, has no use other than being ground into finished cement. Gray portland cement is currently classifiable under Harmonized Tariff Schedule (HTS) item number 2523.29 and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as ''other hydraulic cements.'' The HTS subheadings are provided for convenience and customs purposes only. The Department's written description remains dispositive as to the scope of the product coverage.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review, and to which we have responded, are listed in the Appendix to this notice and addressed in the ''Issues and Decision Memo'' (Decision Memo) from Jeffrey May, Deputy Assistant Secretary, to James J. Jochum, Assistant Secretary for Import Administration, dated December 20, 2004, which is hereby adopted by this notice. The Decision Memo is on file in Import Administration's Central Records Unit, Room B–099 of the main Department of Commerce building. In addition, a complete version of the Decision Memo is available on the Internet at *http://ia.ita.doc.gov*. The paper copy and electronic version of the Decision Memo are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have corrected certain programming and clerical errors in our preliminary results, where applicable.

[1] Although we consider CEMEX and GCCC to be one entity for purposes of this antidumping duty order, because they are represented by separate counsel and have submitted separate case and rebuttal briefs, we have referred to them by their respective names when summarizing comments.

These changes are discussed in the Final Results Analysis Memorandum dated October 20, 2004.

Final Results of Review

We determine that the following weighted-average margin exists for the collapsed parties, CEMEX and GCCC, for the period August 1, 2002, through July 31, 2003:

Exporter/manufacturer	Weighted-average percentage margin
CEMEX/GCCC	54.97

Assessment Rates

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. We will issue appropriate assessment instructions directly to CBP within 15 days of publication of these final results of review. In accordance with 19 CFR 351.212(b), we have calculated an exporter/importer-specific assessment rate. For the sales in the United States through the respondent's affiliated U.S. parties, we divided the total dumping margin for the reviewed sales by the total entered value of those reviewed sales. We will direct CBP to assess the resulting percentage margin against the entered customs values for the subject merchandise on each of the entries during the review period (see 19 CFR 351.212(a)).

The Department clarified its ''automatic assessment'' regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the period of review produced by the company included in the final results of review for which the reviewed company did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see Notice of Policy Concerning Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003).

Cash-Deposit Requirements

As discussed in the Decision Memo at comment 6, we continue to determine that it is appropriate to require a per-unit cash-deposit amount for entries of subject merchandise produced or exported by CEMEX/GCCC. The following deposit requirements shall be effective upon publication of this notice of final results of administrative review for all shipments of gray portland cement and clinker from Mexico, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) The cash-deposit amount for CEMEX/GCCC will be $32.85 per metric ton; (2) for previously investigated or reviewed companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this or any previous reviews or the original less-than-fair-value (LTFV) investigation but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash-deposit rate for all other manufacturers or exporters will continue to be 61.85 percent, which was the ''all others'' rate in the LTFV investigation. See *Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker From Mexico*, 55 FR 29244 (July 18, 1990). The deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO are sanctionable violations.

These final results of administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 20, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix Issues in the Decision Memorandum

1. Revocation
2. Regional Assessment
3. Sales-Below-Cost Test
4. Bag vs. Bulk
5. Swap Sales
6. Cash-Deposit Methodology
7. Ordinary Course of Trade
8. Ministerial Errors

[FR Doc. E4–3874 Filed 12–29–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–504]

Petroleum Wax Candles From the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review

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

SUMMARY: On August 3, 2004, the Department of Commerce (the Department) published the preliminary results of its new shipper review of the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC) for Shandong Huihe Trade Co., Ltd. (Shandong Huihe). *See Petroleum Wax Candles From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty New Shipper Review of Shandong Huihe, Ltd.*, 69 FR 46512 (*Preliminary Results*). The new shipper review covers the period August 1, 2002, through July 31, 2003.

Based on the Department's verification of Shandong Huihe's questionnaire responses and our consideration of the comments received, we have made changes to our analysis. Therefore, the final results differ from the *Preliminary Results*.

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, or Tom Gilgunn, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–0780, or (202) 482–4236, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 3, 2004, the Department published the preliminary results of its new shipper review of the antidumping duty order on petroleum wax candles from the PRC for Shandong Huihe. *See Preliminary Results*. This new shipper review covers the period August 1, 2002, through July 31, 2003.

Since the publication of the *Preliminary Results*, the following

events have occurred. On August 27, 2004, Shandong Huihe submitted its response to a supplemental questionnaire. The Department conducted verification of Shandong Huihe's responses in Jinan, China on October 11–13, 2004. On October 22, 2004, the Department extended the final results of this review to 147 days from July 26, 2004, the date that the preliminary results were issued, or December 20, 2004. *See Petroleum Wax Candles From the People's Republic of China: Extension of Time Limit for Final Results of New Shipper Review of Shandong Huihe Trade Co. Inc.*, 69 FR 60142. We received timely filed case and rebuttal briefs from Shandong Huihe and the National Candle Association (petitioners) on November 29, 2004, and December 2, 2004, respectively. The Department conducted a hearing for this new shipper review on December 9, 2004.

Scope of the Antidumping Duty Order

The products covered by this order are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers. The products were classified under the Tariff Schedules of the United States (TSUS) item 755.25, Candles and Tapers. The products are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) item 3406.00.00. Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this proceeding remains dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the *Memorandum from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, to James J. Jochum, Assistant Secretary for Import Administration: Issues and Decision Memorandum for the Final Results of the New Shipper Review of Petroleum Wax Candles From the People's Republic of China*, dated December 20, 2004 (*Decision Memo*), which is hereby adopted by this notice.

A list of the issues which parties have raised and to which we have responded, all of which are in the *Decision Memo*, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B–099 of the main Department Building. In addition, a complete version of the Decision Memo can be accessed directly on the Web at *http://ia.ita.doc.gov*. The paper copy and electronic version of the *Decision Memo* are identical in content.

Changes Since the Preliminary Results Use of Adverse Facts Available

Based on our analysis of information obtained during verification which occurred after the *Preliminary Results*, and of briefs and rebuttal briefs submitted by interested parties, we have changed our analysis for Shandong Huihe. For these final results, we are basing the margin for Shandong Huihe on adverse facts available (AFA). For a discussion of this change, refer to the *Application of Facts Available* section, below.

Application of Adverse Facts Available

As further discussed below, pursuant to sections 776(a)(2)(B) and (C), 776(b), and 782(d) and (e) of the Tariff Act of 1930, as amended (the Act), the Department determines that the application of total adverse facts available is warranted for Shandong Huihe. Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form and manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to sections 782 (d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) provides that the Department must inform the interested party of the nature of any deficiency in its response and, to the extent practicable, allow the interested party to remedy or explain such deficiency. Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

We find that pursuant to sections 776(a)(2)(B) and (C) of the Act, we should apply facts available to exports by Shandong Huihe because Shandong Huihe failed to report in a timely manner information that was requested by the Department, and because Shandong Huihe took further action that impeded the Department's ability to conduct this proceeding.

Shandong Huihe reported in response to the Department's inquiries about the location of its sales activities that, ''Huihe's administrative and sales office is located in Niuwang Village, Gaoxin District, Jinan City, Shandong Province, China.'' See Shandong Huihe's December 16, 2003, Section A questionnaire response at page 10. However, during verification, the Department learned that Shandong Huihe's sales manager, largest shareholder, and legal representative, the person able to enter Shandong Huihe into binding contracts, works at an office in Qingdao, 400 kilometers from Jinan. *See Verification Report* at page 6. Further, the Department also learned that the sales negotiations for Shandong Huihe's were conducted from the sales manager's office via telephone and telephonic facsimile; all of the relevant sales documents were created on the computer system located at this office; and, the sales manager's files for Shandong Huihe's sales are stored at this office. *Id.* at page 6. At no point in this new shipper review, prior to verification, did Shandong Huihe notify the Department of the existence of any additional sales offices, or seek guidance on the applicable reporting requirements as contemplated by section 782(c)(1) of the Act. Nor did Shandong Huihe report at the start of verification that it had an additional sales office in Qingdao, China. *See Verification Report* at page 1. Shandong Huihe thus failed to provide in a timely manner information requested by the Department within the meaning of section 776(a)(2)(B) of the Act.

The Department finds that the application of facts available is warranted for another reason. Specifically, the Department finds that Shandong Huihe significantly impeded the proceeding by refusing to consent to an extension of the schedule so as to permit verification at the Qingdao office, where keys sales and export functions take place. Access to the facility where these functions take place was critical to the Department's ability to conduct a thorough verification of Shandong Huihe's responses, specifically, the *bona fides* of Shandong Huihe's sales, affiliations, and reported sales process. Shandong Huihe thus took specific action to prevent the Department from determining the reliability of central elements of its responses, thereby impeding this proceeding. That action itself warrants

the application of facts available pursuant to section 776(a)(2)(C) of the Act.

While it is true that the Department does occasionally allow for off–site verifications, it does so only with full knowledge beforehand, and usually with a great deal of additional scrutiny. Shandong Huihe did not report the existence of its Qingdao sales office in its responses, and thus the Department was unaware of it until well into verification. Without being able to actually travel to this office and examine the company records and computer systems located there, the Department was left to rely solely on Shandong Huihe's assurances that it provided accurate and complete information.

Furthermore, Shandong Huihe has not met the requirements of sections 782(d) and (e) of the Act. Section 782(d) is not applicable because information concerning the additional sales office was not submitted by the established deadline. The Department only discovered this information at verification. Similarly, section 782(e) of the Act has also not been satisfied since, on two separate occasions, Shandong Huihe failed to provide consent that would have enabled the verification team to conduct an on-site verification of the company-specific information in Qingdao. Thus, Shandong Huihe has failed to satisfy the requirements of section 782(e), and subsections (1), (2), and (4) of the Act.

Once the Department determines that the use of facts available is warranted, the Department must then determine whether an adverse inference is warranted pursuant to section 776(b) of the Act, which permits the Department to apply an adverse inference if it makes the additional finding that an interested party has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information.

In determining whether a respondent has failed to cooperate to the best of its ability, the Department need not make a determination regarding the willfulness of the respondent's conduct. *See Nippon Steel Corp.* v. *United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Instead, the courts have made clear that the Department must articulate its reasons for concluding that a party failed to cooperate to the best of its ability, and explain why the missing information is significant to the review. In determining whether a party failed to cooperate to the best of its ability, the Department considers whether a party could comply with the request for information, and whether a party paid insufficient attention to its statutory duties. *See Pacific Giant*, 223 F. Supp. 2d. 1336, 1342 (2002), *see also Tung Mung Dev. Co.* v. *US*, 2001 Ct. Intl. Trade LEXIS 94 at 89 (July 3, 2001). The Department also considers whether there is at issue a ''pattern of behavior.'' *Borden, Inc.* v. *United States*, 22 C.I.T. 1153, 1154 (1998).

As discussed below, we determine that, within the meaning of section 776(b) of the Act, Shandong Huihe failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information, and that the application of adverse facts otherwise available (AFA) is therefore warranted.

On more than one occasion, Shandong Huihe failed to provide information when requested to do so by the Department. Specifically, Shandong Huihe never indicated prior to verification that it had an additional sales office in Qingdao and that it sales operations took place from that office. Moreover, at the start of verification, in response to the Department's request for corrections, Shandong Huihe did not report its additional sales office. *See Verification Report* at page 1.

Shandong Huihe could possibly have remedied these deficiencies even after they were discovered by the Department, but it chose not to avail itself of that opportunity. During verification, the Department learned that Shandong Huihe conducted its sales operations out of its Qingdao, China office. *See Verification Report* at page 6. The Department made it clear to Shandong Huihe at that time that Shandong Huihe's failure to provide information about its Qingdao office in its responses greatly impaired the Department's ability to conduct a complete and accurate verification under section 782(I) of the Act. *See Verification Report* at page 6. Immediately, and again the following day, the Department requested that Shandong Huihe extend the verification schedule to allow verification of its sales and export information at its Qingdao office. The Department thus offered Shandong Huihe an opportunity to remedy its failure to provide requested information in a timely manner, but Shandong Huihe refused the Department's offer. And Shandong Huihe did not attempt to explain its reasons for refusing to work with the Department on this matter.

In all new shipper reviews, the Department has a heightened obligation to make an exhaustive investigation into a respondent company's past and current affiliations, the *bona fides* of the sales by the respondent, and every aspect of the new shipper company and sales relevant to the review. The Department conducts verification to examine not only the documents supporting information on the record, but also to examine other records and the environment in which those documents and information were generated and maintained. Companies that seek to benefit from new shipper reviews have a responsibility to work with the Department to facilitate such in–depth inquiry. Plainly stated, Shandong Huihe neither did so nor did it attempt to explain why it would not do so. Thus, we find that Shandong Huihe's failed to cooperate to the best of its ability and, therefore, an adverse inference is warranted.

Section 776(c) of the Act requires that the Department corroborate, to the extent practicable, secondary information which it applies as facts available. The SAA states that corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. To corroborate information, the Department will explain the reliability and relevance of the information used. We are applying as AFA the highest rate from any segment of this administrative proceeding, which is the highest rate from the 2001–2002 administrative review. *See Amended Notice of Final Results of the Antidumping Duty Administrative Review: Petroleum Wax Candles From the Peoples Republic of China*, 69 FR 20858 (April 19, 2004) (*Amended Final*). Unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only sources for calculated margins are administrative determinations. No information has been presented in the current review that calls into question the reliability of this information. Thus, the Department finds that the information is reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers From Mexico: Final Results of Antidumping Administrative Review*, 61 FR 6812 (February 22, 1996), the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense

resulting in an unusually high margin. Similarly, the Department does not apply a margin that has been discredited. *See D&L Supply Co.* v. *United States*, 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated). The information used in calculating this margin was based on sales and production data of a respondent in a prior review, together with the most appropriate surrogate value information available to the Department, chosen from submissions by the parties in that review, as well as gathered by the Department itself. Furthermore, the calculation of this margin was subject to comment from interested parties. *See Amended Final.* Moreover, as there is no information on the record of this review that demonstrates that this rate is not appropriately used as adverse facts available, we determine that this rate has relevance. As the rate is both reliable and relevant, we determine that it has probative value. Accordingly, we determine that the highest rate from any segment of this administrative proceeding (*i.e.*, the calculated rate of 108.3 percent, which is the current PRC-wide rate and the rate currently applicable to other exporters) is in accord with section

776(c)'s requirement that secondary information be corroborated to the extent practicable (*i.e.*, that it have probative value).

Final Results of Review

For these final results we determine that the following dumping margin exists:

Manufacturer and Exporter	Margin (percent)
Shandong Huihe Trade Co. Ltd ...	108.30

Cash Deposit Requirements

The Department will notify Customs and Border Protection (CBP) that bonding is no longer permitted to fulfill security requirements for shipments from Shandong Huihe of petroleum wax candles from the PRC entered, or withdrawn from warehouse, for consumption in the United States on or after the publication of this notice of final results of antidumping duty new shipper review in the **Federal Register**. Further, effective upon publication of this notice for all shipments of the subject merchandise exported by Shandong Huihe, and entered, or withdrawn from warehouse, for consumption, the cash deposit rate will be the PRC-wide rate of 108.30 percent *ad valorem*.

Assessment of Antidumping Duties

The Department will instruct CBP to assess antidumping duties on all appropriate entries. Since we have reached the final results of this antidumping duty new shipper review with respect to Shandong Huihe, based on total AFA, the PRC-wide rate of 108.30 percent in effect at the time of entry applies to all exports of petroleum wax candles from the PRC by Shandong Huihe entered, or withdrawn from warehouse, for consumption during the period of review (August 1, 2002, through July 31, 2003). The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of this notice of final results of antidumping duty new shipper review.

Notification to Importers

This notice also serves as a reminder to importers of their responsibility under section 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 351.305(a)(3) of the Department's regulations. Timely written notification of the return/destruction of APO material or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation, which is subject to sanctions.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(2)(B) and 777(I)(1) of the Act.

Dated: December 20, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix

List of Issues

1. Whether the Department should apply adverse facts available (AFA) to Shandong Huihe;
2. The *bona fides* of Shandong Huihe's sale;
3. Shandong Huihe's eligibility as a new shipper.

[FR Doc. E4–3867 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–822–801, A–447–801, A–451–801, A–485–601, A–842–801, A–843–801, A–844–801]

Solid Urea from Belarus, Estonia, Lithuania, Romania, Tajikistan, Turkmenistan, and Uzbekistan: Final Results and Revocation of Orders

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

SUMMARY: On October 1, 2004, the Department of Commerce (''Department'') initiated the sunset reviews of the antidumping duty orders on solid urea from Belarus, Estonia, Lithuania, Romania, Tajikistan, Turkmenistan, and Uzbekistan (69 FR 58890). Because the domestic interested parties did not participate in these sunset reviews, the Department is revoking these antidumping duty orders.

EFFECTIVE DATE: November 17, 2004.

FOR FURTHER INFORMATION CONTACT: Hilary Sadler, Esq., Office of Policy, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230; telephone: (202) 482–4340.

SUPPLEMENTARY INFORMATION:

Scope

For purposes of these sunset reviews, the product covered is urea, a high-nitrogen content fertilizer which is produced by reacting ammonia with carbon dioxide. The product is currently classified under the Harmonized Tariff Schedules of the United States (''HTSUS'') item 3102.10.0000. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Background

On July 14, 1987, the Department issued an antidumping duty order on solid urea from the Union of Soviet Socialist Republics (''USSR'') (52 FR 26367). In December 1991, the USSR divided into 15 republics. In response to the dissolution, the Department transferred the original order to all 15 republics and applied a uniform cash deposit rate. *See Solid Urea from the Union of Soviet Socialist Republics; Transfer of the Antidumping Duty Order*

on Solid Urea From the Union of Soviet Socialist Republics to the Commonwealth of Independent States and the Baltic States and Opportunity to Comment, 57 FR 28828 (June 29, 1992).

In March 1999, the Department initiated sunset reviews on these orders and later published its notice of continuation of the antidumping duty orders. *See Continuation of Antidumping Duty Orders: Solid Urea From Armenia, Belarus, Estonia, Lithuania, Romania, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan*, 64 FR 62653 (November 17, 1999). Pursuant to section 751(c) of the Act and 19 CFR 351.218, the Department initiated the sunset reviews of these orders, excluding Armenia, by publishing the notice of the initiation in the **Federal Register**, 69 FR 58890 (October 1, 2004). In addition, as a courtesy to interested parties, the Department sent letters, via certified and registered mail, to each party listed on the Department's most current service list for these proceedings to inform them of the automatic initiation of the sunset reviews of the orders.

We received a waiver from domestic interested parties by the deadline dates. *See* 19 CFR 351.218(d)(1)(iii)(A) and Waiver of the Domestic Interested Parties (October 18, 2004). As a result, the Department determined that no domestic interested party intends to participate in the sunset reviews, and on October 21, 2004, we notified the International Trade Commission, in writing, that we intended to issue a final determination revoking these antidumping duty orders. See 19 CFR 351.218(d)(1)(iii)(B)(2).

Determination to Revoke

Pursuant to section 751(c)(3)(A) of the Act and 19 CFR 351.218(d)(1)(iii)(B)(3), if no domestic interested party files a notice of intent to participate, the Department shall issue a final determination, within 90 days after the initiation of the review, revoking an order. Because the domestic interested parties waived their right to participate in the sunset reviews, the Department finds that no domestic interested party is participating in these sunset reviews. Therefore, consistent with 19 CFR 351.222(i)(2)(i) and section 751(c)(6)(A)(iii) of the Act, we are revoking these antidumping duty orders effective November 17, 2004, the fifth anniversary of the date the Department published the continuation of the antidumping duty orders.

Effective Date of Revocation

Pursuant to sections 751(c)(3)(A) and 751(c)(6)(A)(iii) of the Act and 19 CFR 351.222(i)(2)(i), the Department will instruct the U.S. Customs and Border Protection to terminate the suspension of liquidation of the merchandise subject to these orders entered, or withdrawn from warehouse, on or after November 17, 2004. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to suspension of liquidation and antidumping duty deposit requirements. The Department will complete any pending administrative reviews of these orders and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

These five-year (sunset) reviews and notice are in accordance with sections 751(c) and 777(i)(1) of the Act.

Original Signed.

Dated: December 17, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E4–3873 Filed 12–28–04; 8:45 am]

Billing Code: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Application for Duty-Free Entry of Scientific Instrument

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether an instrument of equivalent scientific value, for the purposes for which the instrument shown below is intended to be used, is being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 04–023. *Applicant:* Oklahoma Medical Research Foundation, 825 NE. 13th, Oklahoma City, Oklahoma 73104.

Instrument: Electron Microscope, Model H–7600–1 TEM.

Manufacturer: Instruments, Hitachi Ltd., Japan.

Intended Use: The instrument is intended to be used to examine and record images of biological specimens from various basic biomedical research laboratories to increase understanding of and to direct basic biomedical research to gain a better understanding of biological phenomena. It will be used to support NIH and NSF-funded research and to train graduate students and postdoctoral investigators.

Application accepted by Commissioner of Customs: November 30, 2004.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 04–28523 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Applications for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 04–024.

Applicant: The University of Iowa, Central Microscopy Research Facilities, 85 Eckstein Medical Research Bldg., Iowa City, IA 52242–1101.

Instrument: Electron Microscope, Model Jeol JEM–1230.

Manufacturer: JEOL Ltd., Japan.

Intended Use: The instrument is intended to be used to obtain and record images from structural and chemical samples provided by investigators throughout the University. Nine full-time staff provide training, process specimens and conduct microscopy evaluation and analysis for or in assistance to 200 faculty research labs. Studies will be primarily biomedical, but will include geosciences and environmental engineering. It will also be used to train both undergraduate and graduate students in the application of various microscopy methodologies.

Application accepted by Commissioner of Customs: December 10, 2004.

Docket Number: 04–025.

Applicant: Oak Ridge National Laboratory c/o UT-Battelle, LLC, PO Box 2008, 1 Bethel Valley Road, Oak Ridge, TN, 37831.

Instrument: Aberration-Corrected Field Emission Electron Microscope, Model JEM–2200FS.

Manufacturer: JEOL Ltd., Japan.

Intended Use: The instrument is intended to be used to study materials including experimental catalysts for automotive emission reduction, novel nanophase materials for high technology applications (including carbon nanotubes, self-assembled nanoparticles, and the like) and a variety of semiconductor materials for electronic and automotive applications. The primary objective in all investigations will be to obtain images at sub-angstrom resolution in order to image specimen features at the atomic level.

Application accepted by Commissioner of Customs: December 16, 2004.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 04–28524 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application for Duty-Free Entry of Scientific Instrument

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether an instrument of equivalent scientific value, for the purposes for which the instrument shown below is intended to be used, is being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 am. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW, Washington, DC.

Docket Number: 04–022.

Applicant: Virginia Commonwealth University, Department of Anatomy and Neurobiology, 1101 E. Marshall Street, Room 12–050, Box 980709, Richmond, VA 23298.

Instrument: Transmission Electron Microscope, Model JEM–1230.

Manufacturer: JEOL, Ltd., Japan.

Intended Use: The instrument will be used to examine, analyze and reconstruct images of brain tissue derived from experimental animals subject to traumatic brain injury, various forms of epileptic seizure and various neurodegenerative disorders. Experiments with various antibodies will be used to determine various forms of neuronal cell injury and repair with computer-assisted reconstruction used to analyze related organelle and cytoskeletal change within neuronal somata and their dendritic and axonal processes.

Application accepted by Commissioner of Customs: November 18, 2004.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 04–28522 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–839]

Notice of Countervailing Duty Order: Carbazole Violet Pigment 23 From India

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

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Sean Carey or Addilyn Chams-Eddine, AD/CVD Operations, Office 6, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–3964 and (202) 482–0648 respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise covered by this investigation is Carbazole Violet Pigment 23 (CVP–23) identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of diindolo [3,2-b:3′,2′-m] triphenodioxazine, 8,18-dichloro-5,15-diethy-5,15-dihydro-, and molecular formula of $C_{34}H_{22}Cl_2N_4O_2$.[1] The subject merchandise includes the crude pigment in any form (*e.g.,* dry powder, paste, wet cake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.,* pigments dispersed in oleoresins, flammable solvents, water) are not included within the scope of the investigation.

Countervailing Duty Order

In accordance with section 705(d) of the Tariff Act of 1930, as amended (the Act), on November 17, 2004, the Department published its final determination in the countervailing duty investigation of CVP–23 from India. *See Final Affirmative Countervailing Duty Determination: Carbazole Violet Pigment 23 From India,* 69 FR 67321 (November 17, 2004). On December 22, 2004, the United States International Trade Commission (USITC) notified the Department of its final determination, pursuant to section 705(b)(1)(A)(i) of the Act, that an industry in the United States suffered material injury as a result of subsidized imports of CVP–23 from India.

Therefore, countervailing duties will be assessed on all unliquidated entries of CVP–23 from India entered, or withdrawn from warehouse, for consumption on or after April 27, 2004, the date on which the Department published its preliminary affirmative countervailing duty determination in the **Federal Register,** and before August 26, 2004, the date the Department instructed the U.S. Customs and Border Protection (CBP) to discontinue the suspension of liquidation in accordance with section 703(d) of the Act, and on all entries of subject merchandise made on or after the date of publication of the USITC's final injury determination in the **Federal Register.** Section 703(d) of the Act states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months. Entries of CVP–23 made on or after August 26, 2004, and prior to the date of publication of the USITC's final injury determination in the **Federal Register** are not liable for the assessment of countervailing duties due to the Department's discontinuation, effective August 26, 2004, of the suspension of liquidation.

In accordance with section 706 of the Act, the Department will direct the CBP to reinstitute the suspension of liquidation for CVP–23 from India effective the date of the publication of USITC's final injury determination in the **Federal Register** and to assess, upon further advice by the Department

[1] The bracketed section of the product description, [3,2-b:3′,2′-m], is not business proprietary information. In this case, the brackets are simply part of the chemical nomenclature. *See* December 4, 2003, amendment to petition (supplemental petition) at 8.

pursuant to section 706(a)(1) of the Act, countervailing duties for each entry of the subject merchandise in an amount based on the net countervailable subsidy rate for the subject merchandise.

On or after the date of publication of the USITC's final injury determination in the **Federal Register,** CBP must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the rate noted below. The cash deposit rates are as follows:

Producer/exporter	Net subsidy rate
Alpanil Industries Ltd	17.57% ad valorem.
Pidilite Industries Ltd	17.33 ad valorem.
AMI Pigments Pvt. Ltd.	33.61 ad valorem.
All Others	20.55 ad valorem.

This notice constitutes the countervailing duty order with respect to CVP–23 from India, pursuant to section 706(a) of the Act. Interested parties may contact the Central Records Unit of the main Department building for copies of an updated list of countervailing duty orders currently in effect.

This countervailing duty order is issued and published in accordance with sections 706(a) and 705 of the Act and 19 CFR 351.211 and 351.224.

Dated: December 22, 2004.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–28519 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–549–818]

Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Notice of Court Decision and Suspension of Liquidation

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

SUMMARY: On October 1, 2004, the United States Court of International Trade (CIT) issued an order sustaining the Department of Commerce's (the Department's) Final Results of Redetermination on Remand (September 15, 2004) (''*Redetermination Results*''). *Royal Thai Government, et. al.,* v. *United States*, Consol. Court No. 02–00026, Slip. Op. 04–124 (CIT 2004) (''*Royal Thai*''). In the *Redetermination Results*, the Department found as ordered by the CIT, that the challenged duty drawback program is not countervailable. The effect of this finding is the reduction of the overall countervailable subsidy rate to a *de minimis* level.

Consistent with the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Timken Co.* v. *United States*, 893 F.2nd 337 (Fed. Cir. 1990) (''*Timken*''), the Department is notifying the public that the *Royal Thai* decision was ''not in harmony'' with the Department's final determination.

EFFECTIVE DATE: October 1, 2004.

FOR FURTHER INFORMATION CONTACT: Sean Carey or Dana Mermelstein, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3964 or (202) 482–1391, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 3, 2001, the Department issued a countervailing duty determination covering hot-rolled steel from Thailand. *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 50410 (October 3, 2001). On December 3, 2001, the countervailing duty order was published. *Notice of Countervailing Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From Thailand* 66 FR 60197 (December 3, 2001).

On February 1, 2002, respondents, the Royal Thai Government (RTG) and Sahaviriya Steel Industries (SSI), filed their complaint, appealing the final determination and countervailing duty order. *Royal Thai Government, et. al.,* v. *United States*, Court. No. 02–00027. Petitioners, National Steel Corporation, Bethlehem Steel Corporation, and United States Steel Corporation, also appealed the final determination. *National Steel Corp, et. al.,* v. *United States*, Court No. 02–00026, consolidated into *Royal Thai Government, et. al.,* v. *United States*, Consol. No. 02–00026.

On May 19, 2004, the RTG and SSI obtained an injunction, applicable during the pendency of this litigation in the CIT, enjoining the United States from liquidating or causing or permitting liquidation of any entries of certain hot-rolled carbon steel flat products from Thailand that: (1) Were affected by the Department's investigative proceeding; (2) were produced and exported by SSI; (3) were entered or withdrawn from warehouse, for consumption, from January 1, 2002, through December 31, 2002; and, (4) remain unliquidated as of 5 p.m. on May 20, 2004.

On July 27, 2004, the CIT found that the Department's determination to countervail the challenged duty drawback program in its entirety was not supported by substantial evidence and is not in accordance with law. Because the CIT found that the drawback program is not countervailable, and the revised subsidy rate is *de minimis* (1.80 percent *ad valorem*), it ordered the Department to find that no countervailable subsidies are being provided to the production or exportation of certain hot-rolled carbon steel flat products from Thailand. *See Royal Thai Government, et. al.,* v. *United States*, Consol. Court No. 02–00026, Slip. Op. 04–91 (CIT 2004).

On October 1, 2004, the CIT affirmed the *Redetermination Results* pursuant to its decision in *Royal Thai*. The CIT thus sustained the *Redetermination Results* in which the Department found that no countervailable subsidies are being provided to the production or exportation of certain hot-rolled carbon steel flat products from Thailand.

Timken Notice

In its decision in *Timken*, the Federal Circuit held that, pursuant to section 516(a)(c)(1) and (e) of the Tariff Act of 1930, as amended, the Department must publish notice of a decision of the CIT which is not in harmony with the Department's determination. The CIT's decision in *Royal Thai* was not in harmony with the Department's *Final Determination*. Therefore, publication of this notice fulfills the statutory obligation.

Suspension of Liquidation

This notice will serve to continue the suspension of liquidation pending the expiration of the period to appeal the CIT's October 1, 2004, decision, or, if that decision is appealed, pending a final decision by the Federal Circuit. Because the CIT issued an injunction on May 19, 2004, the Department will continue to suspend entries of hot-rolled steel from Thailand as specified in the injunction. The Department will revoke the Order and issue instructions covering these entries if the CIT's decision is not appealed, or if it is affirmed on appeal.

Dated: December 20, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E4–3872 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Advisory Committee on Commercial Remote Sensing Meeting

ACTION: Notice of public meeting.

SUMMARY: The Advisory Committee on Commercial Remote Sensing (ACCRES) will meet February 2, 2005.

DATE AND TIME: The meeting is scheduled as follows: February 2, 2005, 9 a.m.–4 p.m. The first part of this meeting will be closed to the public. The public portion of the meeting will begin at 1 p.m.

ADDRESSES: The meeting will be held in Room 1N100 A/B of the MITRE Corporation in McLean Virginia. The MITRE Corporation is located at 7515 Colshire Drive, McLean, Virginia 22102. While open to the public, seating capacity may be limited.

SUPPLEMENTARY INFORMATION: As required by section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1982), notice is hereby given of the meeting of ACCRES. ACCRES was established by the Secretary of Commerce (Secretary) on May 21, 2002, to advise the Secretary through the Under Secretary of Commerce for Oceans and Atmosphere on long- and short-range strategies for the licensing of commercial remote sensing satellite systems.

Matters To Be Considered

The first part of the meeting will be closed to the public pursuant to Section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, as amended by Section 5(c) of the Government in Sunshine Act, Pub. L. 94–409 and in accordance with Section 552b(c)(1) of Title 5, United States Code. Accordingly, portions of this meeting which involve the ongoing review and implementation of the April 2003 U.S. Commercial Remote Sensing Space Policy and related national security and foreign policy considerations for NOAA's licensing decisions may be closed to the public. These briefings are likely to disclose matters that are specifically authorized under criteria established by Executive Order 12958 to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.

All other portions of the meeting will be open to the public. During the open portion of the meeting, the Committee will discuss NOAA Planning, Programming, Budgeting, and Execution System, licensing coordination activities, and commercialization and privatization issues. The committee will also receive public comments on its activities.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for special accommodations may be directed to ACCRES, NOAA/NESDIS International and Interagency Affairs Office, 1335 East-West Highway, Room 7311, Silver Spring, Maryland 20910.

Additional Information and Public Comments

Any member of the public wishing further information concerning the meeting or who wishes to submit oral or written comments should contact Timothy Stryker, Designated Federal Officer for ACCRES, NOAA/NESDIS International and Interagency Affairs Office, 1335 East-West Highway, Room 7311, Silver Spring, Maryland 20910. Copies of the draft meeting agenda can be obtained from Tahara Moreno at (301) 713–2024 ext. 202, fax (301) 713–2032, or e-mail *Tahara.Moreno@noaa.gov.*

The ACCRES expects that public statements presented at its meetings will not be repetitive of previously-submitted oral or written statements. In general, each individual or group making an oral presentation may be limited to a total time of five minutes. Written comments (please provide at least 13 copies) received in the NOAA/NESDIS International and Interagency Affairs Office on or before December 5, 2003, will be provided to Committee members in advance of the meeting. Comments received too close to the meeting date will normally be provided to Committee members at the meeting.

FOR FURTHER INFORMATION CONTACT: Michael Hales, NOAA/NESDIS International and Interagency Affairs, 1335 East West Highway, Room 7313, Silver Spring, Maryland 20910; telephone (301) 713–2024 x220, fax (301) 713–2032, e-mail *Michael.Hales@noaa.gov*, or Tahara Moreno at telephone (301) 713–2024 x202, e-mail *Tahara.Moreno@noaa.gov.*

Gregory W. Withee,

Assistant Administrator for Satellite and Information Services.

[FR Doc. 04–28488 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–HR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122104B]

Marine Mammals; File No. 881–1758

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

ACTION: Receipt of application.

SUMMARY: Notice is hereby given that the Alaska SeaLife Center (ASLC), 301 Railway Avenue, Seward, AK 99664, (Shannon Atkinson, Ph.D., Principal Investigator) has applied in due form for a permit to conduct scientific research on harbor seals (*Phoca vitulina*) undergoing rehabilitation.

DATES: Written or telefaxed comments must be received on or before January 28, 2005.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249.

Written comments or requests for a public hearing on either request should be submitted to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on the particular request would be appropriate.

Comments may also be submitted by facsimile at (301)427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing email comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the email comment

the following document identifier: File No. 881–1758.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Ruth Johnson, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The applicant proposes to study growth, development, and health of harbor seals throughout their residency in the ASLC Rehabilitation Program. Researchers would compare growth and health parameters of rehabilitated seals to permanently captive seals undergoing long-term dietary studies at the ASLC and to seals captured and sampled in the wild during other permitted studies.

In addition to conducting standard rehabilitation practices, researchers would collect blood, fecal, and urine samples; collect body composition measurements using bioelectrical impedance and deuterium oxide, sodium bromide, Evan's blue dye, and nitrogen administration followed by post-administration blood samples; conduct assimilation efficiency experiments to study metabolic development; and collect blubber biopsies to study fatty acid composition and contaminant loads. The applicant has requested a 5-year permit.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 23, 2004.

Jennifer Skidmore,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–28540 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 121504H]

Endangered Species; File No. 1486

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Harold M. Brundage, Environmental Research and Consulting, Inc., 112 Commons Court, Chadds Ford, Pennsylvania, 19317 has been issued a permit to take shortnose sturgeon (*Acipenser brevirostrum*) for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and,

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9200; fax (978)281–9371.

FOR FURTHER INFORMATION CONTACT: Jennifer Jefferies or Amy Sloan, (301)713–2289.

SUPPLEMENTARY INFORMATION: On May 27, 2004, notice was published in the **Federal Register** (69 FR 30287) that a request for a scientific research permit to take shortnose sturgeon had been submitted by the above-named individual. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Mr. Brundage is authorized to sample and track shortnose sturgeon in the Delaware River. Annually, up to 1750 adult and juvenile fish will be taken via gill nets, trammel nets and trawls; measured; weighed; PIT and Floy T-bar tagged; and the fish will be subsequently released. A subset of 100 fish annually will also be tissue sampled. Finally, a subset of 30 adult and 30 juvenile fish annually will also be tagged with internal ultrasonic tags and tracked. This permit is authorized for five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an environmental assessment was prepared analyzing the effects of the permitted activities. After a Finding of No Significant Impact, the determination was made that it was not necessary to prepare an environmental impact statement.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of the endangered 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 22, 2004.

Jennifer Skidmore,

Acting, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–28539 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Solicitation of Public Comments on Request for Textile and Apparel Safeguard Action on Imports from China

December 21, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (the Committee)

ACTION: Solicitation of public comments concerning a request for safeguard action on imports from China of brassieres and other body supporting garments (Category 349/649).

SUMMARY: The Committee has received a request from the National Council of Textile Organizations, the National Textile Association, the American Manufacturing Trade Action Coalition, SEAMS, and UNITE HERE! (Requestors) asking the Committee to reapply the limit on imports from China of brassieres and other body supporting garments in accordance with the textile and apparel safeguard provision of the Working Party on the Accession of China to the World Trade Organization (the Accession Agreement). On December 24, 2003 the Committee established an Accession Agreement limit on imports from China of brassieres and other body supporting garments, which will expire on December 23, 2004. The Committee hereby solicits public comments on this request.

FOR FURTHER INFORMATION CONTACT: Jay Dowling, Office of Textiles and Apparel,

U.S. Department of Commerce, (202) 482-4058.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agriculture Act of 1956, as amended; Executive Order 11651, as amended.

BACKGROUND:

The textile and apparel safeguard provision of the Accession Agreement provides for the United States and other members of the World Trade Organization that believe imports of Chinese origin textile and apparel products are, due to market disruption, threatening to impede the orderly development of trade in these products to request consultations with China with a view to easing or avoiding the disruption. Pursuant to this provision, if the United States requests consultations with China, it must, at the time of the request, provide China with a detailed factual statement showing ''(1) the existence or threat of market disruption; and (2) the role of products of Chinese origin in that disruption.'' Beginning on the date that it receives such a request, China must restrict its shipments to the United States to a level no greater than 7.5 percent (6 percent for wool product categories) above the amount entered during the first 12 months of the most recent 14 months preceding the request. If exports from China exceed that amount, the United States may enforce the restriction.

The Committee has published procedures (the Procedures) it follows in considering requests for Accession Agreement textile and apparel safeguard actions (68 FR 27787, May 21, 2003; 68 FR 49440, August 18, 2003), including the information that must be included in such requests in order for the Committee to consider them.

On December 1, 2004, the Requestors asked the Committee to reapply an Accession Agreement textile and apparel safeguard action on imports from China of brassieres and other body supporting garments (Category 349/649) on the ground that an anticipated increase in imports of brassieres and other body supporting garments after December 23, 2004, threatens to disrupt the U.S. market for brassieres and other body supporting garments. The request is available at *http://otexa.ita.doc.gov/Safeguard__intro.htm*. In light of the considerations set forth in the Procedures, the Committee has determined that the Requestors have provided the information necessary for the Committee to consider the request.

The Committee is soliciting public comments on the request, in particular with regard to whether there is a threat of disruption to the U.S. market for brassieres and other body supporting garments and, if so, the role of Chinese-origin brassieres and other body supporting garments in that disruption. To this end, the Committee seeks relevant information addressing factors such as the following, which may be relevant in the particular circumstances of this case, involving a product under a quota that will expire on December 23, 2004: (1) Whether imports of brassieres and other body supporting garments from China are entering, or are expected to enter, the United States at prices that are substantially below prices of the like or directly competitive U.S. product, and whether those imports are likely to have a significant depressing or suppressing effect on domestic prices of the like or directly competitive U.S. product or are likely to increase demand for further imports from China; (2) Whether exports of Chinese-origin brassieres and other body supporting garments to the United States are likely to increase substantially and imminently (due to existing unused production capacity, to capacity that can easily be shifted from the production of other products to the production of brassieres and other body supporting garments, or to an imminent and substantial increase in production capacity or investment in production capacity), taking into account the availability of other markets to absorb any additional exports; (3) Whether Chinese-origin brassieres and other body supporting garments that are presently sold in the Chinese market or in third-country markets will be diverted to the U.S. market in the imminent future (for example, due to more favorable pricing in the U.S. market or to existing or imminent import restraints into third country markets); (4) The level and the extent of any recent change in inventories of brassieres and other body supporting garments in China or in U.S. bonded warehouses; (5) Whether conditions of the domestic industry of the like or directly competitive product demonstrate that market disruption is likely (as may be evident from any anticipated factory closures or decline in investment in the production of brassieres and other body supporting garments, and whether actual or anticipated imports of Chinese-origin brassieres and other body supporting garments are likely to affect the development and production efforts of the U.S. brassieres and other body supporting garments industry; and (6) Whether U.S. managers, retailers, purchasers, importers, or other market participants have recognized Chinese producers of brassieres and other body supporting garments as potential suppliers (for example, through pre-qualification procedures or framework agreements).

Comments may be submitted by any interested person. Comments must be received no later than **January 28, 2005**. Interested persons are invited to submit ten copies of such comments to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001A, U.S. Department of Commerce, 14th and Constitution Avenue N.W., Washington, DC 20230.

The Committee will protect any business confidential information that is marked ''business confidential'' from disclosure to the full extent permitted by law. To the extent that business confidential information is provided, two copies of a non-confidential version must also be provided in which business confidential information is summarized or, if necessary, deleted. Comments received, with the exception of information marked ''business confidential'', will be available for inspection between Monday - Friday, 8:30 a.m and 5:30 p.m in the Trade Reference and Assistance Center Help Desk, Suite 800M, USA Trade Information Center, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, DC, (202) 482-3433.

The Committee will make a determination within 60 calendar days of the close of the comment period as to whether the United States will request consultations with China. If the Committee is unable to make a determination within 60 calendar days, it will cause to be published a notice in the **Federal Register**, including the date by which it will make a determination. If the Committee makes a negative determination, it will cause this determination and the reasons therefore to be published in the **Federal Register**. If the Committee makes an affirmative determination that imports of Chinese-origin brassieres and other body supporting garments threaten to disrupt the U.S. market, the United States will request consultations with China with a view to easing or avoiding the disruption.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E4–3869 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of an Import Limit for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Products Produced or Manufactured in Thailand

December 21, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection adjusting a limit.

EFFECTIVE DATE: December 28, 2004.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of this limit, refer to the Bureau of Customs and Border Protection website *(http://www.cbp.gov)*, or call (202) 344-2650. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at *http://otexa.ita.doc.gov*.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limit for Group II is being increased for carryover.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 69 FR 4926, published on February 2, 2004). Also see 68 FR 60923, published on October 24, 2003.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 21, 2004.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on October 20, 2003, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Thailand and exported during the twelve-month period which began on January 1, 2004 and extends through December 31, 2004.

Effective on December 28, 2004, you are directed to adjust the limit for Group II shown below, as provided for under the Uruguay Round Agreement on Textiles and Clothing:

Category	Adjusted twelve-month limit [1]
Group II 237, 331pt.[2], 332–348, 351, 352, 359pt.[3], 433–438, 440, 442–448, 459pt.[4], 631pt.[5], 633–648, 651, 652, 659–H[6], 659pt.[7], 845, 846 and 852, as a group	520,284,473 square meters equivalent.

[1] The limit has not been adjusted to account for any imports exported after December 31, 2003.

[2] Categories 331pt.: all HTS numbers except 6116.10.1720, 6116.10.4810, 6116.10.5510, 6116.10.7510, 6116.92.6410, 6116.92.6420, 6116.92.6430, 6116.92.6440, 6116.92.7450, 6116.92.7460, 6116.92.7470, 6116.92.8800, 6116.92.9400 and 6116.99.9510.

[3] Category 359pt.: all HTS numbers except 6115.19.8010, 6117.10.6010, 6117.20.9010, 6203.22.1000, 6204.22.1000, 6212.90.0010, 6214.90.0010, 6406.99.1550, 6505.90.1525, 6505.90.1540, 6505.90.2060 and 6505.90.2545.

[4] Category 459pt.: all HTS numbers except 6115.19.8020, 6117.10.1000, 6117.10.2010, 6117.20.9020, 6212.90.0020, 6214.20.0000, 6405.20.6030, 6405.20.6060, 6405.20.6090, 6406.99.1505 and 6406.99.1560.

[5] Category 631pt.: all HTS numbers except 6116.10.1730, 6116.10.4820, 6116.10.5520, 6116.10.7520, 6116.93.8800, 6116.93.9400, 6116.99.4800, 6116.99.5400 and 6116.99.9530.

[6] Category 659–H: only HTS numbers 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090 and 6505.90.8090.

[7] Category 659pt.: all HTS numbers except 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090, 6505.90.8090 (Category 659–H); 6115.11.0010, 6115.12.2000, 6117.10.2030, 6117.20.9030, 6212.90.0030, 6214.30.0000, 6214.40.0000, 6406.99.1510 and 6406.99.1540.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E4–3870 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in the Philippines

December 21, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection adjusting limits.

EFFECTIVE DATE: December 28, 2004.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Bureau of Customs and Border Protection website (*http://www.cbp.gov)*, or call (202) 344-2650. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at *http://otexa.ita.doc.gov*.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limit for Categories 638/639 is being increased for the partial undoing of special shift, reducing the limit for Categories 338/339 to account for the quantity being returned to 638/639.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 69 FR 4926, published on February 2, 2004). Also see 68 FR 59923, published on October 20, 2003.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 21, 2004.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on October 14, 2003, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textiles and textile products

and silk blend and other vegetable fiber apparel, produced or manufactured in the Philippines and exported during the twelve-month period which began on January 1, 2004 and extends through December 31, 2004.

Effective on December 28, 2004, you are directed to adjust the limits for the following categories, as provided for under the Uruguay Round Agreement on Textiles and Clothing:

Category	Twelve-month restraint limit [1]
Levels in Group I	
338/339	3,665,204 dozen.
638/639	2,980,832 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 2003.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E4–3871 Filed 12–29–04; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Exempting Certain Textiles and Textile Products of the People's Republic of China from Safeguard Import Limits

December 23, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Exempting Certain Products from China Textile Safeguard Import Limit.

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain products, exempted from visa and quota requirements under previous arrangements, should also be exempted from limits imposed on textile and textile product imports from China under paragraph 242 of the Report of the Working Party on the Accession of China to the World Trade Organization (Accession Agreement).

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

Paragraph 242 of the Report of the Working Party on the Accession of China to the World Trade Organization (WTO) allows WTO Members that believe imports of Chinese origin textile and apparel products are, due to market disruption, threatening to impede the orderly development of trade in these products to request consultations with the People's Republic of China with a view to easing or avoiding such market disruption. CITA has imposed limits on imports from China pursuant to Paragraph 242 (see 68 FR 74944, 68 FR 74945, 68 FR 74947, and 69 FR 63371).CITA has in the past exempted from quota and visa requirements textile and textile products entered under certain subheadings of the Harmonized Tariff Schedule of the United States (HTS), including articles, previously imported, with respect to which the duty was paid upon such previous importation or which were previously free of duty, entered under HTS subheadings 9801.00.20, 9801.00.25, or 9801.00.26; articles returned to the United States after having been exported to be advanced in value or improved in condition, entered under HTS subheadings 9802.00.40 or 9802.00.50; certain commercial samples treated to be unsuitable for sale or for use otherwise than as a sample, to be used in the United States only for soliciting orders for products of foreign countries valued at U.S. $1 or less, entered under HTS subheading 9811.00.60; articles to be repaired, altered or processed (including processes which result in articles manufactured or produced in the United States), entered under HTS subheading 9813.00.05; articles not intended for sale or distribution to the public that are associated with an international athletic event held in the United States, such as the Olympics or similar international athletic event, entered under HTS subheading 9817.60.00. CITA has also exempted properly marked commercial samples valued at $800 or less from these requirements.

In the directive below, the Chairman of CITA directs the Commissioner, Customs and Border Protection, to exempt such items from limits imposed under Paragraph 242.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 23, 2004.

Commissioner,

Bureau of Customs and Border Protection, Washington, D.C. 20229.

Dear Commissioner: Effective on December 29, 2004, in accordance with paragraph 242 of the China Accession Agreement and the procedures set forth by the Committee on May 21, 2003 (68 FR 27787), as clarified on August 18, 2003 (68 FR 49440), the United States has established, and may in future establish, safeguard limits on certain textile and apparel products from China.

Properly marked commercial samples valued at U.S.$800 or less and importations under HTS items:

9801.00.20
9801.00.25
9801.00.26
9802.00.40
9802.00.50
9811.00.60
9813.00.05
9817.60.00

shall not be charged to applicable quota limits.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–28525 Filed 12–28–04; 8:45 am]

BILLING CODE 3510–DS–S

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Notice of Designation of Inspector General as a Debarring Official for Limited Purposes

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: Pursuant to a directive included in the Consolidated Appropriations Act of 2004 and the Consolidated Appropriations Act of 2005, the Chief Executive Officer of the Corporation for National and Community Service (CNCS) has designated the Inspector General of CNCS as a debarring official for grantees that administer activities under AmeriCorps programs.

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Irshad Abdal-Haqq, Associate General Counsel, Office of General Counsel, 1201 New York Avenue, NW., Washington, DC, 20525, (202) 606–5000 Ext. 434 (*iabdal-haqq@cns.gov*).

SUPPLEMENTARY INFORMATION: The Corporation has designated its Inspector General as a debarring official pursuant to the Consolidated Appropriations Act of 2004 and the Consolidated Appropriations Act of 2005, which state, ''[t]he Inspector General of the

Corporation for National and Community Service shall conduct random audits of the grantees that administer activities under the AmeriCorps programs and shall levy sanctions in accordance with standard Inspector General audit resolution procedures which include, but are not limited to, debarment of any grantee (or successor in interest or any entity with substantially the same person or persons in control) that has been determined to have committed any substantial violations of the requirements of the AmeriCorps programs, including any grantee that has been determined to have violated the prohibition of using Federal funds to lobby the Congress: *Provided,* That the Inspector General shall obtain reimbursements in the amount of any misused funds from any grantee that has been determined to have committed any substantial violations of the requirements of the AmeriCorps programs.''

The Inspector General is now a debarring official for grantees that administer activities under AmeriCorps programs. This authority applies to AmeriCorps grantees that have been the subject of an Office of Inspector General (OIG) audit, or the subject of an audit and investigation. The Inspector General intends to exercise this authority with respect to the subject of any audit report issued on or after January 23, 2004, the date the Consolidated Appropriations Act of 2004 became effective. In processing debarment actions, the Inspector General will follow the procedures in the Corporation's debarment and suspension regulation, codified in 45 CFR 2542.

The following programs *may* trigger OIG debarment authority:

- Any program that receives Corporation funds under Section 121 (Subtitle C State/National) of the NCSA (includes the following recipients of AmeriCorps funding: States, subdivisions of States, Indian tribes, nonprofit organizations, and institutions of higher education).
- Any program that receives approved AmeriCorps positions (includes Education Awards Program, AmeriCorps Promise Fellows, and AmeriCorps VISTA).
- Any program that receives Planning, Operational, and Replication funding authorized under Section 124 of the NCSA.

The following programs will *not* trigger OIG debarment authority:

- Domestic Volunteer Service Act funded programs other than AmeriCorps VISTA (including Retired and Senior Volunteer Program, Special Volunteer Program, Foster Grandparent Program, and Senior Companion Program).
- Learn & Serve America.
- State Commission Administrative Program Assistance.
- Challenge, Next Generation, Martin Luther King, Jr. Day, Points of Light Foundation, America's Promise, and other earmarked programs outside of AmeriCorps.
- Training & Technical Assistance.
- Program Development Assistance & Training (PDAT).
- Disability Outreach and Placement.

If a grantee administers multiple programs, only the AmeriCorps programs trigger OIG debarment authority.

Dated: December 22, 2004.

Frank R. Trinity,

General Counsel.

[FR Doc. 04–28446 Filed 12–28–04; 8:45 am]

BILLING CODE 6050–$$–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 (EMSSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register.**

DATES: Wednesday, January 12, 2005; 6 p.m.

ADDRESSES: DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, Tennessee.

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* or check the Web site at *www.oakridge.doe.gov/em/ssab.*

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: Overview of the 2003 Annual Site Environmental Report.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item 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. Individuals 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, P.O. Box 2001, EM–90, Oak Ridge, TN 37831, or by calling her at (865) 576–4025.

Issued at Washington, DC, on December 23, 2004.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–28534 Filed 12–28–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho National Engineering and Environmental Laboratory

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EMSSAB), Idaho National Engineering and Environmental Laboratory. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Tuesday, January 18, 2005; 8 a.m.–6 p.m.; Wednesday, January 19, 2005; 8 a.m.–5 p.m.

Opportunities for public participation will be held Tuesday, January 18, from 12:15 to 12:30 p.m. and 5:45 to 6:00 p.m.; and on Wednesday, January 19, from 11:45 a.m. to 12 noon and 4:00 to 4:15 p.m. Additional time may be made available for public comment during the presentations.

These times are subject to change, please check with the meeting facilitator to confirm these times.

ADDRESSES: Red Lion Hotel on the Falls, 475 River Parkway, Idaho Falls, ID 83402.

FOR FURTHER INFORMATION CONTACT: Ms. Peggy Hinman, INEEL Board Administrator, North Wind, Inc., P.O. Box 51174, Idaho Falls, ID 83405, Phone (208) 557–7885, or visit the Board's Internet home page at *http://www.ida.net/users/cab.*

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 Topics (agenda topics may change up to the day of the meeting; please contact Peggy Hinman for the most current agenda or visit the CAB's Internet site at *www.ida.net/users/cab/*):

- Alternatives to Incineration Project Plan
- Presentation from new Idaho National Laboratory contractor, Battelle Energy Alliance, regarding transition
- Role of the public in implementing the new legislation for reclassification of high-level waste
- Rebound Study Information, WAG 1, Operable Unit 1–07B, New Pump and Treat Facility (NPTF)
- Prepare a Board recommendation regarding the Proposed Consolidation of Nuclear Operations Related to Production of Radioisotope Power Systems Environmental Impact Statement (Consolidation EIS)

Public Participation: The meeting is open to the public. Written statements may be filed with the Board administrator either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact the Board Chair at the address or telephone number listed above. The request 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, Richard Provencher, Assistant Manager for Environmental Management, Idaho Operations Office, U.S. Department of Energy, is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided equal time to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the Department of Energy's Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Minutes will also be available by writing to Ms. Peggy Hinman, INEEL Board Administrator, at the address and phone number listed above.

Issued at Washington, DC, on December 23, 2004.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–28533 Filed 12–28–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EMSSAB), Hanford. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, January 27, 2005; 9 a.m.–5 p.m.; Friday, January 28, 2005; 8:30 a.m.–4 p.m.

ADDRESSES: Red Lion Hotel Columbia Center, 1101 North Columbia Center Boulevard, Kennewick, Washington, Phone: (509) 946–7611, Fax: (509) 943–8564.

FOR FURTHER INFORMATION CONTACT: Yvonne Sherman, Public Involvement Program Manager, Department of Energy Richland Operations Office, 825 Jadwin, MSIN A7–75, Richland, WA, 99352; Phone: (509) 376–6216; Fax: (509) 376–1563.

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:

Thursday, January 27, 2005

1. Central Plateau Values Piece, began in November
2. Capping Workshop
3. U–221 Proposed Plan
4. Briefing on Washington's Cleanup Priority Act (I–297)
5. Information on Models and Assumptions in the Composite Analysis

Friday, January 28, 2005

1. Tank Waste Fact Sheet from Public Involvement Committee
2. Discussion of Outreach for Yakima Meeting in April
3. End States Vision update

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Yvonne Sherman's office 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. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday–Friday, except Federal holidays. Minutes will also be available by writing to Yvonne Sherman, Department of Energy Richland Operation Office, 825 Jadwin, MSIN A7–75, Richland, WA 99352, or by calling her at (509) 376–1563.

Issued at Washington, DC, on December 23, 2004.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–28535 Filed 12–28–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER04–1082–000 and ER04–1082–001]

BS Energy LP; Notice of Issuance of Order

December 23, 2004.

BS Energy LP (BSELP) filed an application for market-based rate authority, with an accompanying tariff. The proposed rate tariff provides for wholesale sales of energy and capacity at market-based rates. BSELP also requested waiver of various Commission regulations. In particular, BSELP requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by BSELP.

On December 20, 2004, the Commission granted the request for

blanket approval under Part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by BSELP should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

BS Energy LP, 109 FERC ¶ 61, 288 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is January 21, 2005.

Absent a request to be heard in opposition by the deadline above, BSELP is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of BSELP, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of BSELP's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Linda Mitry,

Deputy Secretary.

[FR Doc. E4–3883 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–123–000]

Destin Pipeline Company, L.L.C.; Notice of Proposed Changes in FERC Gas Tariff

December 21, 2004.

Take notice that on December 15, 2004, Destin Pipeline Company, L.L.C. (Destin) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the tariff sheets listed on Appendix A to the filing, to become effective January 14, 2005.

Destin states that this filing, made in accordance with the provisions of section 154.204 of the Commission's regulations, is to make minor administrative and clarifying changes to its tariff.

Destin states that copies of this filing are being served on all affected shippers and applicable state regulatory agencies.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3854 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–4–000]

Duke Power, a Division of Duke Power Corporation; Notice of Initiation of Proceeding and Refund Effective Date

December 21, 2004.

On December 15, 2004, the Commission issued an order in the above-docketed proceeding. The Commission's order institutes a proceeding in Docket No. EL05–4–000 under section 206 of the Federal Power Act with respect to the justness and reasonableness of Duke Power's market-based rates.

The refund effective date in Docket No. EL05–4–000, established pursuant to section 206(b) of the Federal Power Act will be 60 days following publication of this notice in the **Federal Register**.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3845 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–4–000]

Duke Power, a Division of Duke Power Corporation; Notice of Initiation of Proceeding and Refund Effective Date

December 21, 2004.

On December 15, 2004, the Commission issued an order in the above-docketed proceeding. The Commission's order institutes a proceeding in Docket No. EL05–4–000 under section 206 of the Federal Power Act with respect to the justness and reasonableness of Duke Power's market-based rates.

The refund effective date in Docket No. EL05–4–000, established pursuant to section 206(b) of the Federal Power Act will be 60 days following

publication of this notice in the **Federal Register.**

Magalie R. Salas,

Secretary.

[FR Doc. E4–3848 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP96–152–033]

Enbridge Pipelines (KPC); Notice of Compliance Filing

December 21, 2004.

Take notice that on December 13, 2004, Enbridge Pipelines (KPC), formerly Kansas Pipeline Company (KPC), (Enbridge KPC) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the tariff sheets listed in Appendix A of the filing, to be effective for the locked-in period from December 2, 1997 through November 8, 2002.

Enbridge KPC states that the purpose of this filing is to comply with the Commission's order issued on October 8, 2004, in Docket No. CP96–152–030. Enbridge Pipelines (KPC), 109 FERC ¶ 61,042 (2004).

Specifically, Enbridge KPC states that it proposes to implement firm and interruptible transportation rates for the locked-in period from December 2, 1997 through November 8, 2002 in accordance with the decisions of the Commission in the above-referenced order.

Enbridge also requests that the Commission grant such waivers, including waiver of the requirements of its regulations under 18 CFR 154.102(e)(2), providing for the numbering of tariff pages within a natural gas company's FERC Gas Tariff, and 18 CFR 154.201(a), requiring the inclusion of marked versions of the tariff pages to be changed or suspended showing additions and deletions, as are necessary to permit Enbridge KPC to file unmarked pro forma tariff sheets. Enbridge KPC states that good cause exists for the Commission to grant these waivers of its regulations.

Enbridge KPC requests that the Commission grant expedited treatment of this filing and issue an order accepting the tariff sheets listed on Attachment A by December 30, 2004.

Enbridge KPC states that copies of this filing are being mailed or, if requested, transmitted by e-mail to all affected customers of Enbridge KPC and interested state commissions, as well as to all parties appearing on the Commission's official service list in this docket.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3841 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–46–000]

Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC v. Consolidated Edison Company of New York, Inc.; Notice of Complaint

December 21, 2004.

Take notice that on December 20, 2004, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC (collectively Entergy Nuclear-Northeast) filed a complaint against Consolidated Edison Company of New York, Inc. (Con Edison) alleging that Con Edison is charging Entergy Nuclear-Northeast unlawful local distribution charges associated with deliveries of unbundled station power.

Entergy Nuclear-Northeast certifies that copies of the complaint were served on the contacts for Con Edison as listed on the Commission's list of Corporate Officials and on the New York Public Service Commission.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3850 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL04–123–000]

Entergy Services, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

December 21, 2004.

On December 17, 2004, the Commission issued an order in the above-docketed proceeding. The Commission's order institutes a proceeding in Docket No. EL04–123–000 under section 206 of the Federal Power Act with respect to the justness and reasonableness of Entergy Services, Inc.'s market-based rates.

The refund effective date in Docket No. EL04–123–000, established pursuant to section 206(b) of the Federal Power Act will be 60 days following publication of this notice in the **Federal Register**.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3842 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–22–000]

Entergy Services, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

December 21, 2004.

On December 17, 2004, the Commission issued an order in the above-docketed proceeding. The Commission's order institutes a proceeding in Docket No. EL05–22–000 under section 206 of the Federal Power Act concerning the justness and reasonableness of the available flowgate capability (AFC) methodology's effect on transmission availability, as discussed in the Commission's order, which addressed Entergy Services, Inc.'s proposed tariff sheets.

The refund effective date in Docket No. EL05–22–000, established pursuant to section 206(b) of the Federal Power Act will be 60 days following publication of this notice in the **Federal Register**.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3846 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–60–001]

Gas Transmission Northwest Corporation; Notice of Compliance Filing

December 21, 2004.

Take notice that, on December 15, 2004, Gas Transmission Northwest Corporation (GTN) tendered for filing a compliance filing pursuant to Commission's December 1, 2004 Letter Order in Docket No. RP05–60–000.

GTN states that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3857 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP91–143–055]

Great Lakes Gas Transmission Limited Partnership; Notice of Revenue Sharing Report; November 2003—October 2004

December 22, 2004.

Take notice that, on December 17, 2004, Great Lakes Gas Transmission Limited Partnership (Great Lakes) submitted its Interruptible/Overrun (I/O) Revenue Sharing Report pursuant to the Stipulation and Agreement (Settlement) filed on September 24, 1992, and approved by the Commission's February 3, 1993 order issued in Docket No. RP91–143–000, et al.

Great Lakes states that copies of the filing were served on parties on the official service list, firm customers and the Public Service Commissions of Minnesota, Wisconsin and Michigan.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, D.C. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Protest Date: 5 p.m. Eastern Time on December 30, 2004.

Linda Mitry,

Deputy Secretary.

[FR Doc. E4–3881 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–25–001]

North Baja Pipeline, LLC; Notice of Compliance Filing

December 21, 2004.

Take notice that on December 13, 2004, North Baja Pipeline, LLC (North Baja) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1–A, First Revised Sheet No. 116.a, to become effective November 15, 2004.

North Baja states that these sheets are being filed in compliance with the Commission's November 12, 2004 ''Order Accepting and Suspending Tariff Sheet Subject to Conditions'' in the above-captioned docket.

North Baja further states that a copy of this filing has been served on parties to this proceeding.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3856 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–124–000]

Northern Border Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

December 21, 2004.

Take notice that on December 16, 2004, Northern Border Pipeline Company (Northern Border) tendered for filing to become part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to become effective January 15, 2005:

Second Revised Sheet No. 443,
Fifth Revised Sheet No. 295,
Sixth Revised Sheet No. 298,
Third Revised Sheet No. 457,
Fourth Revised Sheet No. 405,
Fifth Revised Sheet No. 407,
First Revised Sheet No. 457A,
Fifth Revised Sheet No. 423,
Fourth Revised Sheet No. 425,
Second Revised Sheet No. No. 461,
Second Revised Sheet No. 429A,
Second Revised Sheet No. 429C,
First Revised Sheet No. 466,
Second Revised Sheet No. 434,
Third Revised Sheet No. 436,
Second Revised Sheet No. 468,
Second Revised Sheet No. 472,
Second Revised Sheet No. 473,
First Revised Sheet No. 479,
First Revised Sheet No. 484, and
First Revised Sheet No. 488.

Northern Border states that the purpose of this filing is to update Northern Border's tariff language to reflect a change in the name of the operator of Northern Border from Northern Plains Natural Gas Company to Northern Plains Natural Gas Company, LLC. Northern Border further states that minor housekeeping changes were made to the Master Electronic Transactions Agreement.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3855 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–405–002]

Northern Natural Gas Company; Notice of Compliance Filing

December 21, 2004.

Take notice that on December 15, 2004, Northern Natural Gas Company (Northern) tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, 2 Substitute Ninth Revised Sheet No. 259, with an effective date of August 19, 2004.

Northern states that it is filing the above-referenced tariff sheet in compliance with the Commission's November 24, 2004 Order in the above-referenced proceeding.

Northern further states that copies of the filing have been mailed to each of its customers and interested state commissions.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3853 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–40–038]

Panhandle Eastern Pipe Line Company, LP; Notice of Refund Report

December 21, 2004.

Take notice that on December 15, 2004, Panhandle Eastern Pipe Line Company, LP (Panhandle) tendered for filing its Refund Report. Panhandle states that Pioneer Natural Resources USA, Inc. (Pioneer) paid the Kansas ad valorem tax refund required by Commission orders on October 15, 2004.

Panhandle states that a copy of this information is being sent to intervenors in the subject proceeding, Non-Settling First Sellers, Panhandle's affected customers, and respective State Regulatory Commissions.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Protest Date: 5 p.m. Eastern Time on December 29, 2004.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3858 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER05–68–000]

Pastoria Energy Center, LLC; Notice of Issuance of Order

December 21, 2004.

Pastoria Energy Center, LLC (Pastoria) filed an application for market-based rate authority, with an accompanying tariff. The proposed rate tariff provides for wholesale sales of energy and capacity at market-based rates. Pastoria also requested waiver of various Commission regulations. In particular, Pastoria requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Pastoria.

On December 17, 2004, the Commission granted the request for blanket approval under Part 34, subject to the following:

[A]ny person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by Pastoria should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Pastoria Energy Center, LLC, 109 FERC ¶ 61, 274 (2004).

Notice is hereby given that the deadline for filing motions to intervene or protest, is January 18, 2005.

Absent a request to be heard in opposition by the deadline above, Pastoria is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Pastoria, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Pastoria's issuances of securities or assumptions of liability.

Copies of the full text of the Commission's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3884 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL05–10–000, EL05–11–000, EL05–12–000, EL05–13–000]

Pinnacle West Capital Corporation, Arizona Public Service Company, Pinnacle West Energy Corporation, APS Energy Services Company, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

December 21, 2004.

On December 20, 2004, the Commission issued an order in the above-docketed proceedings. The Commission's order institutes proceedings in Docket Nos. EL05–10–000, EL05–11–000, EL05–12–000 and EL05–13–000 under section 206 of the Federal Power Act with respect to the justness and reasonableness of the market-based rates of Pinnacle West Capital Corporation, Arizona Public Service Corporation, Pinnacle West Energy Corporation and APS Energy Services Company, Inc.

The refund effective date in Docket Nos. EL05–10–000, EL05–11–000, EL05–12–000 and EL05–13–000, established pursuant to section 206(b) of the Federal Power Act will be 60 days following publication of this notice in the **Federal Register**.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3844 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–37–000]

Puget Sound Energy, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

December 21, 2004.

On December 20, 2004, the Commission issued an order in the above-docketed proceeding. The Commission's order institutes a proceeding in Docket No. EL05–37–000 under section 206 of the Federal Power Act with respect to the justness and reasonableness of Puget Sound Energy, Inc.'s market-based rates.

The refund effective date in Docket No. EL05–37–000, established pursuant to section 206(b) of the Federal Power Act will be 60 days following publication of this notice in the **Federal Register**.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3847 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL04–124–000]

Southern Company Services, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

December 21, 2004.

On December 17, 2004, the Commission issued an order in the above-docketed proceeding. The Commission's order institutes a proceeding in Docket No. EL04–124–000 under section 206 of the Federal Power Act with respect to the justness and reasonableness of Southern Company Services, Inc.'s market-based rates.[1]

The refund effective date in Docket No. EL04–124–000, established pursuant to section 206(b) of the Federal Power Act will be 60 days following publication of this notice in the **Federal Register**.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3843 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–41–000]

Xcel Energy Services, Inc. and Southwest Power Pool, Inc.; Notice of Initiation of Proceeding and Refund Effective Date

December 21, 2004.

On December 17, 2004, the Commission issued an order in the above-docketed proceeding. The Commission's order institutes a proceeding in Docket No. EL05–41–000 under section 206 of the Federal Power Act with respect to the justness and reasonableness of the market based rates of Xcel Energy Services, Inc. and Southwest Power Pool, Inc.

The refund effective date in Docket No. EL05–41–000, established pursuant to section 206(b) of the Federal Power Act will be 60 days following publication of this notice in the **Federal Register.**

Magalie R. Salas,

Secretary.

[FR Doc. E4–3849 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

[1] The Commission's December 17, 2004 Order stated that Southern Company Services, Inc. acts as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company. 109 FERC ¶ 61,275 at P 1.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–46–000]

Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC v. Consolidated Edison Company of New York, Inc.; Notice of Complaint

December 22, 2004.

Take notice that on December 20, 2004, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC (collectively, Entergy Nuclear-Northeast) filed a complaint against Consolidated Edison Company of New York, Inc. (Con Edison) alleging that Con Edison is charging Entergy Nuclear-Northeast unlawful local distribution charges associated with deliveries of unbundled station power.

Entergy Nuclear-Northeast certifies that copies of the complaint were served on the contacts for Con Edison as listed on the Commission's list of Corporate Officials and on the New York Public Service Commission.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically

should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: January 11, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E4–3882 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–26–000, et al.]

Southaven Holdings, LLC, et al.; Electric Rate and Corporate Filings

December 20, 2004.

The following filings have been made with the Commission and are listed within.

1. Southaven Holdings, LLC

[Docket No. EC05–26–000]

Take notice that on December 10, 2004, Southaven Holdings, LLC (Holdings) tendered for filing, pursuant to section 203 of the Federal Power Act, 16 U.S.C. 824b (2000), and part 33 of the Commission's regulations, 18 CFR part 33 (2004), an application requesting Commission authorization for the disposition of jurisdictional facilities arising from the transfer of 100 percent of the upstream ownership interests in Southaven Power, LLC (a public utility) to Holdings, a newly-created special purpose entity owned by a group of financial institutions that have outstanding loans to Southaven Power, LLC. Southaven Holdings, LLC explains that the proposed transfer may occur either through a foreclosure or a consensual transfer made through a work-out process.

Comment Date: 5 p.m. Eastern Time on January 3, 2005.

2. NorthWestern Energy, NorthWestern Energy Marketing, LLC

[Docket Nos. ER03–329–006, ER02–41–006]

Take notice that on December 13, NorthWestern Energy, and NorthWestern Energy Marketing, LLC tendered for filing their triennial review in compliance with the Commission's orders in MP Energy, Inc., *et al.*, Docket No. ER97–399–000 *et al.*, 78 FERC ¶ 61, 005 (1997) and NorthWestern Energy Marketing, LLC, Docket No. ER02–41–000, Letter Order (January 22, 2002).

Comment Date: 5 p.m. Eastern Time on January 3, 2005.

3. New York Independent System Operator, Inc.

[Docket Nos. ER03–552–010, ER03–984–008]

Take notice that on November 30, 2004, the New York Independent System Operator, Inc. (NYISO) submitted a compliance filing pursuant to the Commission's Order issued June 2, 2004 in Docket No. ER03–552–006, *et al.*, 107 FERC ¶ 51,243.

Comment Date: 5 pm Eastern Time on January 7, 2005.

4. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER05–46–001]

Take notice that on December 14, 2004, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted a revised network integration transmission service agreement between Wabash Valley Power Association, Inc., Midwest Energy Cooperative and the Midwest ISO designated as Second Revised Service Agreement No. 549 under Midwest ISO's, FERC Electric Tariff, Second Revised Volume No. 1. Midwest ISO states that this filing was made to include the Certificates of Concurrence. Midwest ISO requests an effective date of October 1, 2004.

Midwest ISO states that a copy of this filing has been served on all parties on the official service list compiled by the Secretary in this proceeding.

Comment Date: 5 p.m. Eastern Time on January 4, 2005.

5. Public Service Company of New Hampshire

[Docket No. ER04–1238–001]

Take notice that on December 13, 2004, Northeast Utilities Service Company (NUSCO) on behalf of Public Service Company of New Hampshire (PSNH), filed its response to Federal Energy Regulatory Commission Questions dated October 29, 2004 pertaining to the executed Distribution Interconnection and Operating Agreement by and between PSNH and Fraser N.H., LLC (Fraser), Great Lakes Hydro America, LLC (GLHA) and White Mountain Energy, LLC (White Mountain and together with Fraser and GLHA, the Generators) that was filed on September 23, 2004.

NUSCO states that a copy of this filing has been sent to the Generators.

Comment Date: 5 p.m. Eastern Time on January 3, 2005.

6. Riverside Generating Company, L.L.C.

[Docket No. ER05–328–000]

Take notice that on December 14, 2004, Riverside Generating Company L.L.C. (Riverside) submitted for filing a rate schedule under which it specifies its revenue requirement for providing cost-based reactive support and voltage control from generation sources within the American Electric Power Service Corporation (AEPSC) control area and under Schedule 2 of the PJM Interconnection, L.L.C. (PJM) open access transmission tariff. Riverside requests an effective date of February 1, 2005.

Riverside states that it has provided copies of the filing to the designated corporate officials and or representatives of AEPSC, PJM and the Kentucky Public Service Commission.

Comment Date: 5 p.m. Eastern Time on January 4, 2005.

7. Duke Energy Corporation

[Docket No. ER05–329–000]

Take notice that on December 14, 2004, Duke Energy Corporation, on behalf of Duke Electric Transmission, (collectively, Duke) submitted an unexecuted facilities study agreement and an unexecuted large generator interconnection agreement between it and Forsyth Energy Projects, LLC (Forsyth), which are designated as service agreements No. 336 and 337 under Duke Electric Transmission, FERC Electric Tariff, Third Revised Volume No. 4.

Duke states that copies of the filings were served upon Forsyth and the South Carolina and North Carolina state public service commissions.

Comment Date: 5 p.m. Eastern Time on January 4, 2005.

8. City Power Marketing, LLC

[Docket No. ER05–330–000]

Take notice that on December 14, 2004, City Power Marketing, LLC (City Power) petitioned the Commission for acceptance of City Power's Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain

Commission regulations. City Power states that it intends to engage in wholesale electric power and energy purchases and sales as a marketer. City Power further states that it is not in the business of generating or transmitting electric power. City Power requests an effective date of December 14, 2004.

Comment Date: 5 p.m. Eastern Time on January 4, 2005.

9. Promet Energy Partners LLC

[Docket No. ER05–331–000]

Take notice that on December 14, 2004, Promet Energy Partners LLC (Promet) petitioned the Commission for acceptance of Promet's Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission regulations. Promet states that it intends to engage in wholesale electric power and energy purchases and sales as a marketer. Promet further states that it is not in the business of generating or transmitting electric power and has no affiliates.

Comment Date: 5 p.m. Eastern Time on January 4, 2005.

10. Robert G. Schoenberger

[Docket No. ID–4154–001]

Take notice that on December 13, 2004, Robert G. Schoenberger tendered for filing an applicaton for authority to hold interlocking positions between Southwest Power Pool and Unitil Corporation.

Comment Date: 5 p.m. Eastern Time on January 12, 2005.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3860 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–22–000, et al.]

Mirant Oregon, et al.; Electric Rate and Corporate Filings

December 21, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Mirant Oregon, Avista

[Docket Nos. EC05–22–000, ER99–1435–007, ER02–1331–005]

Take notice that on December 17, 2004, Mirant Oregon, LLC (Mirant Oregon) and Avista Corporation d/b/a/ Avista Utilities (Avista Utilities (collectively, Applicants) filed with the Commission an supplemental information regarding it application filed November 23, 2004, seeking Commission authorization with respect to the disposition of jurisdictional facilities associated with the transfer to Avista Utilities of Mirant Oregon's 50 percent ownership interest in Coyote Springs 2.

Comment Date: 5 p.m. Eastern Time on January 3, 2005.

2. FortisOntario, Inc., FortisUS Energy Corporation

[Docket Nos. ER03–775–003, ER00–136–002]

Take notice that on December 15, 2004, FortisOntario, Inc. and FortisUS Energy Corporation (collectively, the Fortis Entities) submitted a filing in response to the Commission's November 24, 2004 deficiency letter in Docket Nos. ER03–775–002 and ER00–136–001.

The Fortis Entities state that copies of the filing were served on parties on the official service list in the above-captioned proceedings.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

3. Commonwealth Edison Company

[Docket No. ER04–718–012]

Take notice that on December 15, 2004, Commonwealth Edison Company (Edison) submitted a compliance filing pursuant to the Commission's Order issued October 28, 2004, 109 FERC ¶ 61,094 (2004).

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

4. NewCorp Resources Electric Cooperative, Inc.

[Docket No. ER04–1149–002]

Take notice that on December 14, 2004, NewCorp Resources Electric Cooperative, Inc. (NewCorp) submitted a refund report in compliance with the Commission's order issued October 29, 2004 in Docket Nos. ER04–1149–000 and ER04–1149–001, 109 FERC ¶ 61,103.

Comment Date: 5 p.m. Eastern Time on January 4, 2005.

5. Midwest Independent Transmission System, Ameren Services Co.

[Docket Nos. ER05–6–003, EL04–135–005, EL02–111–022, EL03–212–019]

Take notice that on December 16, 2004, Duke Energy North America, LLC (Duke) Submitted a hubbing adjustment for the Duke Energy Vermillion, LLC and Duke Energy Washington, LLC control area.

Duke has requested that certain portions of the filing be given confidential treatment pursuant to 18 CFR 388.12. Duke states that copies of the public version of the filing were served upon the official service list in the above-captioned proceeding.

Comment Date: 5 p.m. Eastern Time on January 7, 2005.

6. Midwest Independent Transmission System Operator, Inc.; Midwest Independent Transmission System Operator, Inc.; Midwest Independent Transmission System Operator, Inc.; Ameren Services Co., et al.

[Docket No. ER05–6–009, Docket No. EL04–135–011, Docket No. EL02–111–028, Docket No. EL03–212–025]

Take notice that on December 17, 2004, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and Midwest ISO Transmission Owners (collectively Applicants) jointly submitted for filing revisions to proposed Schedule 22 of the Midwest ISO Open Access

Transmission Tariff submitted on November 24, 2004 in compliance with the Commission's November 18, 2004 order in Docket Nos. ER05–6, EL04–135, EL02–111, and EL03–212, *Midwest Indep. Transmission Sys. Operator, Inc.,* 109 FERC ¶ 61,168 (2004).

Applicants state that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Comment Date: 5 p.m. Eastern Time on January 7, 2005.

7. Sirius Investment Management, Inc.

[Docket No. ER05–71–001]

Take notice that on December 15, 2004, Sirius Investment Management, Inc. (Sirius) tendered for filing proposed changes in its FERC Electric Service Tariff, Volume No. 1 in response to the Commission's October 26, 2004 deficiency letter.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

8. Klondike Wind Power II LLC

[Docket No. ER05–332–000]

Take notice that on December 14, 2004, Klondike Wind Power II LLC (Klondike II) tendered for filing an application for authorization to sell energy, capacity and ancillary services at market-based rates. Klondike II requests waiver of certain Commission regulations and the granting of certain blanket approvals.

Comment Date: 5 p.m. Eastern Time on January 4, 2005.

9. Nevada Power Company

[Docket No. ER05–334–000]

Take notice that on December 15, 2004, Nevada Power Company tendered for filing an executed Service Agreement for Network Integration Transmission Service Retail Access Transmission Service (Transmission Service Agreement) between Nevada Power Company; Public Service Company of New Mexico, Scheduling Coordinator; the Colorado River Commission of Nevada, Aggregator for End Use Customer; and the Southern Nevada Water Authority, End-Use Customer and an executed Network Operating Agreement between Nevada Power Company and Public Service Company of New Mexico. Nevada Power Company requests an effective date of February 1, 2005.

Comment Date: 5 p.m. Eastern Time on January 15, 2005.

10. Southern California Edison Company

[Docket No. ER05–335–000]

Take notice that on December 15, 2004, Southern California Edison Company (SCE) submitted for filing an Interconnection Facilities Agreement (Interconnection Agreement), Service Agreement No. 131 under SCE's Wholesale Distribution Access Tariff (WDAT), FERC Electric Tariff, First Revised Volume No. 5, and an associated Service Agreement for Wholesale Distribution Service (WDAT Service Agreement), Service Agreement No. 132 under the WDAT, between SCE and the March Joint Powers Utility Authority (March JPUA).

SCE states that copies of the filing were served upon the Public Utilities Commission of the State of California and March JPUA.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

11. Florida Power & Light Company

[Docket No. ER05–336–000]

Take notice that on December 15, 2004, Florida Power & Light Company (FLP) submitted Service Agreement No. 232 for the provision of long-term transmission service to the Georgia Transmission Corporation as well as a Notice of Cancellation for Service Agreement No. 219 among the same parties.

FLP states that copies of the filing were served upon the Georgia Transmission Corporation and the Public Service Commission of the State of Florida.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

12. Central Hudson Gas & Electric Corporation

[Docket No. ER05–337–000]

Take notice that on December 15, 2004 Central Hudson Gas & Electric Corporation (Central Hudson) tendered for filing proposed changes in its Rate Schedule FERC No. 202 which sets forth the terms and changes for substation service provided by Central Hudson to Consolidated Edison Company of New York, Inc.

Central Hudson requests waiver on the notice requirements set forth in 18 CFR 35.11 of the regulations to permit the charges to become effective January 1, 2004 as agreed to by the parties.

Central Hudson states that a copy of its filing was served on Consolidated Edison Company of New York, Inc. and the State of New York Public Service Commission.

Comment Date: 5 p.m. Eastern Standard Time on January 5, 2005.

13. American Electric Power Service Corporation

[Docket No. ER05–338–000]

Take notice that on December 15, 2005, American Electric Power Service Corporation (AEPSC), submitted for filing Notices of Cancellation for a Network Operating Agreement and a Network Service Agreement between Northeast Texas Electric Cooperative, Inc. (NTEC) and Central and South West Services, Inc., designated Agent for Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company. AEPSC requests an effective date of December 31, 2004 for the cancellations.

AEPSC states it has served copies of the filing on NTEC and the Public Utility Commission of Texas, the Oklahoma Corporation Commission, the Louisiana Public Service Commission and the Arkansas Public Service Commission.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

14. PacifiCorp

[Docket No. ER05–339–000]

Take notice that on December 15, 2004, PacifiCorp tendered for filing a Notice of Cancellation of PacifiCorp's Rate Schedule FERC No. 264 to be effective December 31, 2004.

PacifiCorp states that copies of this filing were supplied to the Public Utility Commission of Oregon, the Washington Utilities and Transportation Commission, Avista Corp, Idaho Power Company, and NorthWestern Energy.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

15. PacifiCorp

[Docket No. ER05–340–000]

Take notice that on December 15, 2004, PacifiCorp tendered for filing a Notice of Cancellation of PacifiCorp's Rate Schedule FERC No. 255 to be effective December 31, 2004.

PacifiCorp states that copies of this filing were supplied to the Public Utility Commission of Oregon, the Washington Utilities and Transportation Commission, Pacific Gas & Electric Company and Southern California Edison Company.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

16. CMS Generation Michigan Power L.L.C.

[Docket No. ER05–341–000]

Take notice that on December 15, 2004, CMS Generation Michigan Power L.L.C. (CMSGMP) tendered for filing a rate schedule pursuant to which it will provide Reactive Power and Voltage Control from Generation Sources to Michigan Electric Transmission Co., L.L.C. (METC) or Midwest Independent System Operator, Inc. (MISO). CMSGMP

requests an effective date of January 1, 2005.

CMSGMP states that a copy of the filing was served upon METC, MISO and the Michigan Public Service Commission.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

17. American Electric Power Service Corporation

[Docket No. ER05–342–000]

Take notice that on December 15, 2004, American Electric Power Service Corporation (AEPSC) filed with the Commission a Notices of Cancellation of a Network Operating Agreement and a Network Service Agreement between East Texas Electric Cooperative, Inc. (ETEC) and Central and South West Services, Inc., designated Agent for Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company. AEPSC seeks an effective date of December 31, 2004 for the cancellations.

AEPSC states it has served copies of this filing on ETEC, the Public Utility Commission of Texas, the Oklahoma Corporation Commission, the Louisiana Public Service Commission and the Arkansas Public Service Commission.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

18. California Independent System Operator Corporation

[Docket No. ER05–346–000]

Take notice that on December 15, 2004, the California Independent System Operator Corporation (ISO) tendered for filing its Grid Management Charge (GMC) rate to recover its administrative and operating costs. The ISO is requesting and effective date of January 1, 2005.

The ISO states that this filing has been served on the Public Utilities Commission of California, the California Energy Commission, the California Electricity Oversight Board, and upon all parties with effective Scheduling Coordinator Service Agreements under the ISO Tariff.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

19. Rainbow Energy Marketing Corporation

[Docket No. ER94–1061–025]

Take notice that on December 15, 2004, Rainbow Energy Marketing Corporation (Rainbow) tendered for filing an amendment to its FERC Electric Tariff, Original Volume No. 1 to allow, among other things, Rainbow to: (1) Sell ancillary services at wholesale at market-based rates, (2) reassign transmission capacity in accordance with the conditions established by the Commission ; and (3) unilaterally modify the tariff. Rainbow states that the filing complies with the Commission's November 17, 2003, order in Docket No. EL01–118 which established six Market Behavior Rules to be included in each market-based rate tariff and also complies with Order No. 614.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

20. The Empire District Electric Company

[Docket No. ER99–1757–006]

Take notice that on December 15, 2004, The Empire District Electric Company (Empire District), pursuant to the Commission's deficiency letter order datedNovember 24, 2004, filed an amendment to the September 27, 2004 filing of Empire District's generation market power study.

Comment Date: 5 p.m. Eastern Time on January 5, 2005.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3861 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2181–014 and 2697–014 Wisconsin]

Northern States Power Company; Notice of Availability of Environmental Assessment

December 21, 2004.

In accordance with the National Environmental Policy Act of 1969, as amended, and Federal Energy Regulatory Commission (18 CFR part 380), Commission staff have reviewed the license applications for the Menomonie and Cedar Falls projects (FERC Project Nos. 2181 and 2697) and have prepared an environmental assessment (EA). The projects are located on the Red Cedar River in Dunn County, Wisconsin.

Northern States Power Company (d/b/a Xcel Energy) has requested Commission approval of the applications for new license along with the Red Cedar River Settlement Agreement (SA). This EA analyzes the potential environmental effects of relicensing the projects and the implementation of the SA, and concludes that issuing new licenses for the projects with appropriate environmental measures would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in Public Reference Room 2–A of the Commission's offices at 888 First Street, NE., Washington, DC. The EA also may be viewed on the Commission's Internet Web site (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance with eLibrary, contact *FERCONlineSupport@ferc.gov* or call toll-free at (866) 208–3676; for TTY, contact (202) 502–8659.

Any comments on the EA should be filed within 30 days of the date of this notice and should be addressed to Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Please reference ''Menomonie Project No. 2181–014 and Cedar Falls Project No. 2697–014'' on all comments. Comments 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. For further information, contact John Ramer at (202) 502–8969.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3852 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2114–003, 064]

Public Utility District No. 2 of Grant County; Notice of Availability of Final Environmental Assessment

December 21, 2004.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for implementation of an Interim Protection Plan (IPP) for steelhead and chinook salmon and an application for approving an Offer of Settlement and Memorandum of Agreement (MOA) on providing downstream passage for juvenile salmonids for the Priest Rapids Hydroelectric Project. Following a review of the IPP and MOA the Commission has prepared a Final Environmental Assessment (FEA) for the project. On December 16, 2004, the Director of the Commission's Office of Energy Projects issued an Order Amending License and Terminating Proceedings; FEA was attached to the Order. The project is located on the Columbia River in Grant, Yakima, Kittitas, Douglas, Benton, and Chelan Counties.

The FEA contains staff's analysis of the potential environmental impacts associated with the implementation of the IPP and MOA. The FEA recommends that the Public Utility District No. 2 of Grant County (licensee for the project) implement the National Oceanographic and Atmospheric Administration's (NOAA Fisheries) Reasonable and Prudent Alternative (RPA), as prepared in NOAA Fisheries Biological Opinion on the proposed action, as well as the summer spill as proposed in the MOA. The FEA concludes that the RPA would not constitute a major federal action that would significantly affect the quality of the human environment.

The FEA is on file with the Commission and available for public inspection. Copies of the EA are available for review in the Public Reference Room at the Commission's offices at 888 First Street, NE., Washington, DC. The FEA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. For assistance, contact FERC On Line Support at *FERCOnlineSupport@ferc.gov* or call toll free at (866) 208–3676, or for TTY contact (202) 502–8659.

For further information, please contact Andrea Shriver at (202) 502–8171.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3851 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD04–13–000]

Assessing the State of Wind Energy in Wholesale Electricity Markets; Notice Requesting Post-Technical Conference Comments

December 21, 2004.On December 1, 2004, the Federal Energy Regulatory Commission (Commission or FERC) held a technical conference in the above referenced docket to assess the state of wind energy in wholesale electricity markets. Specifically, the conference focused on potential policy changes that would better accommodate the participation of wind energy in wholesale electricity markets. The conference concluded with a list of action items, a summary of which is attached. To the extent items are absent from the list, parties may supplement the list in written comments as discussed below. Commission staff plans to proceed on the list of action items, starting with exploring elimination of Order No. 888 imbalance penalties and then progressing to development of new transmission services. For this latter effort, Commission staff, as discussed at the December 1 conference, will initially work with staff of the Bonneville Power Administration.

Interested persons are invited to file post-technical conference comments, including comments on the actions items listed in the attachment, the staff paper and any other topic relevant to this proceeding. These comments must be filed with the Commission no later than 5 p.m. Eastern Standard Time (EST) on January 28, 2005.

A transcript of the technical conference is available from the Commission's Web site, *http://www.ferc.gov;* and the Commission staff paper entitled *Staff Briefing Paper: Assessing the State of Wind Energy in Wholesale Electricity Markets* has been posted to the Commission's Web site and is available at: *http://www.ferc.gov/legal/ferc-regs/land-docs/11–04-wind-report.pdf.*

For more information about this Notice, please contact Jignasa Gadani at 202–502–8608, *jignasa.gadani@ferc.gov.*

Magalie R. Salas,

Secretary.

Attachment

At the conference, several parties requested action on various items by the Commission and/or other entities. The action items discussed at the conference include:

Transmission Rates and Services

- Should FERC reevaluate the imbalance penalties under the Order No. 888 *pro forma* transmission tariff? Based upon its evaluation the Commission could determine whether it is appropriate to modify its policy on imbalances. Potential solutions include:
  - ○ Eliminating imbalance penalties for intermittent resources (while keeping non-punitive charges that reflect only the costs imposed by imbalances).
  - ○ Allowing intermittent resources scheduling flexibility in order to minimize imbalance penalties.
  - ○ Pricing imbalances on avoided cost and/or to aggregate imbalances over a greater time period and allow for netting and trading.
- Should existing regional grid operators evaluate the applicability of tariff provisions on imbalance charges currently in place in the California Independent System Operator Corporation's (CAISO's) service territory to other regions?
- Can improved wind generation forecasts help reduce imbalance penalties? What state-of-the-art forecast methodologies are available? Industry forecasters are encouraged to propose state-of-the-art parameters to be used as a benchmark.
- How can FERC and the industry increase utilization of existing transmission facilities? Potential options could include, but are not limited to:
  - ○ A common definition of the needs and wants of the industry in relation to the development of innovative transmission services under *pro forma* transmission tariffs.
  - ○ Partial Firm Transmission Service.

o Curtailable Firm Transmission Service.

○ Long-term Non-firm Transmission Service.

• Should FERC seek to develop an alternative to the transmission access queue? First-come-first-served may not be the most appropriate option. Potential solutions could include:

○ Clustering.

○ Open Season.

• In what ways should FERC and the industry seek to eliminate rate pancaking?

• Should FERC address allocation of new transmission capacity costs across seams?

• Should FERC update its abandoned plant policy to enable transmission owners to recover costs when building in excess of their current needs in anticipation of interconnection by generators?

• Should FERC examine the possibility of adopting a new transmission interconnection category—a ''Renewable Resource Trunk Facility'' that would not be treated as a generation tie and would be rolled into rates?

• Utilities that have existing policies and procedures in place that accommodate wind resources should identify which provisions have been proven to work, which have not, and any operational data in support.

Transmission Planning

• Order No. 888 pro forma tariff provisions 13.5 and 28.2 address a Transmission Provider's obligations in response to requests for service, continued reliable operations, planning, and construction and/or redispatch. How effective are these provisions of the tariff? Do they need to be revisited? Should these provisions somehow provide for regional planning and expansion; and if so, how might this be accomplished outside an ISO or RTO?

State Support

• In what ways should FERC work with States on their preferences for Renewable Portfolio Standards (RPS) and Renewable Energy Credits (RECs)? How can the Commission develop policies that will assist utilities in meeting diverse State renewable requirements?

Tribal Consultation

• What issues do Indian tribes face in developing wind energy and bringing it to wholesale markets?

• What are the wind energy development issues in which FERC and Indian tribes should be consulting?

Capacity Value for Wind Resources

• Should benchmark criteria be established for use in developing capacity credits for State-administered reserve margins and capacity requirements?

• Should FERC advocate the use of the Effective Load Carrying Capability method of determining the capacity value of intermittent resources?

Other

Please comment on the following issues raised at the conference:

• The suggestion that FERC staff review the results of the Western Area Power Administration's wind transmission study results to analyze the transmission capacity credits for wind resources.

• Should FERC, in conjunction with the Western Interstate Energy Board and the U.S. Department of Energy's National Renewable Energy Laboratory, analyze and compare actual transmission flows against Available Transmission Capacity?

• How can the Commission monitor the secondary market for transmission service and develop methods in which to spur activity in this market?

• How can FERC counter the difficulty of funding long-term regional transmission planning in non-RTO regions?

• Should the U.S. Department of Energy increase funding for energy storage technology? If so, would this benefit the grid operations as wind is added to the grid, by increasing the ability to accommodate the diurnal/nocturnal nature of wind use and maximize capacity?

• How can the industry seek better data standards? Will better quality data on transmission availability assist in gaining an appropriate picture of the operational aspects of existing transmission facilities?

• How can the industry develop standards that govern wind integration cost studies?

• What regional planning efforts should the industry undertake in order to develop better methods of cost support and cost recovery?

• Should programmatic assessment or evaluation of transmission corridors be undertaken by the Bureau of Land Management, Department of Agriculture, and the U.S. Department of Energy?

• Should the government explore increasing its funding of weather data sites to expand beyond airport facilities to areas with high wind potential and why?

[FR Doc. E4–3859 Filed 12–28–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7856–2]

Underground Injection Control Program; Hazardous Waste Injection Restrictions; Petition for Exemption—Class I Hazardous Waste Injection; Onyx Environmental Services, L.L.C. (Onyx)

AGENCY: Environmental Protection Agency.

ACTION: Notice of final decision on exemption reissuance.

SUMMARY: Notice is hereby given that reissuance of an exemption to the land disposal restrictions under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act has been granted to Onyx, for the Class I injection well located at Port Arthur, Texas. As required by 40 CFR part 148, the company has adequately demonstrated to the satisfaction of the Environmental Protection Agency by petition and supporting documentation that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This final decision allows the continued underground injection by Onyx, of the specific restricted hazardous waste identified in the exemption reissuance, into the Class I hazardous waste injection well at the Port Arthur, Texas facility specifically identified in the reissued exemption until November 30, 2018, as long as the basis for granting an approval of this exemption remains valid, under provisions of 40 CFR 148.24. If Onyx wishes to continue underground injection of restricted hazardous waste beyond November 30, 2018, a reissuance request must be submitted. As required by 40 CFR 148.22(b) and in accordance with the procedures in 40 CFR 124.10, a public notice was issued October 25, 2004. The public comment period closed on December 10, 2004. EPA received no comments. This decision constitutes final Agency action and there is no Administrative appeal.

DATES: This action is effective as of December 17, 2004.

ADDRESSES: Copies of the petition for exemption reissuance and all pertinent information relating thereto are on file at the following location: Environmental Protection Agency, Region 6, Water Quality Protection Division, Source Water Protection Branch (6WQ–S), 1445 Ross Avenue, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Philip Dellinger Chief, Ground Water/ UIC Section, EPA—Region 6, telephone (214) 665–7165.

Dated: December 21, 2004.

Sharon Fancy Parrish,

Acting Director, Water Quality Protection Division, EPA Region 6.

[FR Doc. 04–28496 Filed 12–28–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0396; FRL–7690–1]

Pesticide Products; Registration Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of applications to register the following pesticide products containing active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended: ''Olive Fly Attract and Kill (A&K) Target Device for Commercial Olives'' and ''Olive Fly Attract and Kill (A&K) Target Device for Ornamental Olives'' containing ammonium bicarbonate; ''Sonata ASO'' and ''QST 2808 MUP'' containing *Bacillus pumilus* strain QST 2808; and ''BIOMITE'' containing citronellol.

FOR FURTHER INFORMATION CONTACT: The Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511C), listed in the table in this unit:

Regulatory Action Leader	Telephone number/e-mail address	Mailing address	Chemical/Reg. Number
Andrew Bryceland	(703) 305–9268; *bryceland.andrew@epa.gov*	Biopesticides and Pollution Prevention Division (7511C), Office of Pesticides Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001	Ammonium bicarbonate 70051–76 70051–96
Barbara Mandula	(703) 308–7378; *mandula.barbara@epa.gov*	Do.	*B. pumilus* strain QST 2808 69592–13 69592–6
Raderrio Wilkins	(703) 308–1259; *wilkins.raderrio@epa.gov.*	Do.	Citronellol 70057–1

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production/Agriculture (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. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions. 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–2004–0396. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are also available for public inspection. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. The request should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

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

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may

be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. Did EPA Approve the Applications?

The Agency approved the applications after considering all required data on risks associated with the proposed uses of Ammonium Bicarbonate; *B. Pumilus* strain QST 2808; Citronellol, and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of Ammonium Bicarbonate; *B. Pumilus* strain QST 2808; Citronellol when used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects to the environment.

III. Approved Applications

1. EPA issued a notice, published in the **Federal Register** of March 28, 2002 (67 FR 14943) (FRL–6827–7), which announced that Thermo Trilogy Corporation, Guilford Road, Suite 175, Columbia, MD 21046, had submitted an application to register the pesticide product, Olive Fly Attract and Kill (A&K) Target Device, an olive fly attractant (EPA File Symbol 70051–TA), containing 12.8% ammonium bicarbonate and 0.2% dioxaspiro-5,5)-undecane (Spiroketal). This product was not previously registered.

The application was approved on June 10, 2004, as ''Olive Fly Attract and Kill (A&K) Target Device for Commercial Olives'' (EPA Reg. No. 70051–76) and ''Olive Fly Attract and Kill (A&K) Target Device for Ornamental Olives'' (EPA Reg. No. 70051–96) for control of olive flies in olive orchards.

2. EPA issued a notice, published in the **Federal Register** of May 8, 2002 (67 FR 30917) (FRL–6829–7), which announced that AgraQuest, Inc, 1530 Drew Avenue, Davis, CA 95616, had submitted an application to register the pesticide product, QST 2808 Technical (later renamed QST 2808 MUP), as a fungicide (EPA File Symbol 69592–A)), containing spores of *B. pumilus* strain QST 2808. This product was not previously registered.

The application was approved on October 14, 2004 for two products: The end use product Sonata™ ASO (EPA Reg. No. 69592–13), containing 1.38% of active ingredient by weight, for control of various fungal diseases on crops; and QST 2808 MUP (EPA Reg. No. 69592–6), containing 1.42% of active ingredient by weight, for manufacturing the end use product.

3. EPA issued a notice, published in the **Federal Register** of August 28, 2002 (67 FR 55234) (FRL–7193–7) which announced that Natural Plant Protection, c/o Technology Science Group, Inc., 4061 North 156th Drive, Goodyear, AZ 85338, had submitted an application to register the pesticide product, Biomite™, a mite attractant (EPA File Symbol 70057–R), containing 0.417% citronellol. The product also contains three other registered active ingredients: Geraniol (2-trans-3,7-dimethyl-2,6-octadien-1-ol), Nerolidol (3,7,11-trimethyl-1,6,10-dodecatrien-3-ol), and Farnesol (3,7,11-trimethyl-2,6,10-dodecatrien-1-ol). This product was not previously registered.

The application was approved on April 20, 2004, as BioMite™ (EPA Reg. No. 70057–1) for use against mites on agricultural crops, ornamental plants, and in professional landscape settings.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: December 14, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 04–28202 Filed 12–28–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2002–0241; FRL–7193–8]

Notice of Filing a Pesticide Petition to Establish a Tolerance fora Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket ID number OPP–2002–0241, must be received on or before January 28, 2005.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I.C. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket ID number OPP–2002–0241 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: Raderrio Wilkins, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–1259; e-mail address: *wilkins.raderrio@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS code 111)
- Animal production (NAICS code 112)
- Food manufacturing (NAICS code 311)
- Pesticide manufacturing (NAICS code 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 the unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have 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 Infomation?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0241. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although, a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall

#2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday excluding legal holidays. The docket telephone number is (703) 305–5805.

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

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, 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–2004–0241. 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–2004–0241. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2004–0241.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID number OPP–2004–0241. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then

identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 15, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by section 408(d)(3) of the FFDCA. The summary of the petition was prepared by Environmentally Safe Systems, Inc. and represents the view of Environmentally Safe Systems, Inc. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues, or an explanation of why no such method is needed.

Environmentally Safe Systems, Inc.

PP 2E6381

EPA has received a pesticide petition [2E6381] from Interregional Research Project Project Number 4 (IR-4), Technology Centre of New Jersey, Rutgers University, 681 U.S. Highway #1 South, New Brunswick, NJ 08902–3390, proposing pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 to establish an exemption from the requirement of a tolerance for the biochemical pesticide sodium metasilicate in or on all food commodities.

Pursuant to section 408(d)(2)(A)(i) of the FFDCA, as amended, Environmentally Safe Systems, Inc. has submitted the following summary of information, data, and arguments in support of their pesticide petition. EPA has not fully evaluated the merits of the pesticide petition. The summary may have been edited by EPA if the terminology used was unclear, the summary contained extraneous material, or the summary unintentionally made the reader conclude that the findings reflected EPA's position and not the position of the petitioner.

A. Product Name and Proposed Use Practices

Sodium metasilicate, the active ingredient in the end use product known as TRIAD, when used as a foliar spray controls or suppresses mealybugs and leafhoppers. It also suppresses powdery mildew. Applications of TRIAD are made at 1½ to 4½ gallons per 100 gallons beginning as soon as possible after the pest is observed and repeated at 14– to 21–day intervals as needed.

B. Product Identity/Chemistry

1. *Identity of the pesticide and corresponding residues.* Sodium metasilicate is mixed with other ingredients to prepare the end use product known as TRIAD, which contains 2.41% sodium metasilicate.

2. *Magnitude of residue at the time of harvest and method used to determine the residue.* This section is not applicable, as this proposes an exemption from the requirement of a tolerance.

3. *A statement of why an analytical method for detecting and measuring the levels of the pesticide residue are not needed.* An analytical method for residues is not applicable, as this proposes an exemption from the requirement of a tolerance.

C. Mammalian Toxicological Profile

Sodium metasilicate is not very toxic via the oral route. Sodium metasilicate has an acute oral LD_{50} of 1,153 milligrams/kilogram (mg/kg) in rats and 770 mg/kg in mice. Primary skin irritation and primary eye irritation tests, as well as acute inhalation and acute oral toxicity tests on an end use formulation containing 2.41% sodium metasilicate have been submitted to EPA. Sodium metasilicate when used as a plant desiccant (not to exceed 4% by weight in aqueous solution) is considered safe (40 CFR 180.2). Sodium metasilicate is classified as a generally recognized as safe (GRAS) substance and is cleared as a direct food ingredient. Residues of sodium metasilicate are exempted from the requirement of a tolerance when used as a surfactant, emulsifier, wetting agent, suspending agent, dispersing agent, or buffer in accordance with good agricultural practices as inert (or occasionally active) ingredients in pesticide formulations applied to growing crops or to raw agricultural commodities after harvest (40 CFR 180.1001(c)).

D. Aggregate Exposure

1. *Dietary exposure—i. Food.* Currently, dietary exposure to sodium metasilicate occurs primarily from its use as a direct food additive (21 CFR 184.1769a). Sodium metasilicate is used in many other products such as dishwashing soaps, other soaps and detergents. Dietary exposure to residues of sodium metasilicate as a result of uses covered under this tolerance

exemption is expected not to be significant.

ii. *Drinking water.* Sodium metasilicate residues in drinking water from use as a pesticide are expected to be minimal when compared to the ubiquity of naturally occurring forms of silicon dioxide in the environment and the widespread use of sodium metasilicate in dishwashing soaps, other soaps and detergents, etc. Because of the gel-forming properties of sodium metasilicate, leaching from the soil is very unlikely. In fact, sodium metasilicate is used for soil stabilization.

2. *Non-dietary exposure.* There may be non-dietary exposure to sodium metasilicate from non-pesticidal uses of sodium metasilicate, but significantly increased non-dietary exposure and non-occupational exposure from sodium metasilicate when used as a pesticide is not expected.

E. Cumulative Exposure

Because of the low oral toxicity of sodium metasilicate and because of the fact that its presence in the diet is, for the most part, as a direct food additive, no cumulative mode of exposure is expected for sodium metasilicate.

F. Safety Determination

1. *U.S. population.* Based on its low toxicity, there is reasonable certainty that no harm will result from aggregate exposure of the U.S. population, including infants and children, to residues of sodium metasilicate. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. There is an inconsequential increase in dietary exposure resulting from application as a pesticide.

2. *Infants and children.* Based on the low toxicity of sodium metasilicate, there is a reasonable certainty that no harm to children or adults will result from aggregate exposure to sodium metasilicate. Exempting sodium metasilicate from the requirement of a tolerance should pose no significant risk to humans.

G. Effects on the Immune and Endocrine Systems

To date there is no evidence to suggest that sodium metasilicate functions in a manner similar to any known hormone, or that it acts as an endocrine disruptor.

H. Existing Tolerances

There are no existing tolerances for sodium metasilicate in the United States.

I. International Tolerances

There are no known approved codex maximum residue levels established for residues of sodium metasilicate.

[FR Doc. 04–28499 Filed 12–28–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

[DA 04–3840]

The Federal Communications Commission's Form 501 Approved by the Office of Management and Budget (OMB)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Office of Management and Budget issued a Notice of Action approving the revised Federal Communications Commission Form 501, Slamming Complaint Form. The form was revised to ensure that consumers have to file a slamming complaint only once, rather than having to seek multiple avenues of redress.

DATES: Effective November 29, 2004.

FOR FURTHER INFORMATION CONTACT: David Marks or Kelli Farmer of the Consumer & Governmental Affairs Bureau at (202) 418–2512 (voice).

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, DA 04–3840, released December 7, 2004. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Text and ASCII formats at: *http://www.fcc.gov/cgb/policy/slamming.*

Federal Communications Commission.

Jay Keithley,

Deputy Bureau Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 04–28421 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

December 20, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction (PRA) comments should be submitted on or before February 28, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW, Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at 202–418–2918 or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0170.

Title: Section 76.1030, Notifications Concerning Interference to Radio Astronomy, Research and Receiving Installations.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 57.

Estimated Time per Response: 0.5 hours (30 minutes).

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 29 hours.

Total Annual Cost: $8,550.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: 47 CFR Section 73.1030 requires licensees to provide written notification to the Interference Office at Green Bank, West Virginia, the Observatories at Green Bank, West Virginia, Sugar Grove, West Virginia, or the Arecibo Observatory, setting forth the particulars of a proposed station. The data is used by the Interference Office/Observatories to enable them to file comments or objections with the FCC in response to the notification in order to minimize potential interference.

OMB Control Number: 3060–0567.

Title: Section 76.962, Implementation and Certification of Compliance.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; State, local or tribal government.

Number of Respondents: 10.

Estimated Time per Response: 0.5 hours (30 minutes).

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 5 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: 47 CFR Section 76.962 requires any cable operator that has been deemed subject to remedial requirements to certify to the Commission its compliance with the Commission order requiring prospective rate reductions, refunds or other relief to subscribers. The certification must be filed with the Commission within 90 days from the date the Commission released the order mandating a remedy; reference the applicable Commission order; state that the cable operator has complied fully with all provisions of the Commission's order; include a description of the precise measures and cable operator has taken to implement the remedies order by the Commission; and be signed by an authorized representative of the cable operator. These certifications are used by the Commission to monitor a cable operator's compliance with Commission rate orders.

OMB Control Number: 3060–0668.

Title: Section 76.936, Written Decisions.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: State, Local or Tribal Government.

Number of Respondents: 1,200.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 1,200 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: 47 CFR Section 76.936 states that a franchising authority must issue a written decision in a rate-making proceeding whenever it disapproves an initial rate for the basic service tier or associated equipment in whole or in part, disapproves a request for a rate increase in whole or in part, or approves a request for an increase whole or in part over the objection of interested parties. Franchising authorities are not required to issue a written decision that approves an unopposed existing or proposed rate for the basic service tier or associated equipment. Public notice must be given of any written decision required in paragraph (a) of this section, including releasing the text of any written decision to the public.

OMB Control Number: 3060–0673.

Title: 47 CFR Section 76.956, Cable Operator Response.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 50.

Estimated Time per Response: 4 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 200 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: 47 CFR Section 76.956 states that unless otherwise directed by the local franchising authority, a cable operator must file with the local franchising authority a response to a cable service complaint. In addition to responding to the merits of a complaint, the cable operator also may move for dismissal of the complaint for failure to meet the minimum showing requirement. The local franchising authority and the Commission use this information to ensure a process for cable operators to file a motion to dismiss a rate complaint filed against them if they feel that the complaint fails to meet the minimum showing.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–28526 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

December 20, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 28, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s) contact Cathy Williams at (202) 418–2918 or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0920.

Title: Application for Construction Permit for a Low Power FM Broadcast Station.

Form Number: FCC Form 318.

Type of Review: Extension of a currently approved collection.

Respondents: Not-for-profit institutions; State, local or tribal government.

Number of Respondents: 2,283.

Estimated Time per Response: 45 minutes to 6 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 6,315 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: FCC Form 318 is required to apply for a construction permit for a new Low Power FM station, to make changes in the existing facilities of such a station, or to amend a pending FCC Form 318 application. The data is used by FCC staff to determine whether an applicant meets basic statutory and regulatory requirements to become a Commission licensee and to ensure that the public interest would be served by grant of the application.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–28527 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–10–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) being Submitted to OMB for Review and Approval

December 16, 2004.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before January 28, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov* or Kristy L. LaLonde, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3087 or via the Internet at *Kristy_L._LaLonde@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copy of the information collection(s) contact Cathy Williams at (202) 418–2918 or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–0595.

Title: Updating Maximum Permitted Rates for Regulated Services and Equipment.

Form Number: FCC Form 1210.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; State, Local or Tribal Government.

Number of Respondents: 3,900.

Estimated Time per Response: 2-15 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 36,000 hours.

Total Annual Cost: $1,500,000.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Section 623 of the Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service and to establish criteria for identifying unreasonable rates for cable programming services and associated equipment. To implement its scheme of rate regulation, the Commission developed a series of rate regulation forms, including FCC Form 1210, Updating Maximum Permitted Rates for Regulated Services and Equipment.

Cable operators use FCC Form 1210 to file for adjustments in maximum permitted rates for regulated services to reflect external costs. Regulated cable operators submit this form to local franchising authorities or the Commission (in situations where the FCC has assumed jurisdiction). In addition, cable operators use FCC Form 1210 to file a response to a complaint filed with the Commission concerning cable programming service rates and associated equipment.

On June 19, 2002, the Commission released a Notice of Proposed Rulemaking (''NPRM''), MB Docket No. 02–144, FCC 02–177, initiated to reflect the March 31, 1999 sunset of Commission jurisdiction to regulate rates for cable programming services (''CPS'') enacted by the Telecommunications Act of 1996 (''1996 Act'''), 47 U.S.C. 543(c)(4).

Since the released of the NPRM in June 2002 as cited above, the Commission has taken no further action.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–28528 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

December 21, 2004.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed

collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 28, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW, Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918 or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0027.

Title: Application for Construction Permit for Commercial Broadcast Station, FCC Form 301.

Form Number: FCC Form 301.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents: 3,247.

Estimated Time per Response: 2 to 4 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 8,380 hours.

Total Annual Cost: $44,630,924.

Privacy Impact Assessment: No impact(s).

Needs and Uses: FCC Form 301 is used to apply for authority to construct a new commercial AM, FM, or TV broadcast station, or to make changes in existing facilities of such a station. This collection also includes the third party disclosure requirement of 47 CFR 73.3580, requiring local public notice in a newspaper of general circulation of the filing of all construction permit applications. FM licensees or permittees may request, by application on FCC Form 301, upgrades on adjacent and co-channels, modifications to adjacent channels of the same class and downgrades to adjacent channels without first submitting a petition for rulemaking. All applicants using this one-step process must demonstrate that a suitable site exists which would comply with allotment standards with respect to minimum distance separation and city-grade coverage and which would be suitable for tower construction. To receive authorization for commencement of Digital Television (''DTV'') operation, commercial broadcast licensees must file FCC Form 301 for a construction permit. This application may be filed anytime after receiving the initial DTV allotment but must be filed before mid-point in a particular applicant's required construction period. The Commission will consider these applications as minor changes in facilities. Applicants will not have to supply full legal or financial qualification information.

On June 24, 2004, the U.S. Court of Appeals for the Third Circuit (the ''Court'') issued an Opinion and Judgment (''*Remand Order*'') in which it upheld certain aspects of the Commission's new media ownership rules adopted on June 2, 2003 (*See* 18 FCC Rcd 13620 (2003)), specifically those dealing with local radio ownership, while requiring further explanation for all other aspects of the new rules. In particular, the Court held that the use of Arbitron Metro markets, the inclusion of noncommercial stations in determining radio market size, the attribution of joint sale agreements, and certain transfer restrictions are consistent with the Administrative Procedure Act. The Court stated that its prior stay of all new ownership rules would remain in effect pending the outcome of the remand proceeding. The Commission filed a petition for rehearing requesting that the Court lift the stay partially—*i.e.*, with respect to the radio ownership rules which the Court's *Remand Order* upheld. On September 3, 2004, the Court granted the Commission's petition, thus partially lifting the stay (''*Rehearing Order*''). As a result of the *Rehearing Order,* the new radio ownership rules took effect September 3, 2004.

Under the new radio ownership rules, radio Joint Sales Agreements (JSAs) are attributable and radio applicants are required to submit as a part of the FCC Form 301 a copy of any attributable JSA or time brokerage agreement.

OMB Control Number: 3060–0031.

Title: Application for Consent to Assignment of Broadcast Station Construction Permit or License, FCC Form 314.

Form Number: FCC Form 314.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents: 2,225.

Estimated Time per Response: 1 to 2 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 3,990 hours.

Total Annual Cost: $16,017,631.25.

Privacy Impact Assessment: No impact(s).

Needs and Uses: FCC Form 314 and applicable exhibits/explanations are required to be filed when applying for consent to assignment of an AM, FM or TV broadcast station construction permit or license. In addition, the applicant must notify the Commission when an approved assignment of a broadcast station construction permit or license has been consummated.

This collection also includes the third party disclosure requirement of 47 CFR 73.3580, requiring local public notice in a newspaper of general circulation of the filing of all applications for assignment of license/permit. Additionally, an applicant for assignment of license must broadcast the same notice over the station at least once daily on four days in the second week immediately following the tendering for filing of the application.

On June 24, 2004, the U. S. Court of Appeals for the Third Circuit (the ''Court'') issued an Opinion and Judgment (''*Remand Order*'') in which it upheld certain aspects of the Commission's new media ownership rules adopted on June 2, 2003 (*See* 18 FCC Rcd 13620 (2003)), specifically those dealing with local radio ownership, while requiring further explanation for all other aspects of the new rules. In particular, the Court held that the use of Arbitron Metro markets, the inclusion of noncommercial stations in determining radio market size, the attribution of joint sale agreements, and certain transfer restrictions are consistent with the Administrative Procedure Act. The Court stated that its prior stay of all new ownership rules would remain in effect pending the outcome of the remand proceeding. The Commission filed a petition for rehearing requesting that the Court lift the stay partially—*i.e.*, with respect to the radio ownership rules which the Court's *Remand Order* upheld. On September 3, 2004, the Court granted the Commission's petition, thus partially lifting the stay (''*Rehearing Order*''). As a result of the *Rehearing*

Order, the new radio ownership rules took effect September 3, 2004.

Under the new radio ownership rules, radio Joint Sales Agreements (JSAs) are attributable and radio applicants are required to submit as a part of the FCC Form 301 a copy of any attributable JSA or time brokerage agreement.

OMB Control Number: 3060–0032.

Title: Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, FCC Form 315.

Form Number: FCC Form 315.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents: 2,225.

Estimated Time per Response: 1 to 2 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 3,990 hours.

Total Annual Cost: $16,017,631.25.

Privacy Impact Assessment: No impact(s).

Needs and Uses: FCC Form 315 and applicable exhibits/explanations are required to be filed when applying for transfer of control of a corporation holding an AM, FM or TV broadcast station construction permit or license. In addition, the applicant must notify the Commission when an approved transfer of control of a broadcast station construction permit or license has been consummated.

This collection also includes the third party disclosure requirement of 47 CFR 73.3580, requiring local public notice in a newspaper of general circulation of the filing of all applications for transfer of control. Additionally, an applicant for transfer of control must broadcast the same notice over the station at least once daily on four days in the second week immediately following the tendering for filing of the application.

On June 24, 2004, the U. S. Court of Appeals for the Third Circuit (the ''Court'') issued an Opinion and Judgment (''*Remand Order*'') in which it upheld certain aspects of the Commission's new media ownership rules adopted on June 2, 2003 (*See* 18 FCC Rcd 13620 (2003)), specifically those dealing with local radio ownership, while requiring further explanation for all other aspects of the new rules. In particular, the Court held that the use of Arbitron Metro markets, the inclusion of noncommercial stations in determining radio market size, the attribution of joint sale agreements, and certain transfer restrictions are consistent with the Administrative Procedure Act. The Court stated that its prior stay of all new ownership rules would remain in effect pending the outcome of the remand proceeding. The Commission filed a petition for rehearing requesting that the Court lift the stay partially—*i.e.*, with respect to the radio ownership rules which the Court's *Remand Order* upheld. On September 3, 2004, the Court granted the Commission's petition, thus partially lifting the stay (''*Rehearing Order*''). As a result of the *Rehearing Order,* the new radio ownership rules took effect September 3, 2004.

Under the new radio ownership rules, radio Joint Sales Agreements (JSAs) are attributable and radio applicants are required to submit as a part of the FCC Form 301 a copy of any attributable JSA or time brokerage agreement.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–28530 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 04–3892]

Consumer Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the rechartering of the Consumer Advisory Committee, (hereinafter ''the Committee''), whose purpose is to make recommendations to the Federal Communications Commission (''FCC'' or ''Commission'') regarding consumer issues within the jurisdiction of the Commission and to facilitate the participation of consumers (including people with disabilities and underserved populations, such as American Indians and persons living in rural areas) in proceedings before the Commission. The Commission also requests applications for membership on the Committee.

DATES: Applications should be received no later than January 31, 2005.

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

FOR FURTHER INFORMATION CONTACT: Scott Marshall, Consumer & Governmental Affairs Bureau, (202) 418–2809 (voice), (202) 418–0179 (TTY), or e-mail *scott.marshal@fcc.gov.*

SUPPLEMENTARY INFORMATION: On December 14, 2004, the Commission released a *Public Notice,* DA 04–3892 that announced the rechartering of the Consumer Advisory Committee and solicited applications for membership on the Committee.

Electronic Access and Filing

A copy of this notice also is available in alternate formats (Braille, cassette tape, large print or diskette) upon request. The notice also is posted on the Commission's Web site at *www.fcc.gov/cgb/cac.* Applications for membership on the Committee may be sent to the Commission via email addressed to Consumer & Governmental Affairs Bureau, Attn.: Scott Marshall, *scott.marshall@fcc.gov* or may be transmitted via facsimile to (202) 418–6509.

Background

The rechartering of the Committee was announced by *Public Notice* dated December 14, 2004. On November 19, 2004, the initial Charter of the Committee terminated. The Charter was renewed for another two (2) year term. This renewal is necessary and is in the public interest. The Committee is organized under and will operate in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2 (1988). The mission of the Committee is to make recommendations to the Commission regarding consumer issues within the jurisdiction of the Commission and to facilitate the participation of consumers (including people with disabilities and underserved populations, such as American Indians and persons living in rural areas) in proceedings before the Commission.

Each meeting of the full Committee will be open to the public. A notice of each meeting will be published in the **Federal Register** at least fifteen (15) days in advance of the meeting. Records will be maintained of each meeting and made available for public inspection.

Functions of the Committee

The topics to be addressed by the Committee will include, but are not limited to, the following areas:

- Consumer protection and education (*e.g.*, cramming, slamming, consumer friendly billing, detariffing, bundling of services, Lifeline/Linkup programs, customer service, privacy, telemarketing abuses, and outreach to underserved populations, such as Native Americans and persons living in rural areas).
- Access by people with disabilities (*e.g.*, telecommunications relay services, video description, closed captioning, accessible billing and access to

telecommunications products and services).

• Impact upon consumers of new and emerging technologies (*e.g.*, availability of broadband, digital television, cable, satellite, low power FM, and the convergence of these and emerging technologies).

• Implementation of Commission rules and consumer participation in the FCC rulemaking process.

During calendar year 2005, it is anticipated that the Committee will meet in Washington, DC, for three (3) one-day meetings. In addition, as needed, working groups or subcommittees will be established to facilitate the Committee's work between meetings of the full Committee. Meetings will be fully accessible to individuals with disabilities.

Membership

The Commission seeks applications from interested organizations or institutions, from both the public and private sectors, that wish to be considered for membership on the Committee. Selections will be made on the basis of factors such as expertise and diversity of viewpoints that are necessary to address effectively the questions before the Committee.

Applicants should be recognized experts in their fields, including, but not limited to, organizations focusing upon consumer advocacy, disabilities, underserved populations (*e.g.*, persons living in rural areas and tribal communities), telecommunications infra-structure and equipment, telecommunications services (including wireless), and broadcast/cable services. Individuals who do not represent an organization or institution are also welcome to apply, but each individual should be aware that government ethics rules requiring financial and other disclosures may apply to such applicants.

The number of Committee members will be established to effectively accomplish the Committee's work. Members must be willing to commit to a two-year term of service, should be willing and able to attend three (3) one-day meetings per year in Washington, DC, and are also expected to participate in deliberations of at least one working group or subcommittee. The Commission is unable to pay per diem or travel costs.

Applications for Membership/Deadline

Applications should be received by the Commission no later than January 31, 2005, and should be sent to the Federal Communications Commission, Consumer & Governmental Affairs Bureau, Attn.: Scott Marshall, via e-mail to *scott.marshall@fcc.gov* or, via facsimile to (202) 418–6509.

Due to the extensive security screening of incoming mail since September 11, 2001, delivery of mail sent to the FCC may be delayed. Therefore, we ask that applications be submitted by email or fax. Applications will be acknowledged within five (5) business days of receipt, via a date stamped copy of the application mailed to the address of the primary representative specified in the application.

A specified application form is not required. However, applications should include the the following information:

(1) The name of the organization or institution applying for Committee membership (hereinafter the ''applicant''); (2) the name of the applicant's including title, postal mailing address, email address, and telephone number; (3) The name of applicant's alternate representative including title, postal mailing address, email address, and telephone number; (4) A statement of the interests represented by the applicant and a detailed description of the applicant's knowledge and qualifications to serve on the Committee; (5) A statement by the applicant indicating a willingness to serve on the Committee for a two year period of time. (6) A commitment to attend three (3) one-day meetings per year in Washington, DC, at the applicant's own expense; and (7) A commitment to work on at least one working group or subcommittee. Members will have an initial and continuing obligation to disclose any interests in, or connections to, persons or entities that are, or will be, regulated by or have interests before the Commission.

After the applications have been reviewed, the Commission will publish a notice in the **Federal Register** announcing the appointment of the Committee members and the first meeting date of the Committee. All applicants will be notified via U.S. mail concerning the disposition of their applications. It is anticipated that appointments to the Committee will be made in March of 2005 with the first meeting of the Committee to occur in April of 2005.

Federal Communications Commission.

K. Dane Snowden,

Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 04–28529 Filed 12–28–04; 8:45 am]

BILLING CODE 6712–01–P

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 may obtain copies of agreements by contacting the Commission's Office of Agreements at 202–523–5793 or via e-mail at *tradeanalysis@fmc.gov.* 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.: 011384–003.

Title: MOSK/HUAL Space Charter Agreement.

Parties: Mitsui O.S.K. Lines Ltd. and HUAL A/S.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell; 1850 M Street, NW.; Washington, DC 20036.

Synopsis: The amendment deletes rate discussion authority from the agreement.

Agreement No.: 011526–004.

Title: MOSK/HUAL Space Charter Agreement.

Parties: Mitsui O.S.K. Lines Ltd. and HUAL A/S.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell; 1850 M Street, NW.; Washington, DC 20036.

Synopsis: The amendment deletes rate discussion authority from the agreement.

Agreement No.: 011637–011.

Title: AMPAC Cooperative Working Agreement.

Parties: Compania Chilena de Navegacion Interoceanica, S.A.; Hamburg-Süd; and Maruba S.C.A.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell; 1850 M Street, NW., Suite 900; Washington, DC 20036.

Synopsis: The proposed agreement modification reflects Maruba's withdrawal from the agreement in April 2005 and the redeployment of vessels due to its departure, establishes a new minimum duration for the revised agreement, makes minor technical changes, and restates the agreement.

By Order of the Federal Maritime Commission.

Dated: December 23, 2004.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–28466 Filed 12–28–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel-Operating Common Carrier Ocean Transportation Intermediary Applicant:

Breakbulk Transportation Incorporated, 1806 Plumbwood Way, Houston, TX 77058. Officers: Darron J. Clay, Vice President (Qualifying Individual), Magnolia L. Clay, President.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicant:

Forex Illinois, Inc., 858 Eagle Drive, Bensenville, IL 60106. Officers: Noel M. Carino, Secretary (Qualifying Individual), Arnold M. Carino, President.

Dated: December 23, 2004.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–28467 Filed 12–28–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, effective on the corresponding date shown below:

License Number: 004508F.
Name: Express Lanes International, Inc.
Address: 401 Broadway, Suite 1208, New York, NY 10013.
Date Revoked: December 9, 2004.
Reason: Failed to maintain a valid bond.

License Number: 018059NF.
Name: G P R International, Inc.
Address: 8347 NW., 68th Street, Miami, FL 33166.
Date Revoked: December 15, 2004.
Reason: Failed to maintain valid bonds.

License Number: 000120F.
Name: Haras & Co., Inc.
Address: 495 Union Avenue, Middlesex, NJ 08846.
Date Revoked: December 10, 2004.
Reason: Failed to maintain a valid bond.

License Number: 017572F.
Name: Impex of Doral Logistics, Inc.
Address: 8436 NW., 72nd Street, Miami, FL 33166.
Date Revoked: December 16, 2004.
Reason: Failed to maintain a valid bond.

License Number: 003794F.
Name: Marina International Forwarding Inc.
Address : 3274 NW., 22nd Avenue, Fort Lauderdale, FL 33309.
Date Revoked: December 9, 2004.
Reason: Failed to maintain a valid bond.

License Number: 017822F.
Name: Prince International Trading L.L.C.
Address: 9720 NW., 114 Way, #100, Miami, FL 33178.
Date Revoked: December 9, 2004.
Reason: Failed to maintain a valid bond.

License Number: 004443F.
Name: Scott Container Service, Inc.
Address: 700 Leigh Street, Detroit, MI 48209.
Date Revoked: December 9, 2004.
Reason: Failed to maintain a valid bond.

License Number: 012279NF.
Name: Frontrunner Worldwide, Inc.
Address: 5001 U.S. Highway 30 West, Fort Wayne, IN 46801–0988.
Date Revoked: October 8, 2004.
Reason: Surrendered license voluntarily.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 04–28469 Filed 12–28–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuance

Notice is hereby given that the following Ocean Transportation Intermediary license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
011170N	Sage Freight Systems Inc., dba Sage Container Lines 182–30 150th Road, Suite 108, Jamaica, NY 11413.	November 23, 2004.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 04–28468 Filed 12–28–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Meeting; Sunshine Act

December 21, 2004.

TIME AND DATE: 10 a.m., Thursday, January 6, 2005.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session:

Secretary of Labor v. *Speed Mining, Inc.,* Docket Nos. WEVA 2004–187–R and WEVA 2004–195–R. (Issues include whether the judge erred in affirming two citations alleging violations of a modification of 30 CFR 75.1700 issued to Speed Mining, Inc. so that it could mine by and through oil and gas wells.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

FOR FURTHER INFORMATION CONTACT: Jean Ellen, (202) 434–9950/(202 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 04–28650 Filed 12–27–04; 3:07 pm]

BILLING CODE 6735–01–M

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Board of Governors of the Federal Reserve System

SUMMARY: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. Board–approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the OMB 83–Is and supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Request for comment on information collection proposals

The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collections, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before February 28, 2005.

ADDRESSES: You may submit comments, identified by FR 3016 or Reg H–5, by any of the following methods:

- Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- E-mail: regs.comments@federalreserve.gov. Include docket number in the subject line of the message.
- FAX: 202/452–3819 or 202/452–3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551.

All public comments are available from the Board's web site at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed form and instructions, the Paperwork Reduction Act Submission (OMB 83–I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Cindy Ayouch, Federal Reserve Board Clearance Officer (202–452–3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact (202–263–4869), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal to approve under OMB delegated authority the extension for three years, with minor revision, of the following report:

Report title: Ongoing Intermittent Survey of Households

Agency form number: FR 3016

OMB control number: 7100–0150

Frequency: On occasion

Reporters: Households and individuals

Annual reporting hours: 658 hours

Estimated average hours per response: Division of Research & Statistics, 1.33 minutes; Division of Consumer & Community Affairs, 3 minutes; Other divisions, 5 minutes; and Non–SRC surveys, 90 minutes

Number of respondents: 600

General description of report: This information collection is voluntary (12 U.S.C. 225a, 263, and 15 U.S.C. 1691b). No issue of confidentiality normally arises because names and any other characteristics that would permit personal identification of respondents are not reported to the Board. However, exemption 6 of the Freedom of Information Act (5 U.S.C. 552(b)(6)) would exempt this information from disclosure.

Abstract: The Federal Reserve uses this voluntary survey to obtain household–based information specifically tailored to the Federal Reserve's policy, regulatory, and operational responsibilities. The University of Michigan's Survey Research Center (SRC) includes survey questions on behalf of the Federal Reserve in an addendum to their regular monthly Survey of Consumer Attitudes and Expectations. The SRC conducts the survey by telephone with a sample of 500 households and includes questions of special interest to Board staff intermittently, as needed. The frequency and content of the questions depend on changing economic, regulatory, and legislative developments.

Current actions: The Federal Reserve proposes to revise this information collection to allow contractors, either the SRC or others, to use broader surveying techniques, such as mall intercept testing, focus groups, and guided discussions.

Proposal to approve under OMB delegated authority the extension for three years, without revision of the following report:

Report title: Recordkeeping Requirements associated with the Real Estate Lending Standards Regulation for State Member Banks

Agency form number: Reg H–5

OMB control number: 7100–0261

Frequency: Aggregate report, quarterly; policy statement, annually

Reporters: State member banks

Annual reporting hours: 19,660 hours

Estimated average hours per response: Aggregate report, 5 hours; policy statement, 20 hours

Number of respondents: 935

General description of report: This information collection is mandatory (12 U.S.C. 1828(o)) and is not given confidential treatment.

Abstract: State member banks must adopt and maintain a written real estate lending policy. Also, banks must identify their loans in excess of the supervisory loan–to–value limits and report (at least quarterly) the aggregate amount of the loans to the bank's board of directors.

Board of Governors of the Federal Reserve System, December 22, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–28447 Filed 12–28–04; 8:45 am]

BILLING CODE: 6210–01–S

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 11, 2005.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. Joel Porter, Memphis, Tennessee; to acquire voting shares of BankTennessee, Collierville, Tennessee.

B. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. Louis Keith Ahlemeyer and Nadine Mae Ahlemeyer, both of Sedalia, Missouri; to acquire voting shares of Investors Financial Corporation of Pettis County, Inc., Sedalia, Missouri, and thereby indirectly acquire voting shares of Community Bank of Pettis County, Sedalia, Missouri.

Board of Governors of the Federal Reserve System, December 22, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–28448 Filed 12–28–04; 8:45 am]

BILLING CODE 6210–01–S

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 14, 2005.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309–4470:

1. NBOG Bancorporation, Inc., Gainesville, Georgia; after-the-fact change in control noticed by Dr. Wendell A. Turner, Gainesville, Georgia, to retain 10.56 percent of the outstanding shares of NBOG Bancorporation, Inc., and its subsidiary, National Bank of Gainesville, both of Gainesville, Georgia.

Board of Governors of the Federal Reserve System, December 23, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–28509 Filed 12–28–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 21, 2005.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106–2204:

1. Benjamin Franklin Bancorp, MHC, Franklin, Massachusetts; to become a bank holding company by acquiring 100 percent of the voting shares of Benjamin Franklin Savings Bank, Franklin, Massachusetts.

B. Federal Reserve Bank of Chicago (Patrick Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Blue River Bancshares, Inc., Shelbyville, Indiana; to become a bank holding company by acquiring 100 percent of the voting shares of Heartland Community Bank, Franklin, Indiana. Applicant also has applied to retain voting shares of Paramount Bank, Lexington, Kentucky a federal savings bank, and thereby operate a savings association, pursuant to section 12 CFR 225.28(b)(4) of Regulation Y.

2. C–B–G, Inc., West Liberty, Iowa; to acquire 24.35 percent of the voting shares of Washington Bancorp, Washington, Iowa, and thereby indirectly acquire voting shares of Federation Bank, Washington, Iowa.

C. Federal Reserve Bank of Minneapolis (Jacqueline G. Nicholas, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Glacier Bancorp, Inc., Kalispell, Montana; to merge with First National Banks–West Co., Evanston, Wyoming, and thereby indirectly acquire First National Bank–West, Evanston, Wyoming.

D. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 2200

North Pearl Street, Dallas, Texas 75201–2272:

1. FC Holdings, Inc., Houston, Texas, and First Community Holdings of Delaware, Inc., Wilmington, Delaware; to become bank holding companies by acquiring 100 percent of the voting shares of First Community Bank San Antonio, National Association, San Antonio, Texas.

E. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105–1579:

1. First National Bank Holding Company, Scottsdale, Arizona; to acquire 100 percent of the voting shares of First Heritage Bank, National Association, Newport Beach, California.

Board of Governors of the Federal Reserve System, December 22, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–28449 Filed 12–28–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 04-27829) published on page 76470 of the issue for Tuesday, December 21, 2004.

Under the Federal Reserve Bank of St. Louis heading, the entry for Liberty Bancshares, Inc. is revised to read as follows:

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. Liberty Bancshares, Inc., Jonesboro, Arkansas; to acquire 100 percent of the voting shares of TrustBanc Financial Group, Inc., Mountain Home, Arkansas, and thereby indirectly acquire TrustBanc, Mountain Home, Arkansas.

In addition, Arkansas Newco II, Inc., Jonesboro, Arkansas, a wholly owned subsidiary of Liberty Bancshares, Inc., also has applied to become a bank holding company by acquiring 100 percent of the voting shares of TrustBanc Financial Group, Inc., Mountain Home, Arkansas, and thereby indirectly acquire voting shares of TrustBanc, Mountain Home, Arkansas.

Comments on this application must be received by January 14, 2005.

Board of Governors of the Federal Reserve System,December 22, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–28450 Filed 12–28–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 26, 2005.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309–4470:

1. American Enterprise Bankshares, Inc., Jacksonville, Florida; to become a bank holding company by acquiring 100 percent of the voting shares of American Enterprise Bank of Florida, Jacksonville, Florida.

2. First Community Holding Company, Hammond, Louisiana; to become a bank holding company by acquiring 100 percent of the voting shares of First Community Bank, Hammond, Louisiana.

B. Federal Reserve Bank of Chicago (Patrick Wilder, Managing Examiner) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Wintrust Financial Corporation, Lake Forest, Illinois; to merge with First Northwest Bancorp, Inc., and thereby indirectly acquire First Northwest Bank, both of Arlington Heights, Illinois.

Board of Governors of the Federal Reserve System, December 23, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–28508 Filed 12–28–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 041–0083]

Genzyme Corporation, et al.; 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 18, 2005.

ADDRESSES: Comments should refer to ''Genzyme Corporation, *et al.*, File No. 041 0083,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the Supplementary Information section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form (except comments containing any confidential material) should be sent to the following e-mail box: *consentagreement@ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Paul Frontczak, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3002.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and Section 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 complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 20, 2004), on the World Wide Web, at *''http://www.ftc.gov/os/2004/12/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. Written comments must be submitted on or before January 18, 2005. Comments should refer to ''Genzyme Corporation, *et al.*, File No. 041 0083,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 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] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be sent to the following e-mail box: *consentagreement@ftc.gov.*

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC 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. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Orders to Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Genzyme Corporation (''Genzyme'') and ILEX Oncology, Inc. (''Ilex''). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects resulting from Genzyme's acquisition of Ilex. Under the terms of the proposed Consent Agreement, Genzyme is required to divest all contractual rights to Ilex's monoclonal antibody, Campath®, for use in solid organ transplant, to Schering AG (''Schering'').

The proposed Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty 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 an Agreement and Plan of Merger dated February 26, 2004, Genzyme proposes to acquire one hundred percent (100%) of the issued and outstanding shares of Ilex in a stock-for-stock transaction valued at approximately $1 billion. 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. market for acute therapy drugs used in solid organ transplant (''SOT''). The proposed Consent Agreement would remedy the alleged violations by replacing the competition that would be lost as a result of the acquisition.

SOT acute therapy drugs are immunosuppressant drugs that are used in solid organ transplants to suppress the transplant recipient's immune system. SOT acute therapy drugs are prescribed for induction therapy and to treat acute rejection. Induction therapy refers to the use of an immunosuppressant drug for a short time before, during, and/or after a solid organ transplant procedure in order to suppress the immune system and decrease the likelihood of rejection of the transplanted organ. An acute rejection is a sudden attack on the transplanted organ by the transplant recipient's immune system. If an acute rejection occurs, SOT acute therapy drugs are used to provide a high dose of immunosuppression in order to stop the rejection.

The U.S. market for SOT acute therapy drugs is highly concentrated. Genzyme is the leading supplier in the market for SOT acute therapy drugs with its drug, Thymoglobulin®. Ilex's Campath®, the newest entrant into the market for SOT acute therapy drugs, currently accounts for a relatively small share of the SOT acute therapy drug market, but is quickly gaining market share and is expected to continue growing. Campath® is FDA-approved for the treatment of chronic lymphocytic leukemia, but is used off-label as an SOT acute therapy drug.

In addition to Thymoglobulin® and Campath®, there are four other SOT acute therapy drugs used in the United States. However, due to similar mechanisms of action, Campath® and Thymoglobulin® are especially close competitors. Both drugs accomplish immunosuppression by depleting T-cells, which are a type of white blood cell that attack transplanted organs and can result in rejection. Atgam® from Pfizer and OKT–3® from Ortho Biotech/Johnson & Johnson are also T-cell depleting SOT acute therapy drugs, but are diminished and aged competitors and account for a small share of the SOT acute therapy drug market. Novartis' Simulect® and Roche's Zenepax® operate by a different mechanism of action—one that prevents the body's immune system from responding to and rejecting a foreign antigen by blocking the receptor for Interluekin—and are known as Interleukin–2 receptor inhibitors. Although Simulect® and Zenepax® are significant competitors and properly included in the relevant market, they exert more competitive

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must 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).

pressure on each other than on Thymoglobulin® or Campath®.

Other immunosuppressant drugs used in connection with SOT, such as maintenance therapy drugs, are not substitutes for SOT acute therapy drugs. Maintenance therapy drugs refer to low doses of immunosuppressant drugs that are typically used for the duration of a patient's life to prevent rejection. Maintenance therapy drugs are designed to provide a low dose of immunosuppression over a long period of time. Transplant patients typically start on maintenance therapy drugs a short time after the transplant and continue taking maintenance drugs for the rest of their lives. In contrast, SOT acute therapy drugs are designed to deliver a potent dose of immunosuppression over a short period of time, ranging from one day to two weeks. Using maintenance therapy drugs in higher doses to administer the same level of immunosuppression over a short period of time may be toxic to the patient. Thus, doctors would not likely prescribe maintenance therapy drugs in place of SOT acute therapy drugs. Likewise, SOT acute therapy drugs likely would not be used for maintenance therapy because SOT acute therapy drugs may be too powerful to use on a long-term basis.

As with many pharmaceutical products, entry into the manufacture and sale of SOT acute therapy drugs is difficult, expensive, and time-consuming. Developing a drug for SOT acute therapy and conducting clinical trials necessary to gain FDA approval is expensive and takes a significant amount of time. After developing a drug and receiving FDA approval, a company must then convince doctors to prescribe the drug. In order to convince doctors to prescribe a new SOT acute therapy drug, the new drug would need to be more efficacious, safer, and/or significantly less expensive than currently available SOT acute therapy drugs. Off-label entry by a drug already approved for another indication is also expensive and time-consuming, because a drug company would still need to develop and implement costly clinical trials to demonstrate benefits over other SOT acute therapy drugs. A company may not actively market a drug for off-label use. There are no drugs that are being evaluated currently for off-label use in SOT acute therapy. Additionally, entry is unlikely because the market for SOT acute therapy drugs is relatively small, lessening the incentive to invest the time and money necessary to develop these drugs. It is therefore unlikely that entry into the market for SOT acute therapy drugs, either by a new drug approved by the FDA, or by off-label entry, will occur in a manner that is timely or sufficient to resolve the anticompetitive effects of the proposed acquisition.

The proposed acquisition would cause significant competitive harm in the U.S. market for SOT acute therapy drugs by eliminating the actual, direct, and substantial competition between Genzyme and Ilex. This loss of competition would likely result in higher prices and decreased development in the market for SOT acute therapy drugs.

The proposed Consent Agreement effectively remedies the acquisition's anticompetitive effects in the market for SOT acute therapy drugs by requiring Genzyme to divest to Schering all of its contractual and decisionmaking rights regarding Campath® for solid organ transplant, including its portion of the earnings from sales of Campath® in solid organ transplant. Through an existing distribution and development agreement with Ilex, Schering already distributes and markets Campath® in the United States, sharing costs and profits. Thus, Schering is already responsible for distributing and marketing Campath® in the United States, and already participates in development activities for the drug. Therefore, the company is well-positioned to acquire the divested assets, and to compete vigorously in the market for SOT acute therapy drugs. In addition, because Campath® is manufactured by a third-party, there is no need for an interim supply agreement as is required in many pharmaceutical merger settlements.

The parties, with the assistance of a Monitor and the approval of the Commission, will implement a formula to determine the portion of Campath® earnings attributable to solid organ transplant sales. The formula uses drug utilization data maintained by the United Network for Organ Sharing (''UNOS'') and its federally-mandated database to determine the portion of Campath® sales that are attributable to SOT. This unique database provides a reliable, independent source for information regarding the use of Campath® in SOT, because all hospitals performing SOT operations in the United States are required to submit data to UNOS on many aspects of SOT operations. Hospital compliance is high, due in part to the fact that hospitals not submitting the required data face losing Medicare reimbursement. The proposed Consent Agreement also allows for this formula to be reevaluated based on changes in the market or in the use of Campath®.

The Commission has appointed Trinity Partners, LLC (''Trinity'') as Monitor to oversee the divestiture of the Campath® earnings from solid organ transplant. The Monitor will work with the parties to develop and implement the formula to compute Campath® earnings attributable to use in solid organ transplant. John E. Corcoran, Trinity's Managing Partner, will oversee the monitoring team. Mr. Corcoran founded Trinity in 1996, and has over twenty years of experience servicing clients in the pharmaceutical, biotechnology, diagnostic, and medical device industries.

Genzyme and Schering will continue to have a relationship regarding uses of Campath® outside solid organ transplant. Virtually all Campath® sales are for oncology use and only a very small portion of sales are attributable to SOT use. The price of Campath®, therefore, is driven by the competitive dynamics in the oncology market. To provide further protection, the proposed Consent Agreement contains firewall provisions to ensure that Genzyme does not receive competitively sensitive information regarding Campath®'s use and development in solid organ transplant. Additional firewalls prohibit Genzyme from participating in pricing decisions should Campath® SOT sales surpass a set percentage of overall Campath® sales.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Agreement to Hold Separate, or to modify their terms in any way.

By direction of the Commission, Commissioner Harbour recused.

Donald S. Clark,

Secretary.

Concurring Statement of Commissioner Jon Leibowitz

I support the conclusion reached by my fellow Commissioners to approve the proposed consent order regarding Genzyme's acquisition of ILEX. Through this transaction, Genzyme intends to acquire ILEX's key oncology product Campath. However, because a small percentage of Campath sales are used off-label for acute therapy in solid organ transplants (''SOT''), a significant competitive problem arises concerning the overlap between ILEX's SOT use and Genzyme's Thymoglubin acute therapy SOT product. The proposed relief provides a solution designed to protect consumers against the likely harm otherwise caused by this

transaction, while allowing the parties to move forward, even though it creates entanglements that could raise serious concerns under a different set of facts. Thus, I write separately to clarify my support for the proposed relief here, and to express some general observations on merger policy, which I am sure will continue to develop during my tenure here at the Commission.

Merger enforcement is a vital component of the Commission's mission. We are charged under the Clayton Act with ensuring that competition and consumers do not suffer from transactions whose effects may be to ''substantially lessen competition.'' Of course, the Clayton Act provides no inalienable right to merge. It is important, then, for the Commission to rigorously scrutinize each transaction we review in fulfilling our mission. Where a transaction may substantially lessen competition, a high burden should be placed on the parties to show that harm is demonstrably outweighed by efficiencies or that potential relief restores competition. My fellow Commissioners and our attorneys, economists and staff take our responsibility very seriously.

At the same time, where transactions present potential economic benefit—through efficiencies or enhanced research and innovation—we should weigh those benefits relative to the likely harm, and not seek to impose unnecessary obstacles to the parties achieving those benefits. In particular, each merger should be reviewed carefully on its merits and its own facts, and we should remain flexible in considering remedies that restore competition.

My support of the proposed remedy regarding Genzyme's acquisition of ILEX is consistent with these principles. Absent the proposed relief, this transaction would have resulted in significant harm to consumers through increased prices and a possible reduction in research and innovation. And since the original transaction's purported efficiencies (assuming they were cognizable under the Merger Guidelines) were not sufficient to reverse the likely anticompetitive harm, it was incumbent that the parties demonstrate that the relief proposed effectively restores competition.

Here, the proposed remedy likely accomplishes that purpose. It is a creative solution—severing Genzyme from its rights and revenues relating to use of ILEX's Campath product in the SOT market (while allowing Genzyme to maintain its rights and revenues to the product in the oncology market) in a manner that substantially diminishes the likelihood of anticompetitive harm.

As a general matter, creative and flexible remedies should be encouraged where we are confident they will succeed in restoring competition. However, no matter how creative the parties are in devising relief, and no matter how flexible the Commission is willing to be, such an approach will not work in many situations. The specific facts concerning each transaction will drive the analysis.

The unique facts of this case add assurance that the proposed relief will work. For example, virtually all of Campath sales are derived from the competitive oncology market, and only a very small portion of its sales are attributable to SOT use. Thus, the price of Campath is constrained by the oncology market (not the SOT market), substantially diminishing the ability or incentive of Genzyme to attempt a price increase on Campath. Another key fact that allows the remedy to work here is the divestiture to Schering AG of the Campath SOT rights and revenues. Schering AG was already responsible (through a pre-merger relationship with ILEX) for distributing and marketing Campath in the United States, and thus is well-positioned to acquire the ILEX SOT rights and vigorously compete post-merger. These facts, along with other particulars of this transaction, allow for this well-tailored proposed order to fit the facts, and remedy the likely competitive harm.

One concern raised by this transaction is that the remedy creates entanglements between the merged firm and Schering AG: Genzyme will continue to receive revenues post-merger from oncology sales for Campath, while Schering will receive revenues for Campath's SOT sales. It is possible that this relationship could lead to collusion (via side payments or some other mechanism) between the companies that make it mutually profitable for them to increase price or reduce research and development to the detriment of consumers.

We should be concerned ordinarily about such entanglements. However, the possibility of collusion in this case is not a sufficient concern for us to challenge this transaction. First, the entanglements are minimized because Campath SOT earnings can easily be determined without requiring communication between the parties since a federally-mandated independent database on organ transplants will identify the number of SOT patients using Campath. Second, the proposed order makes use of several of the Commission's key tools to prevent this from happening (*e.g.*, employing a monitor, erecting firewalls, and the threat of civil penalties for violating the proposed order), and a violation of the proposed order through collusion could result in criminal sanctions for violating section 1 of the Sherman Act. In the past, the Commission has demonstrated its willingness to sue companies for illegal side payments in the pharmaceutical industry (*e.g.*, In the Matter of Schering-Plough Corp.), and the Commission, no doubt, will remain vigilant in ensuring that we continue to do so in the future.

For these reasons, I concur in the decision of the Commission, but will remain cautious about considering future consent orders that create entanglements which could foster collusion and potentially harm consumers.

[FR Doc. 04–28458 Filed 12–28–04; 8:45 am]
BILLING CODE 6750–01–P

GENERAL SERVICES ADMINISTRATION

Federal Travel Regulation (FTR)

Maximum Per Diem Rate for New York

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice of Per Diem Bulletin 05–4, revised continental United States (CONUS) per diem rate.

SUMMARY: The General Services Administration (GSA) has reviewed the lodging rate of a certain location in the State of New York and determined that it is inadequate. The per diem rate prescribed in Bulletin 05–4 may be found at *http://www.gsa.gov/perdiem.*

DATES: This notice is effective December 29, 2004 and applies to travel performed on or after January 10, 2005.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Lois Mandell, Office of Governmentwide Policy, Travel Management Policy, at (202) 501–2824. Please cite FTR Per Diem Bulletin 05–4.

SUPPLEMENTARY INFORMATION:

A. Background

After an analysis of the per diem rate established for FY 2005 (see the **Federal Register** notices at 69 FR 53071, August 31, 2004, and 69 FR 60152, October 7, 2004), the per diem rate is being changed in the following location:

State of New York

- Nassau County

B. Procedures

Per diem rates are published on the Internet at *www.gsa.gov/perdiem* as an FTR Per Diem Bulletin and published in the **Federal Register** on a periodic basis. This process ensures timely increases or decreases in per diem rates established by GSA for Federal employees on official travel within CONUS. Notices published periodically in the **Federal Register**, such as this one, now constitute the only notification of revisions in CONUS per diem rates to agencies.

Dated: December 22, 2004.

Becky Rhodes,

Deputy Associate Administrator. Office of Transportation and Personal Property.

[FR Doc. 04–28494 Filed 12–28–04; 8:45 am]

BILLING CODE 6820–14–S

GENERAL SERVICES ADMINISTRATION

Public Meeting Addressing Privacy and Policy Issues in a Common Identification Standard for Federal Employees and Contractors

AGENCY: Office of Electronic Government and Technology, GSA.

ACTION: Notice of public meeting.

SUMMARY: The General Services Administration, in partnership with the Department of Commerce and the Office of Management and Budget will host a public meeting to seek individual views on the policy, privacy, and security issues associated with the Common Identification Standard for Federal Employees and Contractors as outlined in Homeland Security Presidential Directive 12 (HSPD–12). The public meeting is on the draft common identification standard (Federal Information Processing Standard 201) and will inform future HSPD–12 implementation guidance issued by the Office of Management and Budget.

DATES: The public meeting is on January 19, 2005, from 8:30 a.m. to noon at the Auditorium of the Potomac Center Plaza, 550 12th Street, SW., Washington, DC 20202, near the Smithsonian and L'Enfant Plaza Metro Stations. The meeting is open to the public and there is no fee for attendance. All attendees must pre-register and present government-issued photo identification to enter the building. Students may present their student ID.

Registration: Please e-mail your plan to attend to Sara Caswell, *sara@nist.gov*. Sara can be reached at 301–975-4634 if you have questions regarding registration. Registration information must be received by 5 p.m. e.s.t., January 11, 2005.

Requests To Speak at the Meeting: Written requests to speak at the meeting are required before January 5, 2005, and should be sent via e-mail to *eauth@omb.eop.gov* or by fax to 202–395–5167. In their requests, individuals should include a statement describing their expertise in, or knowledge of, the issues on which the public meeting will focus. Potential speakers should provide their contact information, including a telephone number, facsimile number, and e-mail address, to enable notification if selected. Selected speakers will be notified on or before Friday, January 7, 2005. There will be open microphone time during the last half hour of the meeting.

FOR FURTHER INFORMATION CONTACT: Ms. Jeanette Thornton, (202) 395–3562 or Ms. Judith Spencer, (202) 208–6576. An agenda and additional information for attendees will be posted on the *www.csrc.nist.gov/piv-project* Web site prior to the meeting.

SUPPLEMENTARY INFORMATION: On August 27, 2004, the President issued HSPD–12 Common Identification Standard for Federal Employees and Contractors.

As the Directive explained, ''wide variations in the quality and security of forms of identification used to gain access to secure Federal and other facilities where there is potential for terrorist attacks need to be eliminated. Therefore, it is the policy of the United States to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy by establishing a mandatory, Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors (including contractor employees).

''Secure and reliable forms of identification for purposes of this directive means identification that (a) is issued based on sound criteria for verifying an individual employee's identity; (b) is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation; (c) can be rapidly authenticated electronically; and (d) is issued only by providers whose reliability has been established by an official accreditation process. The Standard will include graduated criteria, from least secure to most secure, to ensure flexibility in selecting the appropriate level of security for each application. The Standard shall not apply to identification associated with national security systems as defined by 44 U.S.C. 3542(b)(2).''

HSPD–12 directed the Secretary of Commerce to ''promulgate in accordance with applicable law a Federal standard for secure and reliable forms of identification (the ''Standard'') not later than 6 months after the date of this directive in consultation with the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of the Office of Management and Budget (OMB), and the Director of the Office of Science and Technology Policy.''

On November 8, 2004, NIST published a draft standard. The Standard and supporting documents are available at *http://csrc.nist.gov/piv-project*. The standard was open for public comment until December 23, 2004. On February 27, 2005 the standard will be promulgated. Information on the past two public workshops on the standard is available at *www.csrc.nist.gov/piv-project*.

The public meeting to address ''Privacy and Security Issues in a Common Identification Standard for Federal Employees and Contractors'' will focus on the specific issues raised in HSPD–12. Meeting speakers should address the privacy and security concerns as they may affect individuals, including Federal employees and contractors as well as the public at large, in implementation.

By bringing together card and biometric experts, privacy advocates, academics, and other interested parties, the public meeting will present views on how to develop policies to implement the Standard without compromising users' privacy and security.

The session will include introductory remarks and speakers to discuss key questions, such as:

1. How do the proposed technologies in the draft FIPS 201 standard affect privacy and security?

- Does the proposed use of contact and contactless smart card chips raise privacy or security concerns?
- Do the biometric (fingerprint and facial image) standards as proposed, raise privacy or security concerns?
- Does the assignment of a permanent or persistent employee identification number raise privacy concerns?
- Do other applications or features of the card, as proposed raise concerns?

2. Do the proposed credential issuance policies and procedures raise privacy and security concerns?

3. What federal uses of the identification raise privacy and security concerns?

4. Are there means to address privacy and security in the development of the card standard and implementation guidance?

• Can privacy enhancing technologies be built into the card?

• How can we limit non-federal uses of the card?

• What training do employees and contractors need to properly secure their cards?

• What training should card issuers have? Security personnel?

• What law and policies must agencies consider in planning for and implementing the new cards?

Dated: December 22, 2004.

G. Martin Wagner,

Associate Administrator for Governmentwide Policy.

[FR Doc. 04–28493 Filed 12–28–04; 8:45 am]

BILLING CODE 6820–WY–P

GENERAL SERVICES ADMINISTRATION

Privacy Act of 1974; Proposed New Privacy Act System of Records

AGENCY: General Services Administration

ACTION: Notice of proposed new Privacy Act system of records

SUMMARY: The General Services Administration (GSA) proposes to establish a new system of records titled ''Internal Evaluation Case Files,'' (GSA/ADM–25). The system of records, to be maintained by GSA's Office of Inspector General (OIG), is being established to create a record keeping system containing evaluations and investigations of OIG personnel. The records in the system currently are a part of another OIG system of records, Investigation Case Files (GSA/ADM–24). The OIG has determined that a separate system would enhance the OIG's ability to conduct internal investigations.

DATES: The system of records will become effective without further notice on January 28, 2005 unless comments received on or before that date result in a contrary determination.

ADDRESSES: Comments should be submitted to the Office of Counsel to the Inspector General (JC), Office of Inspector General, General Services Administration, 1800 F Street NW, Washington DC 20405.

FOR FURTHER INFORMATION CONTACT: GSA Privacy Act Officer, General Services Administration, Office of the Chief People Officer, 1800 F Street NW, Washington DC 20405; telephone (202) 501–1452.

Dated: November 19, 2004

June V. Huber,

Director, Office of Information ManagementOffice of the Chief People Officer

GSA/ADM–25

System name: Internal Evaluation Case Files.

System location: This system is located in the GSA Office of Inspector General, 1800 F Street, NW, Washington, DC 20405. The database for this system is on a local area network in the GS Building and is operated by the System Development and Support Division of the Office of Inspector General.

Categories of individuals covered by the system: Individuals covered by the system are employees and former employees of the GSA Office of Inspector General. The system also includes any person who was the source of a complaint or allegation; a witness who has information or evidence on any aspect of an investigation; and any possible or actual suspect in a civil, criminal, or administrative action.

Categories of records in the system: Investigative files containing information such as name, date and place of birth, experience, and investigative material that is used as a basis for taking civil, criminal, and administrative actions.

Authority for maintenance of the system: 5 U.S.C. App. 3., Section 2 *et seq.*

Purpose: The system serves as a basis for issuing subpoenas and taking civil, criminal, and administrative actions.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

Records are used by GSA officials and representatives of other Government agencies on a need–to–know basis in the performance of their official duties under the authorities set forth above and for the following routine uses.

1. A record of any case in which there is an indication of a violation of law, whether civil, criminal, or regulatory in nature, may be disseminated to the appropriate Federal, State, local, or foreign agency charged with the responsibility for investigating or prosecuting such a violation or charged with enforcing or implementing the law.

2. A record may be disclosed to a Federal, State, local, or foreign agency or to an individual organization in the course of investigating a potential or actual violation of any law, whether civil, criminal, or regulatory in nature, or during the course of a trial or hearing or the preparing for a trial or hearing for such a violation, if there is reason to believe that such agency, individual, or organization possesses information relating to the investigation, and disclosing the information is reasonably necessary to elicit such information or to obtain the cooperation of a witness or an informant.

3. A record relating to a case or matter may be disclosed in an appropriate Federal, State, local, or foreign court or grand jury proceeding in accordance with established constitutional, substantive, or procedural law or practice, even when the agency is not a party to the litigation.

4. A record relating to a case or matter may be disclosed to an actual or potential party or to his or her attorney for the purpose of negotiation or discussion on matters such as settlement of the case or matter, plea–bargaining, or informal discovery proceedings.

5. A record relating to a case or matter that has been referred by an agency for investigation, prosecution, or enforcement or that involves a case or matter within the jurisdiction of any agency may be disclosed to the agency to notify it of the status of the case or matter or of any decision or determination that has been made or to make such other inquiries and reports as are necessary during the processing of the case or matter.

6. A record relating to a case or matter may be disclosed to a foreign country pursuant to an international treaty or convention entered into and ratified by the United States, or to an Executive agreement.

7. A record may be disclosed to a Federal, State, local, foreign, or international law enforcement agency to assist in crime prevention and detection or to provide leads for investigation.

8. A record may be disclosed to a Federal, State, local, foreign, tribal or other public authority in response to its request in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuing of a license, grant, or other benefit by the requesting agency, to the extent that the information relates to the requesting agency's decision on the matter.

9. A record may be disclosed to the public, news media, trade associations, or organized groups when the purpose is educational or informational, such as describing crime trends or distinctive or unique modus operandi, provided that the record does not identify a specific individual.

10. A record may be disclosed to an appeal or grievance examiner, formal complaints examiner, equal opportunity

investigator, arbitrator, or other authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee. This includes matters and investigations involving the Merit Systems Protection Board or the Office of Special Counsel. A record also may be disclosed to the United States Office of Personnel Management (OPM) in accordance with the agency's responsibility for evaluating Federal personnel management.

11. A record may be disclosed as a routine use to a Member of Congress or to a congressional staff member in response to an inquiry of the congressional office made at the request of the person who is the subject of the record.

12. Information may be disclosed at any stage of the legislative coordination and clearance process to the Office of Management and Budget (OMB) for reviewing private relief legislation as set forth in OMB Circular No. A–19.

13. A record may be disclosed:

(a) to an expert, a consultant, or contractor of GSA engaged in a duty related to an agency function to the extent necessary to perform the function; and

(b) to a physician to conduct a fitness–for–duty examination of a GSA officer or employee.

14. A record may be disclosed to any official charged with the responsibility to conduct qualitative assessment reviews of internal safeguards and management procedures employed in investigative operations. This disclosure category includes members of the President's Council on Integrity and Efficiency and officials and administrative staff within their investigative chain of command, as well as authorized officials of the Department of Justice and the Federal Bureau of Investigation.

Policies and practices for storing, retrieving, reviewing, retaining, and disposing of records in the system:

Storage: Paper records are kept in files and file folders. Electronic records are stored on hard drive or CD–ROM.

Retrievability: Both paper records and electronic records are retrievable by name or assignment number.

Safeguards: Paper records are stored in locked rooms with access limited to authorized personnel. Computer based records are available only to authorized users with a need to know and are protected by a network logon password, user password, and restricted right of access to the software, system, file, data element, and report.

Retention and disposal: Records are disposed of by shredding or burning, as scheduled in GSA Handbook, GSA Maintenance and Disposition System (OAD P 1820.2A).

System manager(s) and address: The system of records manager is an employee of the Internal Evaluation Staff (JE) of the Office of Inspector General, General Services Administration, 1800 F St. NW, Washington DC 20405.

Notification procedure: An individual who wishes to be notified whether the system contains a record concerning him or her should address a request to the Office of Counsel to Inspector General (JC), General Services Administration, Room 5324, 1800 F St. NW, Washington DC 20405.

Records access procedures: An individual seeking access to a record should put his or her request in writing and address it to the Office of Counsel to the Inspector General (JC), including full name (maiden name if appropriate), address, and date and place of birth. General inquiries may be made by telephone: (202) 501–1932.

Contesting record procedures: GSA rules for contesting the content of a record or appealing a denial of a request to amend a record are in 41 CFR Part 105–64.

Record source categories: The sources are individuals themselves, employees, informants, law enforcement agencies, other Government agencies, employers, references, co–workers, neighbors, educational institutions, and intelligence sources.

Systems exempted from certain provisions of the act:

In accordance with 5 U.S.C. 552a(j), this system of records is exempt from all provisions of the Privacy Act of 1974 with the exception of subsections (b); (c)(1) and (2); (e)(4)(A) through (F); (e)(6), (7), (9), (10), and (11); and (i) of the Act, to the extent that information in the system pertains to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals; to the activities of prosecutors, courts, and correctional, probation, pardon, or parole authorities; and to (1) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (2) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, that is associated with an identifiable individual; or (3) reports of enforcement of the criminal laws, from arrest or indictment through release from supervision. This system is exempted to maintain the efficacy and integrity of the Office of Inspector General's law enforcement function.

In accordance with 5 U.S.C. 552a(k), this system of records is exempt from subsections (c)(3); (d); (e)(1); (e)(4) (G), (H), and (I); and (f) of the Privacy Act of 1974. The system is exempt:

a. To the extent that the system consists of investigatory material compiled for law enforcement purposes. However, if any individual is denied any right, privilege, or benefit for which the individual would otherwise be eligible as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identify of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of the Act, under an implied promise that the identity of the source would be held in confidence; and

b. To the extent the system consists of investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of the Act, under an implied promise that the identity of the source would be held in confidence.

This system has been exempted to maintain the efficacy and integrity of lawful investigations conducted pursuant to the Office of Inspector General's law enforcement responsibilities and responsibilities in the areas of Federal employment, Government contracts, and access to security classified information.

[FR Doc. 04–26456 Filed 12–23–04; 10:40 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Required Elements for Voluntary Establishment of Paternity Affidavits.

OMB No.: 0970–0171.

Description: The Department of Health and Human Services is required to provide minimum elements for affidavits for voluntary establishment of paternity. This ensures that all affidavits will have minimum standard sets of information, facilitating their applicability across State and Tribal IV–D agencies. This requirement also ensures that all affidavits will contain information necessary for any future actions with respect to child support obligations.

Respondents: State and Tribal IV–D and birth record agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
None	862,043	varies	.166	143,099

Estimated Total Annual Burden Hours: 143,099 hours.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *grjohnson@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: December 21, 2004.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 04–28426 Filed 12–28–04; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Voluntary Establishment of Paternity.

OMB No.: 0970–0175.

Description: Section 466(a)(5)(c) of the Social Security Act requires States to have in effect laws providing for a voluntary civil process to establish paternity. These laws also require States to ensure that written materials are provided that fully explain the benefits and responsibilities of signing an affidavit of paternity. Paternity establishment is the necessary first step in any child support proceeding and this provision streamlines this process.

Respondents: State and Tribal IV–D agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Developed by IV–D agency	862,043	variable	.166	143,099

Estimated Total Annual Burden Hours: 143,099 hours.

In compliance with the requirements of Section 4506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: grjohnson@acf.hhs.gov. All requests should be identified by the title of the information collection.

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whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) 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. consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: December 21, 2004.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 04–28427 Filed 12–28–04; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Refugee State-of-Origin Report.

OMB No.: 0970–0043.

Description: The information collection of the ORR–11 (Refugee State-of-Origin Report) is designed to satisfy the statutory requirements of the Immigration and Nationality Act (the Act). Section 412(a)(3) of the Act requires the Office of Refugee Resettlement (ORR) to compile and maintain data on the secondary migration of refugees within the United States, after arrival.

In order to meet this legislative requirement, ORR requires each State to submit an annual count of the number of refugees who were initially resettled in another State. The State does this by counting the number of refugees with Social Security numbers indicating residence in another State at the time of arrival in the United States. (The first three digits of the Social Security number indicate the State of residence of the applicant.)

Data submitted by the States are compiled and analyzed by an ORR statistician, who then prepares a summary report, which is included in ORR's Annual Report to Congress. The primary use of the data is to quantify and analyze refugee secondary migration among the 50 States. ORR uses these data to adjust its refugee arrival totals in order to calculate the ORR social services allocation.

Respondents: States.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ORR–11	50	1	4.333	217

Estimated Total Annual Burden Hours: 217.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer.

E-mail address: grjohnson@acf.hhs.gov.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, E-mail address: *katherine_t._astrich@eop.gov.*

Dated: December 22, 2004.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 04–28428 Filed 12–28–04; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request.

Title: Project 1099.

OMB No.: 0970–0183.

Description: A voluntary program that provides state child support enforcement agencies, upon their request, access to the earned and unearned income information reported to the Internal Revenue Service (IRS) by employers and financial institutions. IRS 1099 information is used to locate noncustodial parents and to verify income and employment.

Respondents: State IV–D Programs.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent per year	Average burden hours per response	Total burden hours
Project 1099	54	12	2	1,296

Estimated Total Annual Burden Hours: 1,296 hours.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Facilities, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC

20447, Attn: ACF Reports Clearance Officer. E-mail address: *grjohnson@acf.hhs.gov*.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project,725 17th Street, NW., Washington, DC 20503, Attn: Desk Officer for ACF, E-mail address: *Katherine_t.tastrich@eop.gov.*

Dated: December 22, 2004.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 04–28464 Filed 12–28–04; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004D–0509]

Proposed Referral Program from the Food and Drug Administration to the National Oceanic and Atmospheric Administration Seafood Inspection Program for the Certification of Live and Perishable Fish and Fishery Products for Export to the European Union and the European Free Trade Association; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending to January 25, 2005, the comment period for the notice that appeared in the **Federal Register** of November 26, 2004 (69 FR 68948). In the notice, FDA announced the availability and requested comments on the draft guidance entitled ''Proposed Referral Program from the Food and Drug Administration to the National Oceanic and Atmospheric Administration Seafood Inspection Program for the Certification of Live and Perishable Fish and Fishery Products for Export to the European Union and the European Free Trade Association.'' The agency is taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: Submit written or electronic comments by January 25, 2005.

ADDRESSES: Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*.

FOR FURTHER INFORMATION CONTACT: Tim Hansen, Center for Food Safety and Applied Nutrition (HFS–415), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1405, e-mail: *thansen@cfsan.fda.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of November 26, 2004 (69 FR 68948), FDA published a notice with a 30-day comment period on a draft guidance entitled ''Proposed Referral Program from the Food and Drug Administration to the National Oceanic and Atmospheric Administration Seafood Inspection Program for the Certification of Live and Perishable Fish and Fishery Products for Export to the European Union and the European Free Trade Association.''

The agency has received several requests for an extension of the comment period for the notice, ranging from an additional 30 to 90 days. Each request conveyed concern that the current 30-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the draft guidance document.

FDA has considered the requests for additional time to submit comments and is extending the comment period for the notice and related guidance document for 30 days, until January 25, 2005. The agency believes that a 30-day extension allows adequate time for interested persons to submit comments without significantly delaying implementation of this important program.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 23, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28573 Filed 12–27–04; 10:43 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket N0. 2003D–0568]

Guidance for Industry and FDA Staff; Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices; Availability

AGENCY: Food and Drug Administration, HHS

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance document entitled ''Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices.'' Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to change the names, revise the identifications, and reclassify the two devices from class III (premarket approval) into class II (special controls). This guidance document describes a means by which the vascular embolization device and the neurovascular embolization device may comply with the requirement of special controls for class II devices. We are also announcing the withdrawal of the 1994 draft guidance document entitled ''Guidance on Biocompatibility Requirements for Long Term Neurological Implants: Part 3—Implant Model,'' dated September 12, 1994.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance on a 3.5″ diskette of the guidance entitled ''Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices'' to the Division of Small Manufacturers, International, and Consumer Assistance (DSMICA) (HFZ–220), Center for Devices and Radiological Health (CDRH) (HFZ–220), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send a self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–442–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*.

FOR FURTHER INFORMATION CONTACT: Peter L. Hudson, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3090.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of February 25, 2004 (69 FR 8667), FDA published a proposed rule to reclassify two embolization devices from class III (premarket approval) into class II (special controls). The agency is also changing the names and revising the identifications of these devices. The vascular embolization device (previously the arterial embolization device) is intended to control hemorrhaging due to aneurysms, certain types of tumors, and arteriovenous malformations. The neurovascular embolization device (previously the artificial embolization device) is intended to permanently occlude blood flow to cerebral aneurysms and cerebral arteriovenous malformations.

FDA revised a November 1, 2002, guidance document entitled ''Guidance for Neurological Embolization Devices'' and published it in the **Federal Register** of February 25, 2004 (69 FR 9667) as a draft class II special controls guidance document to support the reclassification of these device types. Interested persons were invited to comment on the draft guidance by May 25, 2004. FDA received one comment. The comment was supportive of the guidance document but made some suggestions on the guidance's content. FDA considered the suggestions and made appropriate revisions. FDA is now identifying the guidance document entitled ''Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices'' as the guidance document that will serve as the special control for these devices.

The guidance document provides a means by which a vascular embolization device or a neurovascular embolization device may comply with the requirement of special controls for class II devices. Following the effective date of the final reclassification rule, any firm submitting a premarket notification (510(k)) for a vascular embolization device or a neurovascular embolization device will need to address the issues covered in the special controls guidance document. However, the firm need only show that its device meets the recommendations of the guidance document or in some other way provides equivalent assurances of safety and effectiveness.

We are also withdrawing the draft guidance document entitled ''Guidance on Biocompatibility Requirements for Long Term Neurological Implants: Part 3—Implant Model'' because it contains outdated information. Archived copies of CDRH guidance documents that have been withdrawn are available from the DSMICA (see **ADDRESSES**).

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on vascular and neurovascular embolization devices. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if the approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

To receive a copy of the guidance entitled ''Class II Special Controls Guidance Document: Vascular and Neurovascular Embolization Devices'' by fax machine, call the CDRH Facts-On-Demand system at 800–899–0381 or 301–827–0111 from a touch-tone telephone. Press 1 to enter the system. At the second voice prompt press 1 to order a document. Enter the document number (1234) followed by the pound sign (#). Follow the remaining voice prompts to complete your request.

Persons interested in obtaining a copy of the guidance also may do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov.cdrh*. A search capability for all CDRH guidance documents is available at *http://www/fda/gov/cdrh/guidance.html*.

IV. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (the PRA). The collections of information addressed in the guidance document have been approved by OMB in accordance with the PRA under the regulations governing 510(k) submissions (21 CFR part 807, subpart E, OMB control number 0910–0120) and the regulations governing good manufacturing practices (quality system regulation) (21 CFR part 820, OMB control number 0910–0073). The labeling provisions addressed in the guidance document have been approved by OMB under the PRA, OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments received may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 15, 2004.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 04–28438 Filed 12–28–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1558–DR]

West Virginia; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of West Virginia (FEMA–1558–DR), dated September 20, 2004, and related determinations.

EFFECTIVE DATE: December 17, 2004.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 17, 2004, the President amended the cost-sharing arrangements concerning Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (Stafford Act), in a letter to Michael D. Brown, Under Secretary for Emergency Preparedness and Response, Federal Emergency Management Agency, Department of Homeland Security as follows:

I have determined that the damage in certain areas of the State of West Virginia, resulting from severe storms, flooding, and landslides on September 16–27, 2004, is of sufficient severity and magnitude that special conditions are warranted regarding the cost sharing arrangements concerning Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act).

Therefore, I amend my declaration of September 20, 2004, to authorize Federal funds for Public Assistance Categories A and B (debris removal and emergency protective measures) at 100 percent of total eligible costs for emergency work performed for a selected period of up to 72 hours. Only work performed during the selected 72-hour period will be reimbursed at 100 percent. Each applicant may select its own 72-hour periods and the periods may be different for Categories A and B. The 72 hours must be one continuous period within a window starting at 12:01 a.m. of the first day of the incident period through 11:59 p.m. of the fourteenth full day following the declaration.

This adjustment to State and local cost sharing applies only to debris removal and emergency protective measures (Categories A and B) under the Public Assistance program costs eligible for such adjustments under the law. The law specifically prohibits a similar adjustment for funds provided to States for Other Needs Assistance (Section 408), and the Hazard Mitigation Grant Program (Section 404). These funds will continue to be reimbursed at 75 percent of total eligible costs.

Please notify the Governor of West Virginia and the Federal Coordinating Officer of these amendments to my major disaster declarations.

This cost share is effective as of the date of the President's major disaster declaration.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04–28472 Filed 12–28–04; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4955–N–02]

Emergency Capital Repair Grants for Multifamily Housing Projects Designated for Occupancy by the Elderly; Supplemental Notice

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: On December 16, 2004, HUD published a notice announcing the availability of up to $10 million in grant funds to make emergency capital repairs to eligible multifamily projects that are owned by private nonprofit entities and designated for occupancy by elderly tenants. The December 16, 2004, notice provides instructions for owners to request the funding and instructions for the HUD field offices to process the request. This notice supplements the December 16, 2004, notice by providing additional information regarding the information collection requirements contained in that notice and republishes Appendix 1, the Rental Use Agreement.

DATES: *Effective Date:* This notice does not change the effective date of HUD's December 16, 2004, notice, which was effective upon publication.

FOR FURTHER INFORMATION CONTACT: Aretha Williams, Director, Grant Policy and Management Division, Office of Housing, Room 6142, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone 202–708–3000 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: On December 16, 2004 (69 FR 75418), HUD published a notice announcing the availability of up to $10 million in grant funds to make emergency capital repairs to eligible multifamily projects that are owned by private nonprofit entities and designated for occupancy by elderly tenants. The capital repair needs must relate to items that present an immediate threat to the health, safety, and quality of life of the tenants. The intent of these grants is to provide one-time assistance for emergency items that could not be absorbed within the project's operating budget, and where the tenants continued occupancy in the immediate near future would be called into question by a delay in initiating the proposed cure. The notice provides instructions for owners to request the funding and instructions for the HUD field offices to process the request.

This notice supplements the December 16, 2004, notice by providing the following additional information regarding the information collection requirements contained in that notice. Specifically, HUD wishes to advise the public that the information collection requirements contained in the December 16, 2004, notice have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and OMB approval is pending. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number. Accordingly, HUD is republishing Appendix 1, the Rental Use Agreement. Once provided, HUD will announce the OMB control number to the public.

Dated: December 22, 2004.

Aaron Santa Anna,

Assistant General Counsel for Regulations.

OMB Approval No: pending
Exp. Date: pending

U.S. Department of Housing and Urban Development **Office of Housing** Emergency Capital Repair Grants For Multifamily Housing Projects	OMB Approval No: pending Expiration date: pending
Public reporting burden for this collection of information is estimated to average 1 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.	

Appendix 1

PROJECT NAME: _____

FHA PROJECT NO: _____

CITY, STATE: _____

RENTAL USE AGREEMENT

This Agreement is made and entered into this _____ day of _____, 2004, by and between the Secretary of Housing and Urban Development acting by and through the Federal Housing Commissioner, and _____ (Mortgagor).

The owner has entered into an agreement with the Commissioner to maintain the property as rental housing for the elderly for the remainder of the specified _____-year period;

The Commissioner has determined that continuation of the property as rental housing is clearly necessary to assure adequate rental housing opportunity for low and moderate-income elderly tenants.

WHEREAS, the owner has requested an Emergency Capital Repair Grant to make emergency capital repairs to the property.

WHEREAS, the owner is willing to agree to maintain the subject property as an affordable rental property until _____.

OMB Approval No: pending
Exp. Date: pending

WHEREAS, in the event the owner chooses to sell, prepay, or transfer the property during the period of time this Use Agreement is in effect, it will require as a condition that the purchaser will commit to maintain the property pursuant to the terms of this Use Agreement.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are expressly acknowledged, the parties agree as follows:

1. The execution and recording of this Agreement shall constitute HUD's approval of the Emergency Capital Repair Grant.

2. The owner agrees that during the period that it owns the property, it will maintain the property as affordable rental housing until _____. During such period, should the property be sold, the Purchaser shall not market project dwelling units for any purpose other than affordable rental housing for the elderly.

3. The provisions of this Agreement shall be binding upon the heirs, successors and assigns of the owner and Purchaser (if sold).

OMB Approval No: pending
Exp. Date: pending

4. The provisions of this Agreement relating to the rental use of the property shall run with the land and shall be binding for the benefit of, in favor of and enforceable by the Secretary and his successors in office. The Secretary and his successors in office and/or any third-party beneficiary shall be entitled to (a) institute legal action to enforce performance and observance of, (b) enjoin any actions which are violative of, and (c) exercise any other legal or equitable right or remedy with respect to such provisions. For the purpose of these covenants, a third-party beneficiary shall be any person eligible for occupancy in the rental project insured pursuant to the provisions of the applicable program for the elderly. These rights and remedies will be exercised separately or in combination.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

_____ _____

ATTEST OWNER

_____

TITLE

UNITED STATES OF AMERICA
SECRETARY OF HOUSING AND URBAN DEVELOPMENT

_____

By: Director, Multifamily
Hub/Program Center

COUNTY OF _____

STATE OF _____

OMB Approval No: pending
Exp. Date: pending

On this _____ day of _____, 2004 before me, the undersigned, officer, personally appeared _____ who acknowledged himself /herself to the _____ of _____, and that as such _____, being authorized to do so, executed the within Agreement for the purpose therein contained by signing the name of said partnership by himself/herself as _____.

WITNESS my hand and Notary seal the day and year aforesaid.

SEAL

_____
Notary Public

My Commission expires_____

COUNTY OF _____

STATE OF _____

[FR Doc. 04–28441 Filed 12–28–04; 8:45 am]
BILLING CODE 4210–27–C

DEPARTMENT OF THE INTERIOR

U.S. Fish and Wildlife Service

Notice of Availability, Draft Restoration Plan and Environmental Assessment

AGENCY: Fish and Wildlife Service, U.S. Department of the Interior.

ACTION: Notice of availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service), on behalf of the U.S. Department of the Interior (DOI), National Oceanic and Atmospheric Administration (NOAA), and New York State Department of Environmental Conservation (New York), as natural resource trustees, announces the release for public review of the Draft Restoration Plan and Environmental Assessment (RP/EA) for the Love Canal, 102nd Street, and Forest Glen Mobile Home Subdivision Superfund sites. The Draft RP/EA presents a preferred alternative, consisting of a variety of restoration projects, that compensates for impacts to natural resources caused by contaminant releases and remedial activities associated with the three mentioned sites.

DATES: Written comments must be submitted on or before February 15, 2005.

ADDRESSES: Requests for copies of the RP/EA may be made to: U.S. Fish and Wildlife Service, New York Field Office, 3817 Luker Road, Cortland, New York 13045.

Written comments or materials regarding the RP/EA should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Anne L. Secord, Environmental Contaminants Program, U.S. Fish and Wildlife Service, New York Field Office, 3817 Luker Road, Cortland, New York 13045. Interested parties may also call 607–753–9334 or e-mail *Anne_Secord@fws.gov* for further information.

SUPPLEMENTARY INFORMATION: During the period of March 1996 through December 2000, natural resource damage settlements were achieved for the Love Canal, 102nd Street, and Forest Glen Mobile Home Subdivision Superfund sites. NOAA was a settling Trustee with DOI on all three settlements; the State of New York was a settling Trustee for the 102nd Street and Forest Glen settlements. These three sites discharged a variety of hazardous chemicals into wetlands, uplands, streams, and rivers in Niagara County, including the Niagara River, Cayuga Creek, East Gill Creek, Bergholtz Creek, and Black Creek. Chemical releases and remedial activities at the three sites adversely affected natural resources such as warmwater fish, migratory birds, amphibians, and reptiles. The funds available from these settlements for restoration activities total approximately $1.3 million.

A combined restoration initiative is proposed to allow for a larger, more effective and meaningful resource restoration.

The RP/EA is being released in accordance with the Compensation, and Liability Comprehensive Environmental Response Act (CERCLA) of 1980 as amended, commonly known as Superfund, (42 U.S.C. 9601 *et seq.*), the Natural Resource Damage Assessment Regulations found at 43 CFR part 11, and the National Environmental Policy Act. It is intended to describe the Trustees' proposals to restore natural resources injured at the sites and evaluate the potential impacts of each.

The RP/EA describes a number of habitat restoration and protection alternatives and discusses the environmental consequences of each. Restoration efforts which have the greatest potential to restore natural resources and services that were injured by contaminants or remedial activities are preferred. Based on an evaluation of the various restoration alternatives, the preferred alternative consists of a suite of restoration projects, including wetland restoration and protection, grassland restoration, stream restoration, urban stream/river restoration, common tern habitat restoration, walleye propagation, oak savannah restoration, and further contaminant characterization.

Interested members of the public are invited to review and comment on the RP/EA. Copies of the RP/EA are available for review at the Service's New York Field Office at 3817 Luker Road, Cortland, New York. Additionally, the RP/EA will be available for review at the following Web site (*http://nyfo.fws.gov*) and at the Niagara Falls Library. Written comments will be considered and addressed in the final RP/EA at the conclusion of the restoration planning process.

Comments, including names and home addresses of respondents, will be available for public review during regular business hours. Individual respondents may request confidentiality. If you wish us to withhold your name and or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. We will not, however, consider anonymous comments. 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.

Author: The primary author of this notice is Anne Secord, U.S. Fish and Wildlife Service, New York Field Office, 3817 Luker Road, Cortland, New York 13045.

Authority: The authority for this action is the CERCLA of 1980 as amended, commonly known as Superfund, (42 U.S.C. 9601 *et seq.*), and the Natural Resource Damage Assessment Regulations found at 43 CFR part 11.

Dated: November 30, 2004.

Dawn Comish,

Acting Regional Director, Region 5, U.S. Fish and Wildlife Service, U.S. Department of the Interior, DOI Designated Authorized Official.

[FR Doc. 04–28498 Filed 12–28–04; 8:45 am]
BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Amendment to Approved Tribal-State Compact.

SUMMARY: This notice publishes the Approval of the Amendment to the Tribal-State Compact between the Puyallup Tribe of Indians and the State of Washington.

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: George T. Skibine, Director, Office of Indian Gaming Management, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Pursuant to Section 11 of the Indian Gaming Regulatory Act of 1988, Pub. L. 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish, in the **Federal Register,** notice of approved Tribal-State Compacts for the purpose of engaging in Class III 9casion) gambling on Indian reservations. The Deputy Principal Assistant Secretary—Indian Affairs, Department of Interior, through his delegated authority, has approved the Third Amendment to the Tribal-State Compact for Class III Gaming between

the Puyallup Tribe of Indians and the State of Washington, which was executed on November 16, 2004.

This Amendment authorizes the Tribe to conduct Class III gaming activities on fee land (the Fife Property) within the Tribe's reservation boundaries.

Dated: December 22, 2004.

Michael D. Olsen,

Acting Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 04–28506 Filed 12–28–04; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under Comprehensive Environmental Response, Compensation and Liability Act

Under 28 CFR 50.7, notice is hereby given that on December 14, 2004, a proposed Consent Decree in *United States* v. *Alcan Aluminum Corp.,* Civil No. 04–1435, was lodged with the United States District Court for the Northern District of New York.

This action concerns the Tri Cities Barrel Superfund Site (Site), which is located in Fenton, New York. In this action, the United States asserted claims against Alcan Aluminum Corp: (1) under section 106(b)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9606(b)(1), for civil penalties for Alcan's failure to comply with an administrative order issued by the U.S. Environmental Protection Agency (EPA) which required Alcan to participate and cooperate with a group of parties who are performing the remedy for the Site under a Remedial Design/Remedial Action consent decree; and (2) under section 107(a) of CERCLA, 42 U.S.C. 9607(a), for recovery of response costs incurred regarding the Site. The proposed consent decree embodies an agreement with Alcan to pay $600,000 of EPA's past response costs, to pay 80% of all future response costs, up to a $800,000 cap, and to pay a $360,000 civil penalty. The decree provides Alcan with a covenant not to sue under sections 106(b)(1) and 107(a) of CERCLA.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Alcan Aluminum Corp.,* D.J. No. 90–11–3–1514/2.

The Consent Decree may be examined at the Office of the United States Attorney, 445 Broadway, Albany, NY 12207, and at the Region II Office of the U.S. Environmental Protection Agency, Region II Records Center, 290 Broadway, 17th Floor, New York, NY 10007–1866. During the public comment period, the Consent Decree also may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $5.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Catherine R. McCabe,

Deputy Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–28536 Filed12–28–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v. *Macaulay,* Case No. 3:04–23209, was lodged with the United States District Court for the District of South Carolina on December 8, 2004. This proposed Consent Decree concerns a complaint filed by the United States against the Defendants pursuant to section 301(a) of the Clean Water Act (''CWA''), 33 U.S.C. 1311(a), to obtain injunctive relief from and impose civil penalties against the Defendants for filling wetlands without a permit.

The proposed Consent Decree requires the defendants to pay a civil penalty and restore the impacted wetland to its natural grade and contour. The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this notice. Please address comments to Emery Clark, Assistant United States Attorney, United States Attorney's Office, Wachovia Building, Suite 500, 1441 Main Street, Columbia, South Carolina 29201 and refer to *United States* v. *Macaulay,* Case No. 3:04–23209.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of South Carolina, 901 Richland Lane, Columbia, South Carolina.

In addition the proposed Consent Decree may be viewed on the World Wide Web at *http://www.usdoj.gov/enrd/open.html.*

Stephen Samuels,

Assistant Chief, Environmental Defense Section, Environment and Natural Resources Division.

[FR Doc. 04–28537 Filed 12–28–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Fee Adjustments for Testing, Evaluation, and Approval of Mining Products

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of fee adjustments.

SUMMARY: This notice revises our [MSHA Approval and Certification Center (A&CC)] user fees. Fees compensate us for the costs that we incur for testing, evaluating, and approving certain products for use in underground mines. We based the 2005 fees on our actual expenses for fiscal year 2004. The fees reflect changes both in our approval processing operations and in our costs to process approval actions.

DATES: This fee schedule is effective from January 1, 2005, through December 31, 2005.

FOR FURTHER INFORMATION CONTACT: Steven J. Luzik, Chief, Approval and Certification Center (A&CC), 304–547–2029 or 304–547–0400.

SUPPLEMENTARY INFORMATION:

Background

On May 8, 1987 (52 FR 17506), we published a final rule, 30 CFR part 5—Fees for Testing, Evaluation, and Approval of Mining Products. The rule established specific procedures for calculating, administering, and revising user fees. We have revised our fee schedule for 2004 in accordance with the procedures of that rule and include this new fee schedule below. For approval applications postmarked before January 1, 2005, we will continue to calculate fees under the previous (2004) fee schedule, published on December 30, 2003.

Fee Computation

In general, we computed the 2005 fees based on fiscal year 2004 data. We calculated a weighted-average, direct cost for all the services that we provided during fiscal year 2004 in the processing of requests for testing, evaluation, and approval of certain products for use in underground mines. From this cost, we calculated a single hourly rate to apply uniformly across all of the product approval categories during 2005.

Dated: December 22, 2004.

David G. Dye,

Acting Assistant Secretary for Mine Safety and Health.

FEE SCHEDULE EFFECTIVE JANUARY 1, 2005
(BASED ON FY 2004 DATA)

ACTION TITLE	HOURLY RATE ($)
Fees for Testing, Evaluation, and Approval of all Mining Products [1]	66
Retesting for Approval as a Result of Post-Approval Product Audit [2].	
30 CFR PART 15—EXPLOSIVES TESTING	
Permissibility Tests for Explosives:	
Weigh-in	462
Physical Exam: First size	325
Chemical Analysis	1,977
Air Gap—Minimum Product Firing Temperature	460
Air Gap—Room Temperature	352
Pendulum Friction Test	163
Detonation Rate	352
Gallery Test 7	7,436
Gallery Test 8	5,533
Toxic Gases (Large Chamber)	805
Permissibility Tests for Sheathed Explosives:	
Physical Examination	128
Chemical Analysis	1,044
Gallery Test 9	1,944
Gallery Test 10	1,944
Gallery Test 11	1,944
Gallery Test 12	1,944
Drop Test	648
Temperature Effects/Detonation	672
Toxic Gases	580

[1] Full approval fee consists of evaluation cost plus applicable test costs.
[2] Fee based upon the approval schedule in effect at the time of retest.

Note: When the nature of the product requires that we test and evaluate it at a location other than our premises, you must reimburse us for the traveling, subsistence, and incidental expenses of our representative in accordance with standardized government travel regulations. This reimbursement is in addition to the fees charged for evaluation and testing.

[FR Doc. 04–28452 Filed 12–28–04; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of existing safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. St. Lawrence Zinc Company

[Docket No. M–2004–010–M]

St. Lawrence Zinc Company, P.O. Box 226, Hailesboro, New York 13645 has filed a petition to modify the application of 30 CFR 57.14106 (Falling object protection) to its No. 4 Mine (MSHA I.D. No. 30–01185) located in St. Lawrence County, New York. The petitioner proposes to use low profile mini-jumbos and two (2) yard load haul dumps without canopies in new mining areas with low height stopes in the No. 4 Mine. The petitioner states that ore drifts of nine (9) feet high and eight (8) feet wide will be maintained in the new mining areas, and the ore veins plunge approximately 25 degrees, thereby reducing the height of the stope (shanty back strike drifts). The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

2. Cumberland Coal Resources, LP

[Docket No. M–2004–052–C]

Cumberland Coal Resources, LP, Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, Pennsylvania 15222 has filed a petition to modify the application of 30 CFR 75.364(b)(1) (Weekly examination) to its Cumberland Mine (I.D. No. 36–05018) located in Greene County, Pennsylvania. The petitioner requests a modification of the existing standard to permit the use of air monitoring stations at a sump in an intake airway in lieu of traveling the entry in its entirety. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via Federal eRulemaking Portal: *http://www.regulations.gov;* E-mail: *Comments@MSHA.gov;* Fax: (202) 693–9441; or Regular Mail/Hand Delivery/Courier: Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209. All comments must be postmarked or received in that office on or before January 28, 2005. Copies of these

petitions are available for inspection at that address.

Dated at Arlington, Virginia this 22nd day of December, 2004.

Marvin W. Nichols, Jr.,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 04–28475 Filed 12–28–04; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

Notice of Meeting

AGENCY: U. S. National Commission on Libraries and Information Science.

ACTION: Notice of meeting.

SUMMARY: The U.S. National Commission on Libraries and Information Science is holding an open business meeting to discuss Commission programs and administrative matters. Commissioners will review programs related to the Commission's strategic initiatives chosen at the last NCLIS meeting. Progress reports from each of the Commission's task forces will be shared, and the Commission will discuss future directions and activities.

DATE AND TIME: NCLIS Business Meeting—January 15, 2005, 12:30 p.m. until 5 p.m.

ADDRESSES: Boston Public Library, McKim Building, 700 Boylston Street, Boston, MA 02116.

Status: Open meeting.

SUPPLEMENTARY INFORMATION: The business meeting is open to the public, subject to space availability. To make special arrangements for physically challenged persons, contact Madeleine McCain, Director of Operations, 1110 Vermont Avenue, NW., Suite 820, Washington, DC 20005, e-mail *mmccain@nclis.gov,* fax 202–606–9203 or telephone 202–606–9200.

Dated: December 22, 2004.

Trudi Bellardo Hahn,

Interim Executive Director.

[FR Doc. 04–28507 Filed 12–28–04; 8:45 am]

BILLING CODE 7528–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 04–150]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Robert M. Padilla, Patent Counsel, Ames Research Center, Code 202A–4, Moffett Field, CA 94035–1000; telephone (650) 604–5104; fax (650) 604–2767.

NASA Case No. ARC–14165–1: Secondary Polymer Layered Impregnated Tile (SPLIT);

NASA Case No. ARC–14650–2: Light-Based Encryption System;

NASA Case No. ARC–14661–2: Improved Functionalization Of Carbon Nanotubes;

NASA Case No. ARC–14744–1US: Ordered Biological Nanostructures Formed From Chaperonin Polypeptides;

NASA Case No. ARC–15041–1: Identification Of Atypical Flight Patterns;

NASA Case No. ARC–15102–1: Reduced Latency In Image Presentation;

NASA Case No. ARC–15204–1: Rapid Polymer Sequencer;

NASA Case No. ARC–15205–1: Biosensors Using Carbon Nanotube Nanoelectrode Arrays;

NASA Case No. ARC–14652–1: 3d Laser Scanner;

NASA Case No. ARC–14653–1: Air Traffic Management Evaluation Tool;

NASA Case No. ARC–14743–2: Improved High Emittance Gap Filler;

NASA Case No. ARC–14950–1: Project Management Tool;

NASA Case No. ARC–15041–2: Information Display System For Atypical Flight Phase;

NASA Case No. ARC–15089–1: Query-Based Document Composition;

NASA Case No. ARC–15157–1: Conversion Of Type Of Quantum Well Structure;

NASA Case No. ARC–15201–2: Toughened Uni-piece Fibrous Reinforced Oxidation-Resistant Composite (TUFROC);

NASA Case No. ARC–15356–1: Energy Index For Aircraft Maneuvers;

NASA Case No. ARC–15370–1: Selective Access And Editing In A Database.

Dated: December 10, 2004.

Keith T. Sefton,

Deputy General Counsel, Administration and Management.

[FR Doc. 04–28510 Filed 12–28–04; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 04–151]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Kent N. Stone, Patent Counsel, Glenn Research Center at Lewis Field, Code 500–118, Cleveland, OH 44135; telephone (216) 433–8855; fax (216) 433–6790.

NASA Case No. LEW–17290–1: Durable Surface Cladding For Ceramic And Polymeric Matrix Composites;

NASA Case No. LEW–17299–2: Mechanically Resilient Polymeric Films Doped With A Lithium Compound;

NASA Case No. LEW–17306–1: Thin Film Heat Flux Sensor Of Improved Design;

NASA Case No. LEW–17517–1: Flow-Field Control-Rods To Stabilize Flow In A Centrifugal Compressor;

NASA Case No. LEW–17256–2: MEMS Direct Chip Attach Packaging Methodologies And Apparatus For Harsh Environments;

NASA Case No. LEW–17458–1: Compact Solid-state Entangled Photon Source;

NASA Case No. LEW–17520–1: Hybrid Power Management (HPM) Upgrade;

NASA Case No. LEW–17551–1: Unitized Regenerative Fuel Cell System;

NASA Case No. LEW–17561–1: Large Area Permanent Magnet ECR Plasma Source;

NASA Case No. LEW–17589–1: Slotted Antenna Waveguide Plasma Source;

NASA Case No. LEW–17592–1: New Ion Conduction Organic/Inorganic Hybrid Polymers;

NASA Case No. LEW–17618–1: High Tg Polyimides For Resin Transfer Molding (RTM);

NASA Case No. LEW–17642–1: Energetic Atomic And Ionic Oxygen Textured Optical Surfaces For Blood Glucose Monitoring;

NASA Case No. LEW–17672–1: Low Density High Creep Resistant Single Crystal Superalloy For turbine Airfoils.

Dated: December 10, 2004.

Keith T. Sefton,

Deputy General Counsel, Administration and Management.

[FR Doc. 04–28511 Filed 12–28–04; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 04–152]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark office, and are available for licensing.

DATES: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Dorothy C. Kerr, Acting Patent Counsel, Goddard Space Flight Center, Mail Code 503, Greenbelt, MD 20771–0001; telephone (301) 286–7351; fax (301) 286–9502.

NASA Case No. GSC–14473–2: Space-Based Internet Protocol System For Vehicle Tracking Systems Monitoring And Control;

NASA Case No. GSC–14681–1: Method And System For Eliminating Processing Artifacts In Recursive Grouping Operations;

NASA Case No. GSC–14796–1: Portable X-Ray Fluorescence Using Machine Source.

Dated: December 10, 2004.

Keith T. Sefton,

Deputy General Counsel, Administration and Management.

[FR Doc. 04–28512 Filed 12–28–04; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 04–153]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, has been filed in the United States Patent and Trademark office, and are available for licensing.

DATES: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Edward K. Fein, Patent Counsel, Johnson Space Center, Mail Code HA, Houston, TX 77058–8452; telephone (281) 483–4871; fax (281) 244–8452.

NASA Case No. MSC–23594–1: Exercise Apparatus;

NASA Case No. MSC–23668–1: Water Outlet Control Mechanism For Fuel Cell System Operation In Variable Gravity Environments;

NASA Case No. MSC–22859–4: Production Of Functional Proteins: Balance Of Shear Stress And Gravity;

NASA Case No. MSC–23454–1: 3–D Interactive Digital Virtual Human.

Dated: December 29, 2004.

Keith T. Sefton,

Deputy General Counsel, Administration and Management.

[FR Doc. 04–28514 Filed 12–28–04; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 04–154]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark office, and are available for licensing.

DATES: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Randy Heald, Patent Counsel, Kennedy Space Center, Mail Code CC–A, Kennedy Space Center, FL 32899; telephone (321) 867–7214; fax (321) 867–1817.

NASA Case No. KSC–12350: Self Calibrating Pressure Transducer.

Dated: December 10, 2004.

Keith T. Sefton,

Deputy General Counsel, Administration and Management.

[FR Doc. 04–28515 Filed 12–28–04; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 04–155]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark office, and are available for licensing.

DATES: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Linda B. Blackburn, Patent Counsel, Langley Research Center, Mail Code 141, Hampton, VA 23681–2199; telephone (757) 864–9260; fax (757) 864–9190.

NASA Case No. LAR–16571–1: Magnetic Field Response Sensor For Conductive Media;

NASA Case No. LAR–16599–1: Adaptive Composite Skin Technology (ACTS);

NASA Case No. LAR 16908–1: Magnetic Field Response Measurement Acquisition System

NASA Case No. LAR–16134–1: Interrupt-Based Phase-Locked Frequency Multiplier;

NASA Case No. LAR–16299–1: Support Assembly For Composite Laminate Materials During Roll Press Processing;

NASA Case No. LAR–16307–2: Methodology For The Effective Stabilization Of Tin-Oxide-Based Oxidation/Reduction Catalysts;

NASA Case No. LAR–16475–1: Carbon Nanotube-Based Sensor And Method For Continually Sensing Changes In A Structure;

NASA Case No. LAR–16549–1: System And Method For Monitoring Piezoelectric Material Performance;

NASA Case No. LAR–16555–1: A Process For The Simultaneous Formation Of Surface And Sub-Surface Metallic Layers In Polymer Films;

NASA Case No. LAR–16573–1: Carbon Nanotube Based Light Sensor;

NASA Case No. LAR–16575–1: Device And Method For Connections Made Between A Crimp Connector And Wire;

NASA Case No. LAR–16689–1: Trailing Vortex Management Via Boundary Layer Separation Control;

NASA Case No. LAR–16854–1: Method And Apparatus To Assess Compartment Syndrome;

NASA Case No. LAR 16616–1, Laser-Induced Fabrication of Metallic

Interlayers and Patterns in Polyimide Films.

Dated: December 10, 2004.

Keith T. Sefton,

Deputy General Counsel, Administration and Management.

[FR Doc. 04–28516 Filed 12–28–04; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 04–156]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark office, and are available for licensing.

DATES: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Jerry L. Seemann, Patent Counsel, Marshall Space Flight Center, Mail Code LS01, Huntsville, AL 35812; telephone (256) 544–6580; fax (256) 544–0258.

NASA Case No. MFS–31303–1–CO: Generalized Fluid System Simulation Program (GFSSP);

NASA Case No. MFS–31529–1: Motor Controller System For Large Dynamic Range Of Motor Operation;

NASA Case No. MFS–31595–1: Light Weight Precision Reflective Optics Manufacturing Process, Apparatus And Product Thereby;

NASA Case No. MFS–31838–1: Pressure Vessel With Improved Impact Resistance And Method Of Making The Same;

NASA Case No. MFS–31852–1: Achromatic Shearing Phase Sensor For Generating Images Indicative Of Measure(s) Of Alignment Between Segments Of A Segmented Telescope's Mirrors;

NASA Case No. MFS–32024–1: Fuel Tank For Liquefied Natural Gas;

NASA Case No. MFS–31648–1: Counter-Rotating Shoulder Mechanism For Friction Stir Welding;

NASA Case No. MFS–31823–1–DIV: Radio-Frequency Driven Dielectric Heaters For Non-Nuclear Testing In Nuclear Core Development;

NASA Case No. MFS–31918–1: Friction Stir Weld Tools;

NASA Case No. MFS–31924–1: Friction Stir Apparatus For Solid State Welding;

NASA Case No. MFS–32105–1: Ultrasonic Stir Welding Process And Apparatus.

Dated: December 10, 2004.

Keith T. Sefton,

Deputy General Counsel, Administration and Management.

[FR Doc. 04–28517 Filed 12–28–04; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 04–157]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of prospective patent license.

SUMMARY: NASA hereby gives notice that Intaka Corporation, of Sunnyvale, California, has applied for a partially exclusive license to practice the invention, NASA case MFS–31549–1, ''Ultra Thin Substrate Integral Memory and Radio Frequency Identification Devices'', U.S. patent application no. 09/962,704 and assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to Mr. Jerry L. Seemann, Chief Patent Counsel/LS01, Marshall Space Flight Center, Huntsville, AL 35812. NASA has not yet made a determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

DATES: Responses to this notice must be received by January 13, 2005.

FOR FURTHER INFORMATION CONTACT: Sammy A. Nabors, Technology Transfer Department/CD30, Marshall Space Flight Center, Huntsville, AL 35812, (256) 544–5226.

Dated: December 8, 2004.

Keith T. Sefton,

Deputy General Counsel, Administration and Management.

[FR Doc. 04–28518 Filed 12–28–04; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR Part 73—Physical Protection of Plants and Materials.

2. *Current OMB Approval Number:* 3150–0002.

3. *How often the collection is required:* On occasion. Required reports are submitted and evaluated as events occur.

4. *Who is required or asked to report:* Persons who possess, use, import, export, transport, or deliver to a carrier for transport, special nuclear material.

5. *The number of annual respondents:* 384.

6. *The number of hours needed annually to complete the requirement or request:* 523,106 hours annually (50,207 hours for reporting (0.64 hours per response) and 472,899 hours for recordkeeping (1,041 hours per recordkeeper)).

7. *Abstract:* NRC regulations in 10 CFR Part 73 prescribe requirements for establishment and maintenance of a physical protection system with capabilities for protection of special nuclear material at fixed sites and in transit and of plants in which special nuclear material is used. The information in the reports and records is used by the NRC staff to ensure that the health and safety of the public is protected and that licensee possession and use of special nuclear material is in compliance with license and regulatory requirements.

Submit, by February 28, 2005, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft 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 about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton (T–5-F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–7233, or by Internet electronic mail to *INFOCOLLECTS@NRC.GOV*.

Dated at Rockville, Maryland, this 22nd day of December, 2004.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 04–28453 Filed 12–28–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–461]

Amergen Energy Company, LLC.; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–62, issued to AmerGen Energy Company, LLC, for operation of the Clinton Power Station, Unit 1 (CPS) located in DeWitt County, Illinois.

The proposed amendment would change Technical Specification (TS) 4.3, ''Fuel Storage,'' to reflect the addition of fuel storage capacity in the fuel cask storage pool and increased fuel storage capacity in the spent fuel pool.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change involves revising CPS TS 4.3, ''Fuel Storage,'' to reflect the increased storage capacity of the spent fuel pool due to the installation of higher density storage racks and the addition of fuel storage capacity in the fuel cask storage pool.

The method of handling fuel is not significantly changed since the same equipment and procedures will be used. During spent fuel rack removal and installation, all work in the spent fuel pool and cask storage pool area will be controlled and performed in strict accordance with specific written guidance. Any movement of fuel assemblies required to be performed to support the modification (e.g., removal and installation of racks) will be performed in the same manner as during normal refueling operations. Shipping cask movements will not be performed during the modification period. There is no change to the methods or equipment to be used in moving fuel casks. Expanding the spent fuel storage capacity does not have a significant impact on the frequency of occurrence for any accident previously evaluated. Therefore, this change will not significantly increase the probability of occurrence of any event previously analyzed.

The consequences of the dropped spent fuel assembly in the spent fuel pool have been evaluated for the proposed change. The results show that the postulated drop of a spent fuel assembly striking the top of the spent fuel storage racks will not distort the racks sufficiently to impair their functionality. The minimum subcriticality margin (i.e., neutron multiplication factor (K_{eff}) less than or equal to 0.95) will be maintained. The structural damage to the Fuel Building, spent fuel pool liner, and any fuel assembly resulting from a dropped fuel assembly striking the pool floor or another assembly located in the racks is primarily dependent on the mass of the falling object and drop height. Since these two parameters are not changed by the proposed modification, the postulated structural damage to these items remains unchanged. The radiological dose at the exclusion area boundary will not be increased since no changes are being made to in-core hold time or burn-up as a result of the proposed amendment.

The consequences of a loss of spent fuel pool cooling were evaluated and found to not involve a significant increase as a result of the proposed changes. The concern with this event is a reduction of spent fuel pool water inventory from bulk boiling resulting in uncovering fuel assemblies. This situation could lead to fuel failure and subsequent significant increase in offsite dose. Loss of spent fuel pool cooling at CPS is mitigated by ensuring that a sufficient time lapse exists between the loss of forced cooling and uncovering fuel. This period of time is compared against a reasonable period to reestablish cooling or supply an alternative water source. Evaluation of this event includes determination of the time to boil. This time period is much less than the onset of any significant increase in offsite dose, since once boiling begins it would have to continue unchecked until the pool surface was lowered to the point of exposing active fuel. The time to boil represents the onset of loss of pool water inventory and is commonly used as a gage for establishing the comparison of consequences before and after a reracking project. The heatup rate in the spent fuel pool is a nearly linear function of the fuel decay heat load. The fuel decay heat load will increase subsequent to the proposed changes because of the increase in the number of assemblies. The thermal-hydraulic analysis determined that the minimum time to boil is more than three hours subsequent to complete loss of forced cooling and a minimum of 24 hours between loss of forced cooling and a drop of water level to within 10 feet of the top of the racks. In the unlikely event that all pool cooling is lost, sufficient time will still be available subsequent to the proposed changes for the operators to provide alternate means of cooling before the water shielding above the top of the racks falls below 10 feet. The supporting analyses have been confirmed to be bounding for all spent fuel pool loading configurations.

The consequences of a design basis seismic event are not increased. The consequences of this event were evaluated on the basis of subsequent fuel damage or compromise of the fuel storage or building configurations leading to radiological or criticality concerns. The new racks have been analyzed in their new configuration and were found to be safe during seismic motion. Fuel has been determined to remain intact and the storage racks maintain the fuel and fixed poison configurations subsequent to a seismic event. The structural capability of the pool and liner will not be exceeded under the appropriate combinations of dead weight, thermal, and seismic loads. The Fuel Building structure will remain intact during a seismic event and will continue to adequately support and protect the spent fuel storage racks, storage array, and pool moderator/coolant.

A fuel cask drop accident was previously evaluated as described in the CPS Updated Safety Analysis Report (USAR) Section 15.7.5. Administrative controls will be implemented to ensure that fuel will be removed from storage racks located within the cask storage pool prior to any fuel cask being moved in this area. The presence of any empty racks in this area will not adversely affect the previously evaluated cask drop scenarios, since any impacted empty racks will tend to absorb the kinetic

energy of the dropped cask and thus reduce the impact load and corresponding damage. The thin walled rack cell material poses significantly less threat to puncturing the cask than impact to the floor of the pool area. Thus, the results of the previously evaluated cask drop accident remain unchanged.

Therefore, the proposed change does not result in a significant increase in the probability or consequences of a previously evaluated accident.

In summary, the proposed change does not result in a significant increase in the consequences of a previously evaluated accident.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change involves revising CPS TS 4.3, ''Fuel Storage,'' to reflect the increased storage capacity of the spent fuel pool as a result of the installation of higher density storage racks and addition of fuel storage capacity in the fuel cask storage pool. Due to the proposed changes, an accidental drop of a rack module during construction activity in the pool was considered as the only event that might represent a new or different kind of accident.

A construction accident of a rack dropping onto stored spent fuel or the pool floor liner is not a postulated event due to the defense-in-depth approach to be taken. A new temporary crane, hoist, and rack lifting rig will be introduced to remove the existing racks and install the new racks. These temporary lift items have been designed to meet the requirements of NUREG–0612, ''Control of Heavy Loads at Nuclear Power Plants, Resolution of Generic Technical Activity A–6,'' and ANSI [American National Standards Institute] N14.6, ''Standard for Special Lifting Devices for Shipping Containers Weighing 10000 Pounds or More for Nuclear Materials.'' A rack drop event is considered to be a ''heavy load drop'' over the pools. Racks will not be allowed to be lifted or to travel over any racks containing new or spent fuel assemblies, thus a rack drop onto fuel is precluded. A rack drop to the pool liner is also precluded since all of the lifting components, except for the temporary crane, either provide redundancy in load path or are designed with safety margins greater than a factor of ten (10). The Fuel Building Crane will be used to lower racks into the pool and place racks within the range of accessibility and to remove racks from the spent fuel pool. The temporary crane will be used to lift racks from the pool floor and move the racks horizontally with a limited lift height above the pool floor. All movements of heavy loads over the pool will comply with the applicable administrative controls and guidelines (*i.e.* plant procedures, NUREG–0612, etc.). A rack drop would not alter the storage configuration or moderator/coolant presence. Therefore, the rack drop does not represent a new or different kind of accident.

The proposed change does not alter the operating requirements of the plant or of the equipment credited with mitigation of the design basis accidents. The proposed change does not affect any of the important parameters required to ensure safe fuel storage. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The function of the spent fuel pool and fuel cask storage pool is to store the fuel assemblies in a subcritical and coolable configuration through all environmental and abnormal loadings, such as an earthquake or fuel assembly drop. The new rack design must meet all applicable requirements for safe storage and be functionally compatible with the spent fuel pool and fuel cask storage pool.

The mechanical, material, and structural designs of the new racks have been reviewed in accordance with the applicable provisions of the NRC [Nuclear Regulatory Commission] Guidance entitled, ''OT Positions of Review and Acceptance of Spent Fuel Storage and Handling Applications,'' provided as an enclosure to Generic Letter 78–11. The rack materials used are compatible with the spent fuel assemblies and the spent fuel pool environment. The fixed neutron absorber (*i.e.* Metamic) has been demonstrated to be acceptable for dry and wet storage applications on a generic basis. In addition, the NRC has approved Metamic for use in both wet storage and dry storage applications. The design of the new racks preserves the proper margin of safety during abnormal loads such as a dropped assembly and tensile loads from a stuck assembly. It has been shown that such loads will not invalidate the mechanical design and material selection to safely store fuel in a coolable and subcritical configuration.

The methodology used in the criticality analysis of the expanded spent fuel pool meets the appropriate NRC guidelines and the ANSI standards. The margin of safety for subcriticality is maintained by having k_{eff} equal to or less than 0.95 under all normal storage, fuel handling, and accident conditions, including uncertainties.

The criterion of having k_{eff} equal to or less than 0.95 during storage or fuel movement is the same as that used previously to establish criticality safety evaluation acceptance. Therefore, the accepted margin of safety remains the same.

The thermal-hydraulic and cooling evaluation of the spent fuel pool demonstrated that the pool could be maintained below the specified thermal limits under the conditions of the maximum heat load and during all credible accident sequences and seismic events. The spent fuel pool temperature will not exceed 150 °F during the worst single failure of a cooling pump. The maximum local water temperature in the hot channel will remain below the boiling point. The fuel will not undergo any significant heat up after an accidental drop of a fuel assembly on top of the rack blocking the flow path. A loss of cooling to the pool will allow sufficient time (*i.e.* 24 hours) for the operators to intervene and line up alternate cooling paths and the means of inventory make-up before the water shielding above the top of the racks falls below 10 feet. The thermal limits specified for the evaluations performed to support the proposed change are the same as those that were used in the previous evaluations.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, Public File Area O–1 F21,

11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 0–1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestors/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *hearingdocket@nrc.gov*; or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to Mr. Thomas S. O'Neill, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60666, the attorney for the licensee.

The Commission hereby provides notice that this is a proceeding on an application for a license amendment falling within the scope of section 134 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10154. Under section 134 of the NWPA, the Commission, at the request of any party to the proceeding, must use hybrid hearing procedures with respect to ''any matter which the Commission determines to be in controversy among the parties.''

The hybrid procedures in section 134 provide for oral argument on matters in controversy, preceded by discovery under the Commission's rules and the designation, following argument of only those factual issues that involve a genuine and substantial dispute, together with any remaining questions of law, to be resolved in an adjudicatory hearing. Actual adjudicatory hearings are to be held on only those issues found to meet the criteria of section 134 and set for hearing after oral argument.

The Commission's rules implementing section 134 of the NWPA are found in 10 CFR Part 2, Subpart K, ''Hybrid Hearing Procedures for Expansion of Spent Fuel Storage Capacity at Civilian Nuclear Power Reactors.'' Under those rules, any party to the proceeding may invoke the hybrid

hearing procedures by filing with the presiding officer a written request for oral argument under 10 CFR 2.1109. To be timely, the request must be filed together with a request for hearing/petition to intervene, filed in accordance with 10 CFR 2.309. If it is determined a hearing will be held, the presiding officer must grant a timely request for oral argument. The presiding officer may grant an untimely request for oral argument only upon a showing of good cause by the requesting party for the failure to file on time and after providing the other parties an opportunity to respond to the untimely request. If the presiding officer grants a request for oral argument, any hearing held on the application must be conducted in accordance with the hybrid hearing procedures. In essence, those procedures limit the time available for discovery and require that an oral argument be held to determine whether any contentions must be resolved in an adjudicatory hearing. If no party to the proceeding timely requests oral argument, and if all untimely requests for oral argument are denied, then the usual procedures in 10 CFR Part 2, Subpart L apply.

For further details with respect to this action, see the application for amendment dated August 18, 2004, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 21st day of December 2004.

For the Nuclear Regulatory Commission.

George F. Dick,

Senior Project Manager, Section 2, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–28454 Filed 12–28–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–219]

Amergen Energy Company, LLC; Oyster Creek Nuclear Generating Station; Exemption

1.0 Background

AmerGen Energy Company, LLC (the licensee), is the holder of Facility Operating License No. DPR–16, which authorizes operation of the Oyster Creek Nuclear Generating Station (OCNGS), a boiling-water reactor facility, located in Ocean County, New Jersey. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The current operating license for OCNGS expires on April 9, 2009.

By letter dated August 10, 2004, AmerGen informed the Commission that it had determined that it would seek renewal of its operating license for OCNGS, but that it was unable until recently to decide to seek license renewal for OCNGS because of events beyond its control. AmerGen was jointly owned by Exelon and British Energy plc (BE), until December 2003. The application stated that for several years, BE had faced financial difficulties, and in December 2003, BE sold its share of AmerGen to Exelon, thereby making AmerGen a wholly owned subsidiary of Exelon Generation Company, LLC. The application stated that AmerGen was not in a position to make a reasonable and sound business decision to pursue license renewal at OCNGS due to facility ownership issues, and BE's financial restraints. AmerGen stated that, in light of these and other factors, it could not prepare and file a sufficient license renewal application by April 9, 2004, in order to meet the 5-year time period specified in Title 10 of the Code of Federal Regulations (10 CFR) Part 2, Section 109(b), ''Effect of timely renewal application.''

2.0 Request/Action

Section 109(b) of 10 CFR Part 2 states: ''If the licensee of a nuclear power plant licensed under 10 CFR 50.21(b) or 50.22 files a sufficient application for renewal of an operating license at least 5 years prior to the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.'' This requirement for license renewal applications was established in December 1991 in conjunction with the publication of the final license renewal rule, 10 CFR Part 54, ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants'' (56 FR 64943).

AmerGen's application requested an exemption from the timing requirements of 10 CFR 2.109(b), for submittal of the OCNGS license renewal application. The exemption would allow the submittal of the renewal application with less than 5 years remaining prior to expiration of the operating license while maintaining the protection of the timely renewal provision in 10 CFR 2.109(b). AmerGen further requested that the exemption be issued at this time, subject to the condition that it becomes effective only if, 6 months prior to expiration of the existing facility operating license, the license renewal proceeding is ongoing and a renewed operating license for OCNGS has not been issued by the NRC and, only if by that time, the NRC staff has issued both an OCNGS draft supplemental environmental impact statement (SEIS) and an OCNGS safety evaluation report (SER) with open items.

3.0 Discussion

Pursuant to 10 CFR 54.15, exemptions from the requirements of Part 54 are governed by Section 50.12. Pursuant to the requirements of 10 CFR 50.12, the Commission may grant an exemption from the requirements of Part 50 when the exemption is (1) authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security, and (2) special circumstances are present as defined in 10 CFR 50.12(a)(2). In its application, AmerGen stated that OCNGS met two special circumstances: 10 CFR 50.12(a)(2)(ii), ''[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule;'' and 10 CFR 50.12(a)(2)(iii), ''[c]ompliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated.''

The purpose of 10 CFR 2.109(b), as it is applied to nuclear power reactors licensed by the NRC, is to implement the ''timely renewal'' doctrine of Section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 558(c), which states:

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a

license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

The underlying purpose of this ''timely renewal'' provision in the APA is to protect a licensee who is engaged in an ongoing licensed activity and who has complied with agency rules in applying for a renewed or new license from facing license expiration as the result of delays in the administrative process.

On December 13, 1991, the NRC published the final license renewal rule, 10 CFR Part 54, with associated changes to 10 CFR Parts 2, 50, and 140 in the **Federal Register** (56 FR 64943). The statement of considerations (SOC) discussed the basis for establishing the latest date for filing license renewal applications and the timely renewal doctrine (56 FR 64962). The SOC stated that:

> Because the review of a renewal application will involve a review of many complex technical issues, the NRC estimates that the technical review would take approximately 2 years. Any necessary hearing could likely add an additional year or more. Therefore, in the proposed rule, the Commission modified § 2.109 to require that nuclear power plant operating license renewal applications be submitted at least 3 years prior to their expiration in order to take advantage of the timely renewal doctrine.
>
> No specific comment was received concerning the proposal to add a 3-year provision for the timely renewal provision for license renewal. The current regulations require licensees to submit decommissioning plans and related financial assurance information on or about 5 years prior to the expiration of their operating licenses. The Commission has concluded that, for consistency, the deadline for submittal of a license renewal application should be 5 years prior to the expiration of the current operating license. The timely renewal provisions of § 2.109 now reflect the decision that a 5-year time limit is more appropriate.

AmerGen's application stated that the OCGNS license renewal application would be submitted in July 2005, and that application of the 5-year term in 10 CFR 2.109(b) for filing a license renewal application is not necessary in this situation to achieve the purpose of the regulation. The July 2005 filing date, which is approximately 44 months before expiration of the existing license in April 2009, according to AmerGen will provide the NRC staff with ample time in which to perform a full and adequate review.

Submittal of the OCNGS license renewal application approximately 44 months prior to expiration of the operating license would provide a review period exceeding the 3 years the NRC originally estimated was needed to review a renewal application and complete any hearing that might be held on the application. The NRC's current schedule for review of license renewal applications, which has been met for all renewal applications to date, is to complete its review and make a decision on issuing the renewed license within 22 months of receipt without a hearing. If a hearing is held, the NRC's model schedule anticipates completion of the staff's review, the hearing process, and issuance of a decision on issuing the license within 30 months of receipt. However, it is recognized that the estimate of 30 months for completion of a contested hearing is subject to variation in any given proceeding. A period of 44 months, nevertheless, is expected to provide sufficient time for performance of a full and adequate safety and environmental review, and completion of the hearing process. Meeting this schedule is based on a complete and sufficient application being submitted in July 2005, and on the review being completed in accordance with the NRC's established license renewal review schedule.

In summary, the licensee has demonstrated that application of the subject regulation is not necessary to achieve the underlying purpose of the rule, thus meeting the criterion specified in 10 CFR 50.12(a)(2)(ii). Accordingly, the NRC staff agrees that special circumstances are present to justify the requested exemption.

It should be noted, though, that AmerGen requested that the exemption be issued now, to become effective only if circumstances were such that the NRC staff has not issued the renewed license for OCNGS 6 months prior to expiration of its existing operating license. Among the key matters central to resolution of issues associated with renewal of the operating license and also to the application of the ''timely renewal'' doctrine is the submission of a sufficient application. Completing the license renewal review process on schedule is, of course, dependent on licensee cooperation in meeting established schedules for submittal of any additional information required by the NRC, and the resolution of all issues demonstrating that issuance of a renewed license is warranted.

Therefore, the exemption is contingent upon the following conditions being met: (1) On or before July 29, 2005, AmerGen must submit a sufficient license renewal application for OCNGS which the NRC staff finds acceptable for docketing in accordance with 10 CFR 2.101 and the requirements of 10 CFR Part 54; (2) to ensure timely completion of the review process, AmerGen must provide any requested information as necessary to support the completion of the NRC staff's safety and environmental reviews in accordance with the review schedule issued by the NRC.

The NRC does not specifically condition the exemption subject to issuance of a draft license renewal SE and associated draft SEIS, despite the licensee's proposal to do so inasmuch as ''timely renewal'' requires only that the licensee submit a sufficient license renewal application in accordance with the agency's rules, in order for the existing license not to expire until there is a final agency determination. Of course, pending final action on the license renewal application, the NRC will continue to conduct all regulatory activities associated with licensing, inspection, and oversight, and will take whatever action may be necessary to ensure adequate protection of the public health and safety. The existence of this exemption does not affect NRC's authority, applicable to all licenses, to modify, suspend, or revoke a license for cause, such as a serious safety concern.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not endanger life or property or common defense and security, and is, otherwise, in the public interest. In addition, special circumstances exist to justify the proposed exemption. Therefore, the Commission hereby grants the licensee an exemption from the requirement of 10 CFR 2.109(b) for OCNGS. Specifically, this exemption will allow the submittal of the OCNGS license renewal application with less than 5 years remaining prior to expiration of the operating license while maintaining the protection of the timely renewal provision in 10 CFR 2.109(b), subject to the two conditions set forth above.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (69 FR 76795).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 22nd day of December 2004.

For the Nuclear Regulatory Commission.

Ledyard B. Marsh,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–28456 Filed 12–28–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2

[Docket Nos. 50–317 and 50–318]

Notice of Consideration of Issuance of Amendments to Renewed Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Renewed Facility Operating Licenses No. DPR–53 and No. DPR–69, issued to Calvert Cliffs Nuclear Power Plant, Inc. (the licensee), for operation of the Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, located in Lusby, MD.

The proposed amendments would add references to the list of approved core operating limits analytical methods in Technical Specification 5.6.5.b for Calvert Cliffs Unit Nos. 1 and 2.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involved a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involved a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of not significant hazards consideration, which is presented below:

1. Operation of the facility in accordance with the proposed amendment[s] would not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed amendment[s] adds references to Technical Specification 5.6.5.b. This Technical Specification lists methods that are used to determine core operating limits. These proposed additional references will allow the use of the Westinghouse nuclear physics codes and a burnable neutron absorber material at Calvert Cliffs Nuclear Power Plant.

The proposed additional references will allow the use of the Westinghouse nuclear physics codes PARAGON, PHOENIX–P, and ANC. These Westinghouse codes will be used for the design of reload cores and for safety evaluation of reload cores. Benchmarking has shown that results from these nuclear physics codes are essentially the same as those obtained from the current DIT/ROCS code systems. These codes will not increase the probability or consequences of an accident because plant systems will not be operated outside of design limits, no different equipment will be operated, and system interfaces will not change.

The use of these computer codes will not increase the consequences of an accident because Limiting Conditions for Operation (LCOs) will continue to restrict operation to within the regions that provides acceptable results, and Reactor Protective System (RPS) trip setpoints will restrict plant transients so that the consequences of accidents will be acceptable. Also, the consequences of the accidents will be calculated using NRC accepted methodologies.

These proposed additional references to Technical Specification 5.6.5.b will allow the use of the burnable neutron absorber material Zirconium Diboride. Zirconium Diboride absorbs neutrons, which reduces the thermal flux and power in the region with the Zirconium Diboride. Neutron absorption by Zirconium Diboride produces helium gas that is released into the fuel rod plenum. The effect of this helium production is taken into account in the fuel design and safety evaluations using codes reviewed and approved by the Nuclear Regulatory Commission.

Implementation of Zirconium Diboride may result in the peak most positive moderator temperature coefficient occurring after beginning of cycle. The core burnup characteristic is well understood as a result of extensive industry experience. Positive moderator temperature coefficient at the beginning of cycle is also within operational experience at Calvert Cliffs and as such, do not represent a significant change in the operation of the plant.

The proposed additional Technical Specification references are not accident initiators. The assumed accident initiators are not changed by the introduction of proposed additional Technical Specification references. Therefore, operation of the facility in accordance with the proposed amendment[s] will not involve a significant increase in the probability of an accident previously evaluated.

The use of the proposed methods will not significantly impact the fission product inventory and transport assumptions in the current licensing basis analyses. Therefore, the radiological consequences of an accident previously evaluated will not increase.

The use of the proposed methods will not increase the consequences of an accident because Limiting Conditions for Operation will continue to restrict operation to within the regions that provide acceptable results, and Reactor Protective system trip setpoints will restrict plant transients so that the consequences of accidents will not exceed the safety analysis acceptance criteria.

Therefore, the proposed Technical Specification changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Operation of the facility in accordance with the proposed amendment[s] would not create the possibility of a new or different kind of accident from any accident previously evaluated.

These proposed additional references will allow the use of the Westinghouse nuclear physics codes PARAGON, PHOENIX-P, and ANC. These codes will be used to confirm the values of selected cycle-specific reactor physics parameter limits from the Technical Specifications and the Core Operating Limits Report. These codes will not change the physical plant or the modes of operation. Benchmaking has shown that results from these codes are essentially the same as those optioned from the current DIT/ROCS code package. The plant systems will not be operated outside of design limits, no different equipment will be operated, and system interfaces will not change. This code package will not create a new or different accident from those previously evaluated.

The proposed amendments also add the Zirconium Diboride burnable absorber topical report to the Technical Specification list of the approved topical reports used to generate the values in the Core Operating Limits Report. With this burnable absorber, the plant systems will not operate outside of design limits, no different equipment will be operated, and system interfaces will not change. This burnable absorber will not create a new or different accident from those previously evaluated.

Therefore, operation of the facility in accordance with the proposed amendment[s] would not create the possibility of a new or different kind of accident from any previously evaluated.

3. Operation of the facility in accordance with the proposed amendment[s] would not involve a significant reduction in a margin of safety.

Safety limits ensure that specified acceptable fuel design limits are not exceeded during steady state operation, normal operational transients, and anticipated operational occurrences. All fuel limits and design criteria will be met based on the approved methodologies defined in the topical reports. The RPS in combination with all LCOs, will continue to prevent any anticipated combination of transient conditions for Reactor Coolant System temperature, pressure, and thermal power level that would result in a violation of the safety limits.

The reload safety analyses determine the LCOs settings and RPS setpoints that establish the initial conditions and trip setpoints. These conditions and setpoints ensure that the Design Basis Events (postulated accident and anticipated operational occurrences) analyzed in the Updated Final Safety Analysis Report produced acceptable results.

The proposed amendment[s] add references to Technical Specification 5.6.5.b. This Technical Specification lists methods that are used to determine core operating

limits. These proposed additional references will allow the use of the Westinghouse computer codes, PARAGON, PHOENIX-P, and ANC, and a burnable neutron absorber material Zirconium Diboride at Calvert Cliffs Nuclear Power Plant. These references were previously reviewed and approved by [the] Nuclear Regulatory Commission.

Therefore, the proposed changes will not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendments before expiration of the 60-day period provided that its final determination is that the amendments involve no significant hazards consideration. In addition, the Commission may issue the amendments prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendments to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceedings, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petition's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceedings; and (4) the possible effect of any decision or order which may be entered in the proceedings on the requestor/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceedings.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the basis for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendments under consideration. The contention must be one which, if prove, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendments and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendments. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendments.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the

Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) e-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing an petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* A copy of the request for hearing an petition for leave to intervene should also be sent to James M. Petro, Jr., Esquire, Counsel, Constellation Energy Group, Inc., 750 East Pratt Street, 5th floor, Baltimore, MD 21202, attorney for the licensee.

For further details with request to this action, see the application for amendment dated July 15, 2004, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* (Note: Public access to ADAMS has been temporarily suspended so that security reviews of publicly available documents may be performed and potentially sensitive information removed. Please check the NRC Web site for updates of the resumption of ADAMS access.)

Dated at Rockville, Maryland, this 21st day of December, 2004.

For the Nuclear Regulatory Commission,

Richard V. Guzman,

Project Manager, Section 1, Project Directorate 1, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–28457 Filed 12–28–04; 8:45 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–7004]

Notice of Public Scoping Meeting Regarding the Proposed USEC American Centrifuge Plant

AGENCY: United States Nuclear Regulatory Commission (NRC).

ACTION: Meeting notice.

SUMMARY: USEC Incorporated (USEC) submitted a license application to the NRC on August 23, 2004, proposing the construction, operation and future decommissioning of the American Centrifuge Plant (ACP) gas centrifuge uranium enrichment facility near Piketon, OH. The NRC previously announced its intent to prepare an Environmental Impact Statement (EIS) on October 15, 2004, (69 FR 61268). This notice is to notify the public and interested parties of a public meeting to discuss to the NRC's environmental review of the proposed ACP.

DATES: The public scoping process required by the National Environmental Policy Act (NEPA) will continue until February 1, 2005. Written comments submitted by mail should be postmarked by that date to ensure full consideration. Comments mailed after that date will be considered to the extent possible.

The NRC will conduct a public scoping meeting to assist in defining the appropriate scope of the EIS, including the significant environmental issues to be addressed. The meeting date, times and location are listed below:

Meeting Date: January 18, 2005.

Meeting Location: Zahns Corner Middle School, 2379 Schuster Road, Piketon, Ohio 45661.

Scoping Meeting: 7 p.m. to 9:45 p.m.

Members of the NRC staff will be available for informal discussions with members of the public from 6 p.m. to 7 p.m. The formal meeting and associated NRC presentation begins at 7 p.m. For planning purposes, those who wish to present oral comments at the meeting are encouraged to pre-register by contacting Ron Linton of the NRC by telephone at 1–800–368–5642, Extension 7777, or by e-mail to *rcl1@nrc.gov* no later than January 6, 2005. Interested persons may also register to speak at the meeting.

ADDRESSES: Members of the public and interested parties are invited and encouraged to submit comments to the Chief, Rules Review and Directives Branch, Mail Stop T6-D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The NRC encourages comments to be submitted electronically to *nrcrep@nrc.gov.* Please refer to Docket No. 70–7004 when submitting comments.

FOR FURTHER INFORMATION CONTACT: For general or technical information associated with the license review of the USEC application, please contact: Yawar Faraz at (301) 415–8113. For general information on the NRC NEPA process, or the environmental review process related to the USEC application, please contact: Matthew Blevins at (301) 415–7684.

SUPPLEMENTARY INFORMATION:

1.0 Background

USEC submitted a license application for a gas centrifuge uranium enrichment facility, known as the American Centrifuge Plant (ACP), to the NRC on August 23, 2004. The NRC environmental review will evaluate the potential environmental impacts associated with the proposed ACP in parallel with the NRC safety review of the license application. The environmental review will be documented in draft and final Environmental Impact Statements in accordance with NEPA and NRC NEPA implementing regulations at 10 CFR Part 51.

2.0 USEC Enrichment Facility

If licensed, the proposed ACP would enrich uranium for use in manufacturing commercial nuclear fuel for use in power reactors. Feed material would be natural (not enriched) uranium in the form of uranium hexafluoride (UF_6). USEC proposes to use gas centrifuge technology to enrich isotope uranium-235 in the uranium hexafluoride up to 10 percent. The centrifuge would operate at below atomospheric pressure. The enriched UF_6 would be transported to a fuel fabrication facility. The depleted UF_6 would be stored on site until a disposition strategy (either re-use or disposal) is carried out by USEC.

Initially, the licensed capacity of the plant would be up to 3.5 million separative work units (SWU) [SWU relates to a measure of the work used to enrich uranium]. USEC has requested that the NRC environmental review examine the impacts of an enrichment

plant with a 7 million SWU capacity to bound potential future expansions. Future expansion beyond 3.5 million SWU would still have to be approved by the NRC via a separate license amendment.

3.0 Alternatives To Be Evaluated

No action—The no-action alternative would be to not build the proposed ACP. Under this alternative the NRC would not approve the license application. This serves as a baseline for comparison.

Proposed action—The proposed action is the construction and operation of a gas centrifuge uranium enrichment facility located near Piketon, OH. Implementation of the proposed action would require the issuance of an NRC license under the provisions of 10 CFR Parts 30, 40 and 70.

Other alternatives not listed here may be identified through the scoping process.

4.0 Environmental Impact Areas To Be Analyzed

The following resource areas have been tentatively identified for analysis in the EIS:

—*Public and Occupational Health:* potential public and occupational consequences from construction, routine operation, transportation, and credible accident scenarios (including natural events);
—*Waste Management:* types of wastes expected to be generated, handled, and stored;
—*Land Use:* plans, policies and controls;
—*Transportation:* transportation modes, routes, quantities, and risk estimates;
—*Geology and Soils:* physical geography, topography, geology and soil characteristics;
—*Water Resources:* surface and groundwater hydrology, water use and quality, and the potential for degradation;
—*Ecology:* wetlands, aquatic, terrestrial, economically and recreationally important species, and threatened and endangered species;
—*Air Quality:* meteorological conditions, ambient background, pollutant sources, and the potential for degradation;
—*Noise:* ambient, sources, and sensitive receptors;
—*Historical and Cultural Resources:* historical, archaeological, and traditional cultural resources
—*Visual and Scenic Resources:* landscape characteristics, manmade features and viewshed;
—*Socioeconomics:* demography, economic base, labor pool, housing, transportation, utilities, public services/facilities, education, recreation, and cultural resources;
—*Environmental Justice:* potential disproportionately high and adverse impacts to minority and low-income populations; and
—*Cumulative Effects:* impacts from past, present and reasonably foreseeable actions at and near the site.

The examples under each resource area are not intended to be all inclusive, nor is this list an indication that environmental impacts will occur. The list is presented to facilitate comments on the scope of the EIS. Additions to, or deletions from, this list may occur as a result of the public scoping process.

5.0 Scoping Meetings

This notice is to encourage public involvement in the EIS process and to solicit public comments on the proposed scope and content of the EIS. The NRC will hold a public scoping meeting in Piketon, OH on January 18, 2005 to solicit both oral and written comments from interested parties.

Scoping is an early and open process designed to determine the range of actions, alternatives, and potential impacts to be considered in the EIS, and to identify the significant issues related to the proposed action. Scoping is intended to solicit input from the public and other agencies so that the analysis can be more clearly focused on issues of genuine concern. The principal goals of the scoping process are to:

—Identify public concerns;
—Ensure that concerns are identified early and are properly studied;
—Identify alternatives that will be examined;
—Identify significant issues that need to be analyzed; and
—Eliminate unimportant issues.

The scoping meetings will begin with NRC staff providing a description of NRC's role and mission followed by a brief overview of NRC's environmental review process and goals of the scoping meeting. The bulk of the meeting will be allotted for attendees to make oral comments.

6.0 Scoping Comments

Written comments should be mailed to the address listed above in the **ADDRESSES** section.

7.0 The NEPA Process

The EIS for the proposed ACP will be prepared according to NEPA and NRC NEPA implementing regulations at 10 CFR Part 51.

After the scoping process is complete, the NRC will prepare a draft EIS. The draft EIS is scheduled to be published in July 2005. A 45-day comment period on the draft EIS is planned, and public meetings to receive comments will be held approximately three weeks after distribution of the draft EIS. Availability of the draft EIS, the dates of the public comment period, and information about the public meetings will be announced in the **Federal Register**, on NRC's USEC web page, and in the local news media when the draft EIS is published. The final EIS is expected to be published in March 2006 that will incorporate public comments received on the draft EIS.

Dated at Rockville, MD, this 21st day of December, 2004.

For the Nuclear Regulatory Commission.

B. Jennifer Davis,

Chief, Environmental and Low-Level Waste Section, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 04–28455 Filed 12–28–04; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 50925]

Securities Exchange Act of 1934; Order Regarding Alternative Net Capital Computation for Merrill Lynch, Pierce, Fenner & Smith Incorporated, Which Has Elected to be Supervised on a Consolidated Basis

December 23, 2004.

Merrill Lynch, Pierce, Fenner & Smith Incorporated (''MLPF&S''), a broker-dealer registered with the Securities and Exchange Commission (''Commission''), and its ultimate holding company, Merrill Lynch & Co., Inc., (''ML & Co.''), have indicated their desire to be supervised by the Commission as a consolidated supervised entity (''CSE''). MLPF&S, therefore, has submitted an application to the Commission for authorization to use the alternative method of computing net capital contained in Appendix E to Rule 15c3–1 (17 CFR 240.15c3–1e) to the Securities Exchange Act of 1934 (''Exchange Act'').

Based on a review of the application that MLPF&S submitted, the Commission has determined that the application meets the requirements of Appendix E. The Commission also has determined that ML & Co. is in compliance with the terms of its undertakings, as provided to the Commission under Appendix E. The Commission, therefore, finds that approval of the application is necessary or appropriate in the public interest or for the protection of investors.

Accordingly,

It is ordered under paragraph (a)(7) of Rule 15c3–1 (17 CFR 240.15c3–1) to the Exchange Act, that MLPF&S may calculate net capital using the market risk standards of Appendix E to compute a deduction for market risk on some or all of its positions, instead of the provisions of paragraphs (c)(2)(vi) and (c)(2)(vii) of Rule 15c3–1, and using the credit risk standards of Appendix E to compute a deduction for credit risk on certain credit exposures arising from transactions in derivatives instruments, instead of the provision of paragraph (c)(2)(iv) of Rule 15c3–1.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3875 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50852; File No. SR–Amex–2004–94]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Changes in the Exchange's Options Rules To Reflect the Exemption of Standardized Options from the Securities Act of 1933 and Provisions of the Securities Exchange Act of 1934

December 14, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 24, 2004, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The proposed rule change has been filed by Amex as a ''non-controversial'' rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Amex proposes to amend its rules to reflect the Commission's recent adoption of Rule 238 under the Securities Act of 1933 (the ''Securities Act'')[5] and Rule 12a–9 under the Act,[6] which together exempt standardized options issued by a registered clearing agency and traded on a registered national securities exchange or on an a registered national securities association from most of the provisions of the Securities Act and from the registration requirements of Section 12(a) of the Act.[7] Specifically, Amex proposes to remove the word ''prospectus'' from Amex Rules 921 and 926. The text of the proposed rule change appears below. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Rule 921. Opening of Accounts

(a)–(g) No change.

Commentary .01–.03 No change.

.04 For purposes of Rule 921 (Opening of Accounts), Rule 922 (Supervision of Accounts) and Rule 926 (Delivery of Options Disclosure Document [and Prospectus]), the term writing uncovered short option positions shall include orders involving combinations and any transactions which involve naked writing.

Rule 926. Delivery of Options Disclosure Document [and Prospectus]

(a) No change.

[(b) Prospectus. Every member and member organization shall deliver a current Prospectus of The Options Clearing Corporation to each customer upon request. The term ''current Prospectus of The Options Clearing Corporation'' means the prospectus portion of Form S–20 which then meets the delivery requirements of Rule 153b of the Securities Act of 1933.]

[(c)] *(b)* The written description of risks required by Rule 921(g) shall be in a format prescribed by the Exchange or in format developed by the member organization, provided it contains substantially similar information as the prescribed Exchange format and has received prior written approval of the Exchange.

Commentary .01–.02 No change.

.03 The Exchange will advise members and member organizations when [a Prospectus or] *the* Options Disclosure Document is amended.

* * * * *

[5] 17 CFR 230.238.

[6] 17 CFR 240.12a–9.

[7] 15 U.S.C. 78*l*(a).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On January 2, 2003, final Commission Rule 238 under the Securities Act[8] and Rule 12a–9 under the Act[9] became effective which exempt standardized options issued by a registered clearing agency and traded on a registered national securities exchange or a registered national securities association from all provisions of the Securities Act, other than the Section 17 antifraud provision, and from the registration requirements of Section 12(a) of the Act.[10]

The Amex is proposing to revise its rules that contain references to a prospectus in connection with options trading because, as a registered national securities exchange, Amex represents that all of its listed options fall within the scope of the exemptions provided by the Commission's rules.

2. Statutory Basis

The Exchange asserts that because the proposed rule change reflects final rules of the Commission, it is therefore consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5) of the Act,[12] in particular, in that it is designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Amex does not believe that the proposed rule change will impose any

[8] 17 CFR 230.238.

[9] 17 CFR 240.12a–9.

[10] 15 U.S.C. 78*l*. *See also* Securities Act Release No. 8171 and Securities Exchange Act Release No. 47082 (December 23, 2002), 68 FR 188 (January 2, 2003).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become immediately effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder [14] because: (i) It does not significantly affect the protection of investors or the public interest; (ii) it does not impose any significant burden on competition; and (iii) by its terms, it does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the Exchange provided the Commission 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.

Although Rule 19b–4(f)(6) under the Act [15] requires that an Exchange submit a notice of its intent to file at least five business days prior to the filing date, the Commission waived this requirement at the Exchange's request. The Exchange has also requested that the Commission waive the 30-day operative delay. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Waiver of the operative delay will allow the Exchange to expeditiously update its options rules to accurately reflect the disclosure requirements with respect to providing prospectuses. For these reasons, the Commission designates the proposal to be operative upon filing with the Commission.[16]

At any time within sixty (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 proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–Amex–2004–94 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Amex–2004–94. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2004–94 and should be submitted by January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3868 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6).

[16] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f). 17 17 CFR 200.30–3(a)(12).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50902; File No. SR–Amex–2004–103]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise Amex Rule 903C To Permit the Listing of Long-Term Index Options Series With a Duration of Up to Sixty Months Until Expiration

December 21, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 14, 2004, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Amex. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders it effective upon filing with the Commission.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Amex seeks to revise Amex Rule 903C to permit the listing of long-term index options series (''LEAPS'') with a duration of up to 60 months (five years) until expiration. The text of the proposed rule change is available at the Amex and at the Commission.

[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).

[5] The Amex provided the Commission with written notice of its intent to file the proposed rule change on December 3, 2004. Amex asked the Commission to waive the 30-day operative delay. *See* Section 19(b)(3)(A) of the Act, and Rule 19b–4(f)(6)(iii) thereunder. 15 U.S.C. 78s(b)(1), 17 CFR 240.19b–4(f)(6)(iii).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to permit the Exchange to list index LEAPS with a duration of up to 60 months (five years) until expiration.[6] Presently, the Exchange has authority pursuant to Amex Rule 903C to list index LEAPS that expire up to 36 months from the time they are listed. The Exchange represents that there has been increasing member firm and customer interest in longer term instruments. The Exchange, therefore, is proposing to amend Amex Rule 903C to permit the listing of index options with up to 60 months until expiration.

Currently, institutional customers use index options to hedge the risks associated with holding diversified equity portfolios.[7] Allowing investors to lock in their hedges with longer-term index LEAPS will permit institutions to protect better their portfolios from adverse market moves.[8] The Amex believes that index LEAPS with up to five years until expiration will allow this protection at a known and limited cost.[9] The proposal will provide institutions with an additional securities product with which to hedge their portfolios as an alternative to hedging with futures positions or off-exchange customized index options.[10] The Amex notes that the Chicago Board Options Exchange, Inc. (''CBOE'') increased the possible duration of LEAPS to 60 months (five years) until expiration in 1995.[11]

2. Statutory Basis

The Amex believes that the proposed rule change is consistent with Section 6 of the Act[12] in general, and furthers the objectives of Section 6(b)(5) of the Act[13] in particular, in that it is designed to perfect the mechanisms of a free and open market and the national market system, protect investors and the public interest, and promote just and equitable principles of trade.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received by the Exchange on this proposal.

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, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15] 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.

The Amex has asked that the Commission waive the 30-day operative delay contained in Rule 19b–4(f)(6)(iii) under the Act.[16] The Commission believes such waiver is consistent with the protection of investors and the public interest, for it will allow the Amex to compete without unnecessary delay with other market entities that offer LEAPS with a duration of up to 60 months until expiration. For these reasons, the Commission designates the proposal to be operative upon filing with the Commission.[17]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/ sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2004–103 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Amex–2004–103. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–

[6] The proposal would permit five-year LEAPS on both broad-based and narrow-based indexes on which LEAPS have been approved for trading on the Amex.

[7] *See* Securities Exchange Act Release No. 35617 (April 17, 1995), 60 FR 20132 (April 24, 1995) (order approving SR–CBOE–95–02).

[8] *See* Securities Exchange Act Release No. 24853 (August 27, 1987), 52 FR 33486 (September 3, 1987) (order approving SR–CBOE–87–24).

[9] *Id.*

[10] *Id.*

[11] *See* CBOE Rule 24.9(b).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] For purposes only of waiving the 30-day pre-operative period, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

2004–103 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3879 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50921; File No. SR–BSE–2004–53]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment 1 Thereto by the Boston Stock Exchange, Inc., Regarding Short Sales

December 22, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 3, 2004, the Boston Stock Exchange, Inc., (''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in items I, II, and III below, which items have been prepared by the self-regulatory organization. On December 13, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was filed by the Exchange as a non-controversial filing, under Rule 19b–4(f)(6) of the Act.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is seeking to make minor modifications to its rules which relate to short sales, in order to comply with the requirmenets sent forth in the Commission's recent release and final rule, Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004) (''SHO Release'') and accompanying orders, Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (August 6, 2004) and Securities Exchange Act Release No. 50747 (November 29, 2004), 69 FR 70480 (December 6, 2004) (''Pilot Orders''). The text of the proposed rule change is available for viewing on the Exchange's Web site, *http://www.bostonstock.com,* the Commission's Web site, *http://www.sec.gov/rules/sro.shtml,* and at the Exchange and 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 self-regulatory organization 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 self-regulatory organization 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 is seeking to make minor modifications to its rules that relate to short sales, in order to comply with the requirements set forth in the Commission's SHO Release and accompanying Pilot Orders.

The Exchange need only make minor modifications to its current rules in order to comply with the requirements set forth in the Commission's recent SHO Release. The first Exchange rule requiring minor modification is Rules of the Board of Governors of the Boston Stock Exchange (''BSE Rules'' or ''Rules''), Chapter II, *Dealings on the Exchange,* Section 16, *Short Sales.* Section 16 is modeled after and is similar to the language appearing in 17 CFR 240.10a–1, prior to the SHO Release and the changes resulting therefrom. This proposed rule modifies the Exchange's rule so that it continues to be modeled after and is consistent with the Commission's rules and regulations regarding short sales.

The second Exchange rule requiring minor modification is BSE Rule Chapter II, *Dealings on the Exchange,* Section 39, *Periodic Reports.* Section 39 in the Supplementary Material uses a definition which is no longer applicable under the SHO Release. There is also a reference to a clause which no longer exists in the Commission's rule. The proposed rule modifies the language and removed the clause to be consistent with the Commission's rules.

The third Exchange rule requiring minor modification is BSE Rule Chapter II, *Dealings on the Exchange,* Section 40, *Limit Order Display Rule.* In order for the BSE Rule to be consistent with the SHO Release and the Pilot Orders, the proposed rule adds the following sentence: ''However, a customer short sale limit should be displayed where the order is eligible for execution if the application of a price test has been suspended by Commission rule, motion or order.''

The fourth Exchange rule requiring minor modification is BSE Rule Chapter XXXV, *Trading in Nasdaq Securities,* Section 27, *Short Sales.* In order for the BSE Rule to be consistent with the SHO Release and the Pilot Orders, the proposed rule adds the following sentence. ''The provisions of this rule shall not prohibit any transaction or transactions which the Commission, upon written request or upon its own motion or order, exempts, either unconditionally or on specified terms and conditions.''

As stated above, the changes are required so that the Exchange's rules are consistent with the SHO Release and the Pilot Orders. Accordingly, the Exchange is proposing the immediate effectiveness of its proposal.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act, in general, and section 6(b)(5) of the Act,[5] in particular, in that it is designed 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 is not designed to permit unfair discrimination between customers, brokers, or dealers, or to regulate by virtue of any authority matters not related to the administration 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 not necessary or appropriate in furtherance of the purposes of the Act.

[18] 18 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Amendment No. 1 to the proposed rule change (December 13, 2004). Amendment No. 1 replaced the Exchange's original filing in its entirety.

[4] 17 CFR 240.19b–4(f)(6). For purposes of determining the effective date and calculating the sixty-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on December 13, 2004, the date the Exchange filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[5] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has been filed by the Exchange pursuant to section 19(b)(3)(A) of the Act[6] and subparagraph (f)(6) of Rule 19b–4 thereunder.[7] The Exchange has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. Therefore, the foregoing rule change, as amended, has become effective pursuant to section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] The Exchange requests that the Commission waive the 30-day pre-operative requirements contained in Rule 19b–4(f)(6)(iii).[10] The Exchange believes good cause exists to grant such waiver because of the importance of short sale regulation to the protection of investors. The Exchange will implement this rule change immediately.

The Commission believes that waiving the 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

At any time within 60 days of the filing of a rule change pursuant to section 19(b)(3)(A) of the Act, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BSE–2004–53 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–BSE–2004–53. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2004–53 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28477 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–M

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6).

[8] *See supra* note 6.

[9] *See supra* note 7.

[10] Under subparagraph (f)(6)(iii) of Rule 19b–4, the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. 17 CFR 240.19b–4(f)(6)(iii).

[11] 17 FR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50914; File No. SR–BSE–2004–56]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Interpretation of a Boston Options Exchange Rule Relating to Directed Orders

December 22, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 7, 2004, the Boston Stock Exchange (''BSE'' 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 Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(i) of the Act,[3] and Rule 19b–4(f)(1) 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 from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the rules of the Boston Options Exchange (''BOX'') to clarify the application of BOX's rules relating to Directed Orders. The text of the proposed rule change is available at the Office of the Secretary, the BSE, 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, the proposed rule change and discussed any comments it received on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to clarify that although a BOX Market Maker (as defined in Chapter I, Section 1(32) of the BOX rules) that receives a Directed Order (as defined in Chapter I, Section 1(21) of the BOX rules) has three seconds to submit the Directed Order to the PIP process (see Chapter V, Section 18 of the BOX rules) or send the Directed Order to the BOX Book before BOX automatically releases the Directed order to the BOX Book (see Chapter VI, Section 5(c) of the BOX rules), Market Makers are expected to act upon Directed Orders as immediately as practicable, which must not exceed three seconds.

BOX has found that in practice, Market Makers act upon Directed Orders in less than one second. At this time, BOX does not wish to change how BOX's trading system is programmed because there could be circumstances where it would be appropriate for a Market Maker to take more time to act on a Directed Order. Instead, BSE wishes to put Market Makers on notice that they are expected to act upon Directed Orders as immediately as practicable, which must not exceed three seconds.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[5] in general, and Section 6(b)(5) of the Act,[6] in particular, in that the proposed rule change is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition 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

The Exchange has neither solicited nor received comments on 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)(i) of the Act[7] and Rule 19b–4(f)(1) thereunder,[8] because the proposed rule change constitutes a stated policy practice, or interpretation with respect to the meaning, administration, or enforcement of an existing BOX rule. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investor, or would otherwise further the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec. gov.* Please include File Number SR–BSE–2004–56 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–BSE–2004–56. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the BSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2004–56 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28482 Filed 12–28–04; 8:45 am]

BILLING CODE 8010—01—M

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[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. 34–50904; File No. SR–BSE–2004–57]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Execution Guarantee Rules

December 21, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 7, 2004, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules regarding execution guarantees.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The text of the proposed rule change appears below.[3] Additions are in italics; deletions are in brackets.

* * * * *

RULES OF THE BOSTON STOCK EXCHANGE

Chapter II

Dealings on the Exchange

Sec. 33 Execution Guarantee

(a) The Execution Guarantee shall be available to each member firm in all issues traded through the Intermarket Trading System (ITS) and registered to a specialist on the Exchange. Specialists must accept and guarantee execution on all agency market and marketable limit orders [from 100 up to and including 1,299 shares] *on the basis of the NBBO bid on a sell order or the NBBO offer on a buy order at the time an order is received. Sell orders will be satisfied up to the size of the lesser of the NBBO bid or 1299 shares; buy orders up to the lesser of the NBBO offer or 1299 shares. No portion of an order larger than 1299 shares is subject to this public agency guarantee.*

(b) Subject to the requirements of the short sale rule, all agency market orders must be filled on the basis of the Consolidated Quotation System best bid or better on a sell order, or the Consolidated Quotation System best offer or better on a buy order.

(c) All agency limit orders will be filled if one of the following conditions occur:

(1) the bid or offering at the limit price has been exhausted in the primary market as defined in the CTA Plan;

(2) there has been a price penetration of the limit in the primary market; or

(3) the issue is trading on the primary market at the limit price unless it can be demonstrated that such order would not have been executed if it had been transmitted to the primary market, or the broker and specialist agree to a specific volume-related or other criteria requiring a fill.

* * * Interpretations and Policies:

.01—Pre-opening orders must be accepted and filled at the primary market opening[, provided however that on such orders the specialist shall be obligated to accept orders up to 1299 shares on both the buy side and the sell side].

.02—In trading halt situations occurring on the primary market, orders will be executed based on the reopening price.

.03—Simultaneous orders must be executed pursuant to the provisions of the Rule up to an accumulated size equal to the prevailing NBBO displayed size on receipt of the order.

.04—For purposes of limit order execution, size will be governed by that displayed on the Consolidated Quotation System (''CQS'').

.05—If the displayed quotations of the Consolidated Quotation System can be demonstrated to be in error or a market center is experiencing system problems which result in an invalid quotation in CQS, an adjustment in execution price may be allowed as prescribed in .06.

.06—In unusual trading situations or in the event of an equipment failure, a specialist or floor broker may seek relief from the requirements of this rule from two out of three Floor Officials (floor members of the Market Performance Committee or Board of Governors).

Chapter XXXIII

BEACON

Section 5 Automatic Execution Parameters

[a) All market and marketable limit orders in ITS issues up to and including 1,299 shares will be eligible for automatic execution. All automatic execution parameters will be updated on a regular basis and published in BEACON. Specialists may provide larger automatic execution parameters than the 1299 minimum requirement. Parameters in excess of these minimum requirements will be pursuant to specific authorization by a Specialist with a member organization, and will not be published in BEACON.

(b) A 599 automatic execution parameter may be requested for a particular stock for good cause shown by submitting a statement to the Market Performance Committee setting forth the specific conditions and/or reasons that render participation at the 1299 parameter injurious.

(c) The BEACON reference price for automatic execution is the consolidated best bid or offer (''BBO'') price. All market and marketable limit orders will be filled in their entirety (up to the current automatic execution parameter) at the reference price, regardless of the displayed size of the BBO.

(d) Market orders that would be executed outside the primary market price range for the day should be ''stopped'' and will be executed at the BEACON reference price, or better as subsequent trades occur on the Consolidated Tape.]

Automatic execution size parameters will be set in BEACON according to specialist specifications, by issue. All market or marketable limit orders of a size equal to or less than the automatic execution parameters will be automatically executed in their entirety, at the price of the NBBO.

Orders that are larger than the size of the automatic execution parameters, will be automatically executed up to the size of the automatic execution parameter, at the price of the NBBO. The remainder of any order which is not automatically executed, i.e. that portion of the order which is greater than the size of the automatic execution parameter, will be guaranteed professional handling by the specialist according to the specialist's fiduciary duties of best execution.

* * * * *

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 BSE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend two sections of the Rules of the Board of Governors of the Boston Stock Exchange (''BSE Rules'') relating to the guaranteed execution of agency market and marketable limit orders (''Execution Guarantee'').

In Chapter II, the Exchange sets forth rules related to the Execution Guarantee (''Execution Guarantee Rules''). Currently, the Execution Guarantee is that Exchange specialists must accept and guarantee execution of all agency market and marketable limit orders from 100 up to and including 1,299 shares, at the price of the National Best Bid or Offer (''NBBO''). The Exchange is proposing to amend its Execution Guarantee Rules so that specialists would be obligated to fill agency market and marketable limit orders at the price of the NBBO, but at a size of the lesser

[3] The Commission notes that a technical change was made to the proposed rule text of Sec. 33(a) submitted by the BSE to correct a typographical error. Specifically, in the rule text proposed to be added to this Section, the word ''a'' was changed to ''at''. Telephone conversation between John Boese, Vice President and Chief Regulatory Officer, BSE, and Jennifer Colihan, Special Counsel, Division of Market Regulation, Commission, on December 20, 2004.

of the displayed size of the NBBO or 1,299 shares. The Exchange represents that the proposed rule change would be consistent with the rules of other exchanges in this area, specifically the Chicago Stock Exchange (Article XX, Rule 37) and the National Stock Exchange (Rule 11.9 (n)).

Although the BSE's proposal is to limit the size of the Execution Guarantee, specialists would still be obligated, under the general principles of best execution, to seek the best execution of their customer orders. This would include the execution of a market order at the size available in the NBBO quotation. For example, if a specialist received a 5,000 share market order and the size reflected in the NBBO was 5,000 shares or greater, the specialist would be obligated to pursue an execution of that order in its entirety, regardless of the BSE's Execution Guarantee Rules.[4]

The Exchange also notes that the average trade size executed on the primary listed markets has drastically reduced in recent years, due to a variety of factors. With the reduction of executed trade size, the size of the NBBO has also greatly reduced, thereby often making it difficult for BSE specialists to find a contra market for trades which they, under current rules, must execute at the NBBO price, for a size up to 1,299 shares, regardless of the size of the posted NBBO. In an era in which average quotation spreads are reducing to the lowest possible difference, the current BSE Execution Guarantee Rules in Chapter II often mean that BSE specialists are forced to absorb a position for which a market no longer exists. Accordingly, the Exchange is seeking to change its Execution Guarantee Rules so that its specialists are not disadvantaged by the requirements of this Rule.

The Exchange is also seeking to change its rules in Chapter XXXIII, BEACON, Section 5, *Automatic Execution Parameters,* regarding Automatic Execution Parameters (''Automatic Execution Rules''), so that the Automatic Execution Rules do not conflict with the proposed changes to the Execution Guarantee Rules. Currently, the Automatic Execution Rules discuss automatic execution parameters in relation to the 1,299 share requirement, and state that all market and marketable limit orders up to and including 1,299 shares will be eligible for automatic execution. The Automatic Execution Rules also discuss the updating and publishing of automatic execution parameters, and permit a specialist to provide automatic execution parameters in excess of the 1,299 share minimum guarantee. Further, they discuss the concept of reference price, defined as the NBBO price, and state that all market and marketable limit orders will be filled in their entirety up to the size of the automatic execution parameter at the reference price, regardless of the size of the NBBO.

To be consistent with the changes proposed to the Execution Guarantee Rules, the Exchange is proposing to replace the current language in Chapter XXXIII, Section 5, in its entirety. The current language of this Section is closely related to the current Execution Guarantee Rules, such as the references to 1,299 share as being the minimum size of the automatic execution parameter. Also, the Exchange believes that the discussion of ''reference price,'' in particular the fact that it is essentially an undefined term within the BSE Rules, could lead to confusion with the proposed changes to the Execution Guarantee Rules discussed above. Therefore, the Exchange is proposing replacing the current language of Chapter XXXIII, Section 5 with language that more accurately reflects the automatic execution of orders on the BSE, in congruence with the proposed changes to the Exchange's Execution Guarantee Rules.

The proposed new language of the Automatic Execution Rules explains that automatic execution parameters are set according to specialist specifications. All market or marketable limit orders of a size equal to or less than the automatic execution parameters will be automatically executed in their entirety at the price of the NBBO. For orders that are larger than the size of the automatic execution parameters, that portion of the order which is in excess of the execution parameter will be guaranteed handling by the specialist in accordance with the specialist's fiduciary duties of best execution, although not necessarily automatic execution, while that portion of the order which would fall within the size of the automatic execution parameter will be automatically executed in BEACON.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act[5] in general, and Section 6(b)(5)of the Act,[6] in particular, in that it is designed 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 is not designed to permit unfair discrimination between customers, brokers, or dealers, or to regulate by virtue of any authority matters not related to the administration 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

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as a non-controversial rule change pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6)[8] thereunder. Consequently, because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing,[9] or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4 thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

[4] If the quote of the BSE specialist is the NBBO, the BSE specialist is obligated by Rule 11Ac1–1(c)(2) under the Act (''Quote Rule'') to execute any order up to the size of his quote. 17 CFR 240.11Ac1–1(c)(2).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(a).

[8] 17 CFR 240.19b–4(f)(6).

[9] The Commission has waived the requirement that the Exchange provide written notice of its intent to file the proposed rule change at least five days prior to the filing date in connection with this filing.

including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BSE–2004–57 on the subject line.

Paper Comments:

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–BSE–2004–57. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method.

The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal offices of the BSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2004–57 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3877 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50920; File No. SR–CBOE–2004–81]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board of Options Exchange, Incorporated Relating to Amending Rule 30.20 To Conform to the Requirements of Regulation SHO

December 22, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act''),[1] notice is hereby given that on December 8, 2004, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend CBOE Rule 30.20 to conform to the requirements of Regulation SHO.[2] The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.[3]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The Commission on July 23, 2004 adopted Regulation SHO (''Reg SHO'') to address short sales of securities and to create uniform rules relating to the short selling of securities.[4] The purpose of this rule is to amend existing Exchange rules relating to short sales to bring them into conformity with the requirements of Reg SHO.

The Exchange proposes to amend Rule 30.20, as described below.

Rule 30.20(a): The Exchange amends this paragraph to require that all orders to sell a security be market either long, short, or short exempt.

Rule 30.20(b): The Exchange amends this paragraph to incorporate a reference to Exchange Act Rule 242.202T.[5]

Rule 30.20(c): The Exchange eliminates the entire text of paragraph (c) in favor of language referencing the Commission's ''Locate and Delivery Requirements for Short Sales.'' As amended, new paragraph (c) provides that no member or member organization shall accept, represent or execute for his or its own account or the account of any other person an order to sell a security subject to the rules in this Chapter unless such member or member organization complies with Exchange Act Rule 242.203.

Rule 30.20.02: The Exchange amends this Interpretation to provide that the terms long, short, and short exempt will have the same meaning as in Exchange Act Rule 242.200.

Rule 30.20.03: The Exchange proposes to delete existing Interpretation .03, which is specific to a product (SuperShares) that the Exchange never traded.

Rule 30.20.04: The Exchange proposes to revise current Interpretation .04 to include new text referencing the Exchange Act Rules governing the requirements for long sales (Exchange Act Rule 242.203(a)) and short sales (Exchange Act Rule 242.203(b)). The Exchange also proposes to clarify that the requirements members currently must satisfy in order to make an affirmative determination for short sales shall continue to be required for documenting compliance with Exchange Act Rule 242.203(b)(1). In this respect, the requirements remain the same.

[1] 15 U.S.C. 78(b)(1).

[2] *See* Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004) (''Adopting Release'').

[3] Exhibit A is available at *http://www.sec.gov/rules/sro.shtml.*

[4] *Id.*

[5] Rule 202T provides a procedure for the Commission to suspend, on a pilot basis, the trading restrictions of the Commission's short sale price test, as well as any short sale price test of any exchange or national securities association, for short sales in such securities as the Commission designates by order as necessary or appropriate in the public interest and consistent with the protection of investors, after giving due consideration to the security's liquidity, volatility, market depth and trading market. Rule 202T makes explicit that no SRO ''shall have a rule that is not in conformity with or conflicts with'' the suspension of a price test for the securities selected for the pilot.

Rule 30.20.05: The Exchange proposes to delete this Interpretation, which is specific to an expired product (S&P 500 Index Bear market Warrants), and replace it with language from Exchange Act Rule 242.203(b)(3) relating to threshold securities.

Rule 30.20.06: The Exchange proposes to adopt this new Interpretation to remind members that even if a security is expected from any short sale price test under any Pilot program (or any order issued pursuant to Exchange Act Rule 242.202T), members or member organizations must still comply with the marking and locate requirements in Exchange Act Rule 242.200 and 203.

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of section 6(b) of the Exchange Act. Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [6] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

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) of the Exchange Act [7] and subparagraph (f)(6) of Exchange Act Rule 19b–4.[8] CBOE has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not significantly burden on competition; and (iii) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. CBOE requests that the Commission waive the 30-day pre-operative delay requirement contained in Rule 19b–4(f)(6)(iii). CBOE believes that good cause exists to grant such waiver because of the importance of short sale regulation to the protection of investors and compliance with Reg SHO.[9]

The Commission believes that waiving the 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change effective and operative immediately.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange 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 Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2004–81 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CBOE–2004–81. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2004–81 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28476 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–M

[6] 15 U.S.C. 78(f)(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] The compliance date for Reg SHO is January 3, 2005. *See* Adopting Release, *supra* note 2. The operative date of the proposed filing is January 3, 2005. *See* CBOE Regulatory Circular RG04–127, December 21, 2004, available at *http://www.cboe.org/Legal/*.

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50915; File No. SR–CBOE–2004–52]

Self-Regulatory Organizations; Order Granting Approval of a Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated to Amend its ''Trigger'' Rule to Permit RAES Orders to Automatically Execute Against Orders Resting on the Exchange's Limit Order Book

December 22, 2004.

On July 30, 2004, the Chicago Board Options Exchange, Incorporated (''CBOE'' 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 relating to the Exchange's AutoQuote Triggered Ebook Execution system (''Trigger''). On September 23, 2004, the Exchange amended the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on November 22, 2004.[4] The Commission received no comments on the proposal. This order approves the proposed rule change.

Trigger allows orders resting in CBOE's electronic book to automatically execute in the limited situation where the bid or offer for a series of options generated by the Exchange's AutoQuote system (or any Exchange approved proprietary quote generation system used in lieu of the Exchange's Autoquote system) crosses or locks the Exchange's best bid or offer for that series as established by a booked order. Currently, Trigger provides for automatic executions of orders resting in the book[5] up to the maximum number of contracts permitted to be entered into RAES for that series (''Trigger Volume''). The trading crowd has the ability, but not the obligation, to execute manually the remaining contracts in the book that exceed the Trigger Volume. Any unexecuted contracts in the booked order in excess of the Trigger Volume remain in the book, and the bid or offer generated by Autoquote is one tick inferior to the price of the booked order, so that the disseminated quote does not cross or lock the Autoquote bid or offer.

The Exchange proposes to amend CBOE Rule 6.8(d)(v) to provide that where contracts remain in the book after an execution (or partial execution), or for any series where Trigger has not yet been implemented, orders in RAES for options of that series may, as determined by the appropriate FPC on a class by class basis, be (1) Automatically executed; or (2) rerouted on the Exchange's Order Routing System to the crowd PAR terminal (or to another location in the event of system problems or contrary firm routing instructions).

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[6] and, in particular, the requirements of section 6(b) of the Act[7] and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with section 6(b)(5) of the Act,[8] because, in the Commission's view, the proposed rule change should help facilitate the execution of incoming RAES orders submitted during the Trigger process by making such orders eligible for automatic execution against the book orders that are crossed or locked by the Exchange's Autoquote system (or any Exchange approved proprietary quote generation system used in lieu of the Exchange's Autoquote system). The Commission notes that the proposed rule change would not change the existing execution process for incoming RAES orders that are submitted prior to a locked or crossed market.[9]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[10] that the proposed rule change (SR–CBOE–2004–52) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28480 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–M

[3] *See* letter from David Doherty, CBOE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 22, 2004, and accompanying Form 19b–4 (''Amendment No. 1''). Amendment No. 1 replaced and superseded the original filing in its entirety.

[4] *See* Securities Exchange Act Release No. 50673 (November 16, 2004), 69 FR 67971.

[5] Such orders are executed against market makers participating in the Exchange's Retail Automated Execution System (''RAES''). CBOE Rule 6.8(d).

[6] 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).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5). Section 6(b)(5) of the Act requires that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.''

[9] These orders would continue to be executed in accordance with the RAES procedures set forth in CBOE Rule 6.8.

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50903; File No. SR–CBOE–2004–84]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Exchange Fees

December 21, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2004, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by CBOE. The proposed rule change has been filed by CBOE as establishing or changing a due, fee, or other charge under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fee Schedule to (i) make certain fee changes, and (ii) adopt a communication review fee. The text of the proposed rule change is available at the Office of the Secretary, CBOE, 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, CBOE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

CBOE proposes to: (i) Amend its Annual FOCUS Report Filing Fee, Firm FOCUS Minimum Monthly Fee, Order Routing System (''ORS'') Order Cancellation Fee and Floor Broker Workstation (''FBW'') Fees; and (ii) adopt a Communication Review Fee. The Exchange also proposes to delete from its Fee Schedule certain fees that it represents are now outdated. The Exchange proposes to amend the following fees:

[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(f)(2).

(i) *Annual FOCUS Report Filing Fee.* CBOE market-makers are required to file annual financial statements with the Exchange pursuant to Rule 17a–5(d) under the Act and CBOE Rule 15.5. Currently, the Exchange charges an annual filing fee of $100 to CBOE market-makers who make their annual filing by paper copy and $25 to CBOE market-makers who submit their annual filing electronically.[5] The Exchange proposes to increase the fee for a paper filing to $150 and increase the fee for an electronic filing to $50. The Exchange represents that these increased fees will assist it in offsetting increased costs of staff review of these filings.

(ii) *Firm FOCUS Minimum Monthly Fee.* CBOE charges member organizations and Designated Primary Market-Makers (''DPMs'') that are subject to Rule 15c3–1 under the Act, and for which the Exchange is the Designated Examining Authority (''DEA''), an annual fee of $.40 per $1,000 of gross revenue as reported on the member organization's FOCUS report (excluding commodity commission revenue) (''DPM & Firm DEA Fee''). The DPM & Firm DEA Fee is currently subject to a monthly minimum fee of $1,000 for clearing firms and $250 for non-clearing member firms (''Firm FOCUS Minimum Monthly Fee'').[6] The Exchange proposes to increase the Firm FOCUS Minimum Monthly Fee assessed to non-clearing member firms to $275 to help the Exchange more closely cover the costs of regulating these member firms.

(iii) *ORS Order Cancellation Fee.* CBOE currently assesses an executing clearing firm $1 per cancelled ORS order if the number of cancelled ORS orders exceeds the number of executed ORS orders in the same month (''ORS Order Cancellation Fee'').[7] The ORS Order Cancellation Fee is not charged if fewer than 500 ORS orders are cancelled in the month. The Exchange proposes to revise the methodology used to assess the ORS Order Cancellation Fee. Specifically, the Exchange proposes to assess $1 for each cancelled ORS order in excess of the number of orders that the executing clearing member executes in a month. As is presently the case, the ORS Order Cancellation Fee will not be assessed if fewer than 500 orders are cancelled in a month.

The proposed ORS Order Cancellation Fee is similar to cancellation fees adopted by other exchanges.[8] The Exchange believes that this revised fee will result in increased order flow to CBOE.

(iv) *FBW Fee.* FBW terminals were initially rolled out to equity option trading crowds. CBOE currently assesses a fee of $425 per month for FBW functionality that is placed on a desktop terminal. CBOE assesses an additional $100 per month if the FBW application resides on a workstation that includes ILX and TNT functionalities. No fee is assessed for use of a mobile FBW.[9]

The Exchange represents that it plans to roll out FBW terminals to index options trading crowds. Only mobile FBWs will be used in index option trading crowds due to lack of space for desktop FBW applications. The Exchange proposes to assess a fee of $100 per month per login ID for mobile FBWs used in index option trading crowds. Additionally, the Exchange proposes to assess DPMs $100 per month per login ID for use of an FBW, whether it is the desktop application or mobile. The Exchange represents that these FBW fees will assist the Exchange in offsetting the cost of rolling out FBWs to its index options trading crowds.

(v) *Communication Review Fee.* CBOE represents that its Department of Financial and Sales Practice Compliance reviews a member firm's options-related advertisements, educational material and sales literature for compliance with applicable rules of the CBOE, Commission, and the Securities Investor Protection Corporation.[10] These public communications include, for example, print, television and radio advertisements, or electronic communications, such as Web sites.

CBOE proposes to implement a fee for this service (''Communication Review Fee'') as follows: *Regular review*—(1) for printed material reviewed, $75 per submission, plus $10 for each page reviewed in excess of 10 pages; and (2) for video and audio media reviewed, $75 per submission, plus $10 per minute for each minute of tape reviewed in excess of 10 minutes; *Expedited review*—(1) for printed material reviewed, $500 per submission, plus $25 for each page reviewed in excess of 10 pages; and (2) for video and audio media reviewed, $500 per submission, plus $25 per minute for each minute of tape reviewed in excess of 10 minutes.

CBOE represents that expedited review will be completed within three business days, not including the date the item is received by the Department of Financial and Sales Practice Compliance, unless a shorter or longer period is agreed to by the Department of Financial and Sales Practice Compliance. The Department of Financial and Sales Practice Compliance may, in its sole discretion, refuse requests for expedited review. The proposed Communication Review Fee is similar to the communication review charge of the National Association of Securities Dealers, Inc. (NASD).[11]

The Exchange intends to implement the fee changes discussed above and the new Communication Review Fee on January 1, 2005.

(vi) *Expired Fees.* The Exchange proposes to delete the paragraph relating to the Booth Rental Incentive Program from its Fee Schedule. The Program is due to expire on December 31, 2004, and the Exchange has determined not to extend the Program. Also, the Exchange proposes to delete the Option Trading Permit Lease Pool Bid Fee as these permits expired.[12]

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Section 6(b)(4) of the Act,[14] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

[5] *See* Securities Exchange Act Release No. 40566 (October 19, 1998), 63 FR 57339 (October 27, 1998).

[6] *See* Securities Exchange Act Release No. 43144 (August 10, 2000), 65 FR 50258 (August 17, 2000). The Firm FOCUS Minimum Monthly Fee applies to those clearing member firms and non-clearing member firms whose DPM & Firm DEA Fee would not otherwise exceed the thresholds of $1,000 and $250.

[7] *See* Securities Exchange Act Release No. 44607 (July 27, 2001), 66 FR 40757 (August 3, 2001).

[8] *See* Securities Exchange Act Release No. 46189 (July 11, 2002), 67 FR 47587 (July 19, 2002.

[9] *See* Securities Exchange Act Release No. 48223 (July 24, 2003), 68 FR 44978 (July 31, 2003).

[10] Under CBOE Rule 9.21(c), CBOE members and member organizations are required to submit to the Exchange's Department of Financial and Sales Practice Compliance for approval every advertisement and all educational materials pertaining to options at least ten days prior to use. Telephone conversation between Jaime Galvan, Senior Attorney, CBOE, and Natasha Cowen, Attorney, Division of Market Regulation (''Division''), Commission, on December 15, 2004.

[11] *See* NASD By-Laws, Schedule A, Section 13.

[12] *See* Securities Exchange Act Release No. 49723 (May 18, 2004), 69 FR 29591 (May 24, 2004).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [15] and subparagraph (f)(2) of Rule 19b–4 thereunder.[16] 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.[17]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2004–84 on the subject line.

Paper Comments:

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CBOE–2004–84. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2004–84 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3878 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50909; File No. SR–CBOE–2004–85]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated Regarding Designated Primary Market-Makers' Handling of Non-Public Customer Orders

December 22, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2004, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. On December 21, 2004, the CBOE submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to modify CBOE Rule 8.85(b)(iii) regarding Designated Primary Market-Makers' (''DPMs'') handling of non-public customer orders. Below is the text of the proposed rule change, as amended. Proposed deletions are in [brackets].

* * * * *

Rule 8.85 DPMs Obligations

(a) No change.

(b) Agency Transactions. Each DPM shall fulfill all of the obligations of a Floor Broker (to the extent that the DPM acts as a Floor Broker) and of an Order Book Official under the Rules, and shall satisfy each of the following requirements, in respect of each of the securities allocated to the DPM:

(i)–(ii) No change.

(iii) accord priority to any [public] customer order which the DPM represents as agent over the DPM's principal transactions, unless the customer who placed the order has consented to not being accorded such priority;

(iv)–(vii) No change.

(c)–(e) No change.

*** * * Interpretations and Policies:**

.01–.04 No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On January 25, 2002 the Commission approved a CBOE rule change filing eliminating the obligation of DPMs to accord priority to non-public customer orders.[4] In approving the filing, the Commission expressly stated that it was making no determination as to whether a DPM's failure to accord priority to non-public customer orders, when the DPM is acting as an agent, is consistent with the federal securities laws or any other applicable law. The Commission further stated that the approval does not affect a DPM's fiduciary obligations under federal securities laws or agency law principles when it acts as agent.

The Exchange now proposes to change the rule in question, CBOE Rule

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[15] 15 U.S.C. 78s(b)(1).

[16] 17 CFR 240.19b–4.

[17] Amendment No. 1 made technical corrections to the propose rule text of the proposed rule change.

[18] 17 CFR 200.30–3(a)(12).

[4] Securities Exchange Act Release No. 45341 (January 25, 2002), 67 FR 5016 (February 1, 2002) (approving SR–CBOE–00–42).

8.85(b)(iii), to revert back to the original language so that the rule applies to both public customer and non-public customer orders.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act [5] in general, and furthers the objectives of Section 6(b)(5) [6] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2004–85 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CBOE–2004–85. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2004–85 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3880 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50888; File No. SR–FICC–2004–19]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to Changes to Eliminate or Amend Rules that are Inconsistent With Current Practice, Have Expired, Are Outdated, Are Unnecessary, or Require Technical Correction

December 20, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on October 7, 2004, the Fixed Income Clearing Corporation (''FICC'') 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 FICC. 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 would eliminate or amend FICC's Government Securities Division (''GSD'') and Mortgage-Backed Securities Division (''MBSD'') rules that are inconsistent with current practice, have expired, are outdated, are unnecessary, or require technical correction.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FICC 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. FICC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[2]

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by FICC.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Delete Provisions In GSD's Rules Regarding The Automated Customer Account Transfer Service (''ACATS'')

The ACATS provisions were added to GSC's rules in 1998, when the National Securities Clearing Corporation requested that the Government Securities Clearing Corpoartion (''GSCC''), the GSD's predecessor, establish with it an interface that would enable account transfers involving netting-eligible government securities to be processed using GSCC's existing netting and settlement processes. This service was not implemented and as such its continued reference in the rules is inconsistent with current practice.

2. Delete Provisions From GSD's Rules That Designate Participation In The Repo Comparison And Netting Processes

GSD's rules currently refer to FICC as designating a member to be eligible to participate in the repo comparison and repo netting processes. When these repo services commenced in 1995, GSCC required testing prior to participation and subsequently designated members as eligible to participate in the services. Participation in these services has now become commonplace and special testing and designation for participation in the repo services is no longer necessary. As such, the provisions in question are outdated.

3. Make Technical Corrections To GSD Rules

FICC proposes to make the following technical corrections to GSD's rules:

i. Change the definitions of ''Interest Adjustment Payment'' and ''Interest Rate Mark Adjustment Payment'' in GSD Rule 1 (Definitions) to correct an erroneous reference in both definitions to the ''Federal Funds Rate'' and replacing them with references to a newly defined term, ''Overnight Investment Rate;''

ii. change the term in Rule 1 ''Multilateral Clearing Organization'' to ''Multilateral Clearing Agency;''

iii. change the language of the definition in Rule 1 of ''Member'' to reflect the fact that certain members (*i.e.,* comparison-only members) are approved for membership by senior management and not by the Membership and Risk Management Committee;

iv. correct Section 1(d) of Rule 2, where GSD is erroneously referred to as its predecessors name, GSCC;

v. delete subsection (b) of Rule 11B, which has expired;

vi. change an incorrect reference to ''Rule 7'' to ''Rule 6C'' in Rule 17, Section 4; and

vii. change a reference to the ''Membership and Standards Committee'' to the ''Membership and Risk Management Committee'' in Rule 48, Section 2.

4. Technical Corrections In The MBSD Rules

FICC proposes to renumber MBSD Rule 15 (Notices) of Article X to Rule 16 as it is in fact the 16th rule in that article.

FICC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act [3] and the rules and regulations thereunder because it will eliminate unnecessary and/or outdated provisions and makes necessary technical changes.

B. Self-Regulatory Organization's Statement on Burden on Competition

FICC does not believe that the proposed rule change will have any impact or impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others.

Written comments relating to the proposed rule change have not yet been solicited or received. FICC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission ActionWithin thirty-five days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FICC–2004–19 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609.

All submissions should refer to File Number SR–FICC–2004–19. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at <*http://ficc.com/gov/gov.docs.jsp?NS-query*=>. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2004–19 and should be submitted on or before January 19, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3866 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

[3] 15 U.S.C. 78q–1.

[4] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50900; File No. SR–ISE–2004–36]

Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Fee Changes

December 21, 2004

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2004, the International Securities Exchange, Inc. (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared by the ISE. On December 15, 2004, the ISE filed an amendment to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend its Schedule of Fees to: (i) Extend, for one year, until November 30, 2005, a program that caps and waives execution and comparison fees for transactions in options on the Nasdaq 100 Tracking Stock (''QQQ'') when a member transacts a certain number of QQQ option contracts; (ii) increase, from 700,000 to 1,000,000, the Exchange's average daily volume (''A.D.V.'') breakpoint which is used for determining the execution fee for market maker and firm proprietary transactions; and (iii) delete references to expired fee waivers.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated December 15, 2004 (''Amendment No. 1''). In Amendment No. 1, ISE updated the attached Schedule of Fees to reflect the applicable text in effect as of the date of filing of the proposed rule change, included clarifying language explaining the Exchange's purpose in extending the QQQ cap and fee waiver, removed the reference to a proposed change to the Schedule of Fees concerning the Exchange's proposed Price Improvement Mechanism (''PIM'') that was pending Commission approval at the time of filing, and made other conforming changes to the text of the proposed rule change. The Exchange plans to resubmit the proposed change relating to the ISE Schedule of Fees dealing with the PIM in a separate, subsequent rule filing to the Commission.

Amendment No. 1 to the proposed rule change replaced the original proposed rule change in its entirety.

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 ISE 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. ISE has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the ISE Schedule of Fees to (i) extend, for one year, until November 30, 2005, a program that caps and waives execution and comparison fees for transactions in QQQ options when a member transacts a certain number of QQQ option contracts, (ii) increase, from 700,000 to 1,000,000, the Exchange's A.D.V. breakpoint which is used for determining the execution fee for market maker and firm proprietary transactions, and (iii) delete references to expired fee waivers.

Specifically, the Exchange proposes to extend, until November 30, 2005, its program that caps and waives execution and comparison fees for transactions in QQQ options when a member transacts a certain number of QQQ option contracts on the Exchange. Under that program, when a member's A.D.V. in QQQ options reaches 8,000 contracts, the member's execution fee for the next 2,000 QQQ option contracts is reduced by $.10 per contract. Further, when a member's monthly A.D.V. in QQQ options reaches 10,000 contracts, the Exchange waives the entire execution fee and the comparison fee for each QQQ option contract traded thereafter. The Exchange instituted this program in November 2003 for a six month period, expiring in May 2004.[4] The Exchange extended this program in May 2004 for an additional six month period, expiring in November 2004.[5] The Exchange now proposes extending this program for a one year period, expiring on November 30, 2005. The Exchange seeks to extend this program for competitive reasons. This program was initiated and extended in an attempt to increase the Exchange's market share in the QQQ option product.

The Exchange also proposes to increase, from 700,000 to 1,000,000, the Exchange's A.D.V breakpoint which is used for determining the execution fee for market maker and firm proprietary transactions. The breakpoints were established when the Exchange commenced trading in May 2000, and have not been revised since that time. As a result of the increase in the overall industry A.D.V. and Exchange A.D.V., the Exchange is proposing to revise the breakpoint so that it is more reflective of the current overall industry A.D.V., as well as current Exchange A.D.V. Accordingly, the Exchange is proposing to revise the calculation so that a $.14 per contract charge is applied when Exchange A.D.V. is from 500,001 to 1,000,000 contracts, and a $.12 per contract charge is applied when Exchange A.D.V. is over 1,000,000 contracts.[6]

Furthermore, the Exchange proposes to delete the following references to expired fee waivers for certain transactions in S&P MidCap 400 Index options: the market maker and firm proprietary execution fee waiver that expired on November 25, 2004; and the non-Public Customer Order surcharge execution fee waiver that expired on November 25, 2004.

2. Basis

The Exchange believes that the proposed rule change is consistent with the requirement under Section 6(b)(4) of the Act[7] that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the Exchange believes that the proposed rule change would enable the Exchange to continue offering competitively priced products.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[4] *See* Securities Exchange Act Release No. 49147 (Jan. 29, 2004), 69 FR 5629 (Feb. 5, 2004) (File No. SR–ISE–2003–32).

[5] *See* Securities Exchange Act Release No. 49853 (June 14, 2004), 69 FR 35087 (June 23, 2004) (File No. SR–ISE–2004–15).

[6] The Commission notes that the effect of the increased breakpoint contained in the proposed rule change will be to increase by $0.02 the per contract charge when Exchange A.D.V. is from 700,001 to 1,000,000 contracts.

[7] 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and Rule 19b–4(f)(2)[9] thereunder, in that it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing the amended proposal with the Commission. At any time within 60 days after the filing of Amendment No. 1 to 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.[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. Comments may be submitted by any of the following methods:

Electronic comments:

• Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–ISE–2004–36 on the subject line.

Paper comments:

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609.

All submissions should refer to File Number SR–ISE–2004–36. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2004–36 and should be submitted by January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3864 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 19b–4(f)(2).

[10] For purposes of calculating the 60-day abrogation period, the Commission considers the abrogation period to have begun on December 15, 2004, the date on which the Commission received Amendment No. 1.

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50897; File No. SR–NASD–2004–169]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change To Adopt Additional Listing Standards Applicable to the Securities of the Nasdaq Stock Market, Inc. or an Affiliate

December 21, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 2, 2004, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On December 14, 2004, and December 15, 2004, Nasdaq filed Amendments No. 1 and No. 2, respectively.[3] On December 15, 2004, Nasdaq filed Amendment No. 3 to the proposal.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 and Amendment No. 2 were deficient for technical reasons and were withdrawn on December 14 and December 15, 2004, respectively.

[4] Amendment No. 3 slightly modifies the text of the proposed rule to make clear that the exclusion in the definition of an Affiliate Security would encompass other exchange traded funds listed on The Nasdaq Stock Market. The amendment also further clarifies and explains the proposed rule change. Amendment No. 3 is incorporated into this notice.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to adopt additional listing standards that would apply to a security listed on Nasdaq by Nasdaq or its affiliate (collectively defined in the proposed rule as ''Nasdaq Affiliates'').

The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.[5]

* * * * *

Rule 4370. Additional Requirements for Nasdaq-Listed Securities Issued by Nasdaq or Its Affiliates

(a) For purposes of this Rule 4370, the terms below are defined as follows:

(1) ''Nasdaq Affiliate'' means Nasdaq and any entity that directly or indirectly, through one or more intermediates, controls, is controlled by, or is under common control with Nasdaq, where ''control'' means that the one entity possesses, directly or indirectly, voting control of the other entity either through ownership of capital stock or other equity securities or through majority representation on the board of directors or other management body of such entity.

(2) ''Affiliate Security'' means any security issued by a Nasdaq Affiliate, with the exception of Portfolio Depository Receipts, as defined in Rule 4420(i)(1)(A), and Index Fund Shares as defined in Rule 4420(j)(1)(A).

(b) Upon initial and throughout continued inclusion of the Affiliate Security in The Nasdaq Stock Market, Nasdaq shall:

(1) file a report each month with the Commission detailing Nasdaq's monitoring of:

[5] Changes are marked to the rule text that appears in the electronic NASD manual found at *http://www.nasd.com.*

(A) the Nasdaq Affiliate's compliance with the provisions of the Rule 4200, 4300 and 4400 Series; and

(B) the trading of the Affiliate Security, which shall include summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to Rule 11890, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data of such security.

(2) engage on independent accounting firm once a year to review and prepare a report on the Affiliate Security to ensure that the Nasdaq Affiliate is in compliance with the Rule 4200, 4300 and 4400 Series and promptly forward to the Commission a copy of the report prepared by the independent accounting firm.

(c) In the event that Nasdaq determines that the Nasdaq Affiliate is not in compliance with any of the Rule 4200, 4300 and 4400 Series, Nasdaq shall file a report with the Commission at the same time that Nasdaq notifies the Nasdaq Affiliate of its non-compliance. The report shall identify the date of non-compliance, type of non-compliance and any other material information conveyed to the Nasdaq Affiliate in the notice of non-compliance. Within five (5) business days of receipt of a plan of compliance from the Nasdaq Affiliate, Nasdaq shall notify the Commission of such receipt, whether the plan of compliance was accepted by Nasdaq or what other action was taken with respect to the plan and the time period provided to regain compliance with the Rule 4200, 4300 and 4400 Series, if any.

* * * * *

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

Nasdaq is proposing a rule change to adopt a new Rule 4370 that would impose additional reporting requirements on Nasdaq should Nasdaq or an affiliate of Nasdaq list a security on The Nasdaq Stock Market (collectively, the ''Nasdaq Affiliates'').[6] In the event that a Nasdaq Affiliate lists a security on Nasdaq (the ''Affiliate Security''), the proposed rule change would require Nasdaq to file a report with the Commission on a monthly basis detailing Nasdaq's monitoring of (1) the Nasdaq Affiliate's compliance with the provisions of Rule 4200, 4300 and 4400 Series (which include bid price requirements, and quantitative and qualitative maintenance requirements) and (2) the trading of the Affiliate Security, including summaries of all related surveillance alerts, complaints, regulatory referrals, trades cancelled or adjusted pursuant to NASD Rule 11890, investigations, examinations, formal and informal disciplinary actions, exception reports and trading data.

Nasdaq also would be required to commission an annual review and report by an independent accounting firm of the compliance of the Affiliate Security with Rule 4200, 4300 and 4400 Series. Nasdaq would be required to furnish promptly a copy of the report to the Commission.

Nasdaq also would be required to notify the Commission at the same time it notifies the Nasdaq Affiliate if Nasdaq determines that the Nasdaq Affiliate was not in compliance with any of its listing standards. The proposed rule change also would require Nasdaq to notify the Commission within five business days of its receipt of a plan of compliance from the Nasdaq Affiliate. Nasdaq's notification also would advise the Commission on whether the plan of compliance was accepted by Nasdaq or what other action was taken with respect to the plan and the time period provided to regain compliance with the Rule 4200, 4300 and 4400 Series, if any. Nasdaq believes that the additional requirements contained in the proposed rule change would provide additional assurance that any Affiliate Securities listed on Nasdaq by a Nasdaq Affiliate comply with Nasdaq's listing standards on an on-going basis. Nasdaq believes that the proposed rule change would eliminate any perception of a potential conflict of interest if a Nasdaq Affiliate seeks to list a security on The Nasdaq Stock Market.

Nasdaq is proposing to exclude from the definition of Rule 4370—solely for purposes of this rule—securities that meet the definition of ''Portfolio Depository Receipts'' under NASD Rule 4420(i)(1)(A) and ''Index Fund Shares'' under NASD Rule 4420(j)(1)(A). These securities, commonly referred to as ''exchange traded funds'' or ''ETFs,'' are issued by open-end management investment companies based on a portfolio of securities. Often this portfolio mirrors a foreign or domestic stock index. An ETF is designed to provide investment results that correspond generally to the price and yield performance of the underlying portfolio of securities. Nasdaq believes that such securities do not present the same concerns as other securities, even if issued by a Nasdaq Affiliate. ETFs, which do not represent investments in an individual company, are already exempt from a number of listing standards including corporate governance rules standards, such as the requirement to have a board of directors comprised of a majority of independent directors and to have a code of conduct applicable to all employees and directors.[7] Nasdaq does not believe that the additional reporting requirements in the proposed rule change would provide any value in this context because ETFs would not constitute an investment in a Nasdaq Affiliate. Further, these issuers are already subject to a comprehensive scheme of regulation pursuant to the Investment Company Act of 1940.

2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A of the Act,[8] in general, and with Section 15A(b)(6) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to 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. Specifically, the rule change would provide additional reporting safeguards for certain listed securities where conflicts of interest might arise.

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.

[6] The NASD currently would be considered a Nasdaq Affiliate for purposes of the proposed rule change.

[7] NASD Rule 4350(a)(2).

[8] 15 U.S.C. 78o–3.

[9] 15 U.S.C. 78o–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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2004–169 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–169. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–169 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28442 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50893; File No. SR–NASD–2004–176)

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Extend an Existing Pilot Relating to Manning Price-Improvement Standards

December 20, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 2, 2004, 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 filed this proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) 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

NASD is proposing to extend through June 30, 2005, the current pilot price-improvement standards for decimalized securities contained in NASD Interpretive Material 2110–2, ''Trading Ahead of Customer Limit Order'' (''Manning Interpretation'' or ''Manning''). Without such an extension, these standards will expire on December 31, 2004. NASD proposes to extend the pilot's expiration date to June 30, 2005,[5] NASD does not propose to make any substantive changes to the pilot. The text of the proposed rule change is available at the NASD's Office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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

NASD's Manning Interpretation requires an NASD member firm to provide a minimum level of price improvement to an incoming order in an NMS or SmallCap security if the firm chooses to trade as principal with the incoming order at a price superior to a customer limit order that it currently holds. If the firm fails to provide the minimum level of price improvement to the incoming order, the firm must execute the held customer limit order. Generally, if a firm fails to provide the requisite amount of price improvement and also fails to execute the held

[6] 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).

[4] 17 CFR 240.19b–4(f)(6).

[5] NASD understands that the Commission's proposed Regulation NMS may have an impact on this pilot program. Accordingly, NASD has represented that it will undertake to work with the Commission to ensure that the pilot program would be consistent with the rules and regulations contained in Regulation NMS, if and when it is adopted. Telephone Conversation between Andrea Orr, Assistant General Counsel, NASD, and Ronesha A. Butler, Special Counsel, Division of Market Regulation, Commission, on December 20, 2004.

customer limit order, it is in violation of the Manning Interpretation.

On April 6, 2001, the Commission approved, on a pilot basis, price-improvement standards for decimalized securities contained in Manning.[6] Since approval, these standards continue to operate on a pilot basis which terminates on December 31, 2004.[7] NASD has determined to seek an extension of its current Manning pilot until June 30, 2005. NASD believes that such an extension provides for an appropriate continuation of the current Manning price-improvement standard while the Commission continues to analyze the issues related to customer limit order protection in a decimalized environment. NASD is not proposing any other changes to the pilot at this time.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[8] in general, and with Section 15A(b)(6) of the Act,[9] in particular, which requires, among other things, that NASD 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 by NASD.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

NASD asserts that the proposed rule change is immediately effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder [11] because it: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date 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.[12]

NASD proposes to make the proposed rule change operative on January 1, 2005, and requests that the Commission waive the 30-day operative date. The Commission hereby grants this request.[13] The Commission believes that waiving the 30-day pre-operative period is consistent with the protection of investors and the public interest because it will allow the benefits of investors resulting from the pilot to continue uninterrupted. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2004–176 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–176. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principle office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR–NASD–2004–176 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28443 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–M

[6] *See* Securities Exchange Act Release No. 34–44165 (April 6, 2001), 66 FR 19268 (April 13, 2001).

[7] *See* Securities Exchange Act Release No. 34–48876 (December 4, 2003), 68 FR 69103 (December 11, 2003).

[8] 15 U.S.C. 78o–3

[9] 15 U.S.C. 78o–3(b)(6).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] In addition, to submit a filing pursuant to Rule 19b–4(f)(6) under the Act, paragraph (f)(6)(iii) thereof also requires the Exchange to give the Commission 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, or such shorter time as designated by the Commission. NASD complied with this requirement.

[13] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50922; File No. SR–NASD–2004–187]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Extension of Short Sale Rule and Continued Suspension of Primary Market Maker Standards Set Forth in Rule 4612

December 22, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2004, the National Association of Securities Dealers, Inc., through its subsidiary, the Nasdaq Stock Market,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Inc. (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in items I, II, and III below, which items have been prepared by Nasdaq. 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 Nasdaq Stock Market, Inc. (''Nasdaq'') is proposing to extend the pilot effectiveness of Rule 3350 until December 15, 2004. Nasdaq is also seeking to continue the suspension of the effectiveness of the Primary Market Maker (''PMM'') standards currently set forth in Rule 4162 until December 15, 2005. If not extended, these pilot programs would expire on December 15, 2004. In addition, Nasdaq is seeking to extend the pilot effectiveness of the penny ($0.01) legal short sale standard contained in paragraph (b)(2) of Interpretative Material 3350 (''IM–3350''). If not extended, this pilot program would expire on December 15, 2004. In addition, Nasdaq is proposing to add an exemption to Rule 3350 to reflect the impact of Regulation SHO on Nasdaq stocks.

The text of the proposed rule change is as follows. Additions are italisized.[3]

Rule 3350 Short Sale Rule

(a)–(b) No Change.

(c) The provisions of paragraph (a) shall not apply to:

(1)–(8) No Change.

(9) *Sales of securities as to which all short sale price tests have been suspended by operation of a Pilot Order issued by the Commission pursuant to SEC Rule 202T.*

(d)–(k) No Change.

(1) This section shall be in effect until [December 15, 2004] *December 15, 2005.*

* * * * *

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. 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–C below, of the most significant aspect of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background and Description of the NASD's Short Sale Rule

Section 10(a) of the Act gives the Commission plenary authority to regulate short sales of securities registered on a national securities exchange, as needed to protect investors. In 1992, Nasdaq, believing that short-sale regulation is important to the orderly operation of securities markets, proposed a short sale rule for trading of its National Market securities that incorporates the protections provided by SEC Rule 10a–1. On June 29, 1994, the SEC approved the NASD's short sale rule (the ''Rule'') applicable to short sales[4] in Nasdaq National Market (''NNM'') securities on an eighteen-month pilot basis through March 5, 1996.[5] The NASD and the Commission have extended Rule 3350 numerous times, most recently, until December 15, 2004.

The Rule employs a ''bid'' test rather than a tick test because Nasdaq trades are not necessarily reported to the tape in chronological order. The Rule prohibits short sales at or below the inside bid when the current inside bid is below the previous inside bid. Nasdaq calculates the inside bid from all market makers in the security and disseminates symbols to denote whether the current inside bid is an ''up-bid'' or a ''down-bid.'' To effect a ''legal'' short sale on a down-bid, the short sale must be executed at a price at least $.01 above the current inside bid. The Rule is in effect from 9:30 a.m. until 4 p.m. each trading day.

The December of 2002, Nasda modified the method it uses to calculate the last bid by having it refer to the ''Nasdaq Inside'' which is comprised of quotations from all participants in Nasdaq execution systems (*e.g.*, SuperMontage), rather than referring to the National Best Bid and Offer (''NBBO''). Nasdaq currently calculates and applies the Nasdaq-based bid tick indicator to all SuperMontage trades. With respect to trades executed outside Nasdaq execution systems and reported to Nasdaq, Nasdaq participants have been permitted to transition from the NBBO-based bid tick to the Nasdaq-based bid tick, provided that each firm select and apply a single bid tick indicator for all such trades executed by that firm. That transition has not been completed and, as explained below, in light of the Commission's proposal of Regulation SHO, Nasdaq has alerted members that it would not be prudent to transition from the NBBO bid tick to the Nasdaq bid tick at this time.

Background of the Primary Market Maker Standards

To ensure that market maker activities that provide liquidity and continuity to the market are not adversely constrained when the short sale rule is invoked, Rule 3350 provides an exemption for ''qualified'' market makers (*i.e.*, market makers that meet the PMM standards). Presently, Rule 4612 provides that a member registered as a market maker pursuant to Rule 4611 may be deemed a PMM if that member meets certain threshold standards. On February 14, 1997, the PMM standards were waived for all NNM securities due to the impacts of the SEC's Order Handling Rules and corresponding NASD rule change and system modifications on the operation of the four quantitative standards.[6]

Proposal To Extend the Short Sale Rule and Suspend the PMM Standards

Nasdaq believes that it is in the best interest of investors to extend the short sale regulation pilot program. When the Commission approved the NASD's short sale rule on a pilot basis, it made specific findings that the Rule was consistent with sections 11A, 15A(b)(6), 15A(b)(9), and 15A(b)(11) of the Act. Specifically, the Commission stated that, ''recognizing the potential for problems associated with short selling, the changing expectations of Nasdaq market participants and the competitive disparity between the exchange markets and the OTC market, the Commission believes that regulation of short selling of Nasdaq National market securities is consistent with the Act.'' [7] In addition, the Commission stated that it ''believes that the NASD's short sale bid-test, including the market maker exemptions, is a reasonable approach to short sale regulation of Nasdaq National Market securities and reflects the realities of its

[3] The proposed rule change is marked to show changes from the rule as it appears in the electronic NASD Manual available at *http.//www.nasd.com.*

[4] A short sale is a sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. To determine whether a sale is a short sale members must adhere to the definition of a ''short sale'' contained in SEC Rule 3b–3, which is incorporated into Nasdaq's short sale rule by Rule 3350(k)(1).

[5] *See* Securities Exchange Act Release No. 34277 (June 29, 1994), 59 FR 26212 (July 7, 1994) (''Short Sale Rule Approval Order'').

[6] *See* Securities Exchange Act Release No. 38294 (February 17, 1997), 62 FR 8289 (February 24, 1997).

[7] *See* Short Sale Rule Approval Order, *supra* note 5.

market structure.'' [8] The benefits that the Commission recognized when it first approved Rule 3350 apply with equal force today.

Similarly, the concerns that caused the Commission to waive the PMM standards in February 1997 continue to exist today. Nasdaq and the Commission agreed to waive the PMM standards for three reasons that were discovered only after the Order Handling Rules were implemented.[9] Through late 1999, Nasdaq believes that it worked diligently to address those concerns to the Commission's satisfaction, including convening a special subcommittee on PMM issues, proposing two different sets of PMM standards, and being continuously available and responsive to Commission staff to discuss this issue. Despite these efforts, the Commission and Nasdaq were unable to establish satisfactory PMM standards. At the request of Commission staff, Nasdaq has begun developing PMM standards suitable to today's rapidly changing marketplace. Re-instating the PMM standards set forth in Rule 4612 would be extremely disruptive to the market and harmful to investors.

Rule 3350(c)(9) has been added to reflect that the Commission has adopted Regulation SHO, a unified short sale rule that applies to Nasdaq-listed securities and supersedes certain aspects of NASD Rule 3350. Nasdaq has alerted market participants that the adoption of Regulation SHO impacts the regulation of short sales on Nasdaq and on other markets in a number of ways. Nasdaq has encouraged firms to analyze Regulation SHO and its impact on their execution and order management systems in anticipation of its January 3, 2005, Compliance date.

Proposal To Extend Penny Short Sale Standard

On March 2, 2001, the Commission approved, on a pilot basis,[10] Nasdaq's proposal to establish a $0.01 above the bid standard for legal short sales in Nasdaq National Market securities as part of the Decimals Implementation Plan for the Equities and Options Markets. This pilot program has been continuously extended since that date and is currently set to expire on December 15, 2004.[11] Nasdaq now proposes to extend, through December 15, 2005, that pilot program. Extension until December 15, 2005 will allow the Nasdaq and the Commission to continue to evaluate the impact of the penny short sale pilot. If the instant filing is approved, Nasdaq will continue during the pilot period to require NASD members seeking to effect ''legal'' short sales when the current best (inside) bid displayed by Nasdaq is lower that the previous bid, to execute those short sales at a price that is at least $0.01 above the current inside bid in that security. Nasdaq believes that continuation of this pilot standard appropriately takes into account the important investor protections provided by Rule 3350 and IM–3350 and the ongoing relationship of the valid short sale price amount to the minimum quotation increment of the Nasdaq market (currently also $0.01).

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[12] in general and with section 15A(b)(6) of the Act,[13] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq believes that the proposed rule change will not 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

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 Nasdaq pursuant to section 19(b)(3)(A) of the Act [14] and subparagraph (f)(6) of Rule 19b–4 thereunder.[15] Nasdaq requests that the Commission waive both the 5-day notice and 30-day pre-operative requirements contained in Rule 19b–4(f)(6)(iii).[16] Nasdaq has designated the purposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days from the date on such it was filed, or such shorter time as the Commission may designate. Nasdaq requests the the Commission waive both the 5-day notice and the 30-day preoperative requirements in Rule 19b–4(f)(6)(iii). Nasdaq believes good cause exists to grant such waivers because of the importance of short sale regulation to the protection of investors and the fact that the pilot programs will each expire if not extended. Nasdaq will implement this rule change immediately.

The Commission believes that waiving the 5-day notice and 30-day pre-operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

At any time within 60 days of the filing of a rule change pursuant to section 19(b)(3)(A) of the Act, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[8] *Id.*

[9] Implementation of the Order Handling Rules created the following three issues: (1) Many market makers voluntarily chose to display customer limit orders in their quotes although the Limit Order Display Rule does not yet require it; (2) SOES decrementation for all Nasdaq stocks significantly affected market makers' ability to meet several of the primary market maker standards; and (3) with the inability to meet the existing criteria for a larger number of securities, a market maker may be prevented from registering as a primary market maker in an initial public offering because it fails to meet the 80% primary market maker test contained in Rule 4612(g)(2)(B).

[10] *See* Securities Exchange Act Release No. 44030 (March 2, 2001), 66 FR 14235 (March 9, 2001).

[11] *See* Securities Exchange Act Release No. 47970 (June 3, 2003), 68 FR 34689 (June 10, 2003).

[12] 15 U.S.C. 78o–3.

[13] 15 U.S.C. 78o–3(6).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6).

[16] Under subparagraph (f)(6)(iii) of Rule 19b–4, the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the self-regulatory organization must file notice of its intent to file the proposed rule change at least five business days beforehand. 17 CFR 240.19b–4(f)(6)(iii).

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2004–187 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–187. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules./sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submission should refer to file Number SR–2004–197 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28478 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–M

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50898; File No. SR–NSX–2004–07]

Self-Regulatory Organizations; National Stock Exchange; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Non-Member Give-Ups

December 21, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 31, 2004, the National Stock Exchange℠ (''NSX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change, as described in Items I, II, and III below, which Items have been prepared by the Exchange. On December 3, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comment on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the clearing requirements contained in Article II, Section 5.1 of the NSX By-Laws to permit members to give-up a non-member's clearing number if certain conditions are satisfied. The text of the proposed rule change appears below. New language is in italics.

* * * * *

CODE OF REGULATIONS (BY–LAWS) OF NATIONAL STOCK EXCHANGE

* * * * *

ARTICLE II Exchange Membership

* * * * *

Section 5. Restrictions on Admittance to or Continuance in Membership and Association

5.1. General Restrictions

* * * * *

Interpretations and Policies

* * * * *

.03 An Exchange member may only give-up its own or another Exchange member's clearing number when executing a transaction on the Exchange*; provided, however, that a member may give-up a non-member's clearing number when executing a transaction on the Exchange if (i) the non-member (a) is a registered broker-dealer and is a self-clearing member of the National Securities Clearing Corporation (''NSCC'') and (b) consents to the disciplinary jurisdiction of the Exchange and agrees to adhere to all applicable Exchange By-Laws and Rules; and (ii) the executing member's guaranteeing clearing firm, who must be an Exchange member, agrees to accept financial responsibility for all transactions given-up to the non-member, including but not limited to, responsibility to clear and settle the non-member's trades in the event that the non-member or the NSCC does not accept any such trades.*

* * * * *

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 NSX 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 NSX 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

Currently, to enter transactions on the NSX, an Exchange member must either be self-clearing or must have a clearing member agree to accept financial responsibility for all of its transactions. In turn, any Exchange member that wishes to self-clear or clear third party transactions on the Exchange must also be a member of the National Securities Clearing Corporation (''NSCC'').

In addition, the Exchange By-Laws currently provide that, when a member executes a transaction on the Exchange, it may only give-up its own clearing number or the number of another Exchange member.[4] The Exchange notes

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The NSX submitted Amendment No. 1 in order to provide additional information in describing the manner in which the proposed rule change will operate. Amendment No. 1 replaces the original rule filing in its entirety. The Exchange notes that Amendment No. 1 does not alter the text of the proposed rule change as it appeared in the original rule filing.

[4] The Exchange notes that use of the term ''non-member'' refers to the fact that a ''non-member'' firm does not have certain voting and ownership rights that other NSX members have. However, as described in the proposed rule text, a ''non-member'' firm that has entered into a give-up

that the provision limiting give-ups to Exchange members' clearing firms was originally put in place to ensure the Exchange's ability to exercise jurisdiction over all parties involved in the execution and settlement of trades that occur on the Exchange. The Exchange proposes to expand the list of clearing firms eligible to be ''given-up'' to include non-member clearing firms,[5] if certain conditions are satisfied.

The conditions that would enable an NSX member to give-up a non-member's clearing number are that (i) the non-member (a) be a registered broker-dealer and a self-clearing member of the NSCC and (b) consent to the disciplinary jurisdiction of the Exchange and agree to adhere to all applicable Exchange By-Laws and Rules; and (ii) the executing member's clearing firm, who must be an Exchange member, agrees to accept financial responsibility for all transactions given-up to the non-member, including but not limited to, responsibility to clear and settle the non-member's trades in the event that the non-member or the NSCC does not accept any such trades. The Exchange believes that this additional give-up alternative offers members more flexibility [6] and is consistent with the above-described intent of Interpretation .03 to Article II, Section 5.1 of the Exchange By-Laws in that it permits the Exchange to retain jurisdiction over the parties involved in executions and those responsible for guaranteeing transaction clearance and settlement.

In order to evidence the satisfaction of the above-referenced requirements, and thus for a member to be eligible to give-up a non-member's clearing number, an access authorization agreement in a form prescribed by the Exchange must be completed and signed by the member, its NSX member clearing firm, and the non-member clearing firm.7 The agreement will specify that the conditions of Interpretation .03 have been satisfied, including that the non-member consents to the disciplinary jurisdiction of the Exchange and agrees to adhere to all applicable Exchange By-Laws and Rules. The agreement will also specify that the executing member's clearing firm agrees to accept financial responsibility for all transactions given-up to the non-member.

The Exchange believes the proposal provides adequate controls regarding non-member give-ups. For operational purposes, the Exchange requires the non-member be a self-clearing member of NSCC, thus requiring NSCC clearing membership for Exchange transactions given-up to non-members, as is currently required for Exchange transactions given-up to NSX members.[8] For disciplinary jurisdiction and compliance purposes, the requirements that the non-member consent to the disciplinary jurisdiction of the Exchange and agree to adhere to all applicable Exchange By-Laws and Rules, provide an adequate level of Exchange control over the non-member give-up transaction. The Exchange believes that these controls provide a jurisdictional basis for disciplinary action against the non-member, allowing the Exchange to enforce its rules with respect to the non-member to the same degree as if the non-member were itself a member. Additionally, the NSX requires that the member clearing firm accept financial responsibility for all transactions given-up to the non-member. The Exchange believes that this guarantees the financial obligations incurred with respect to non-member give-up transactions. As is currently the case for give-ups to member clearing firms, the Exchange will assess the executing member with the relevant fees on all transactions given-up to non-members.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with the provisions of Section 6(b) of the Act,[9] in general, and Section 6(b)(5) of the Act,[10] in particular, which requires, among other things, that the rules of the Exchange be designed 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, to foster cooperation and coordination with persons engaged in clearing and settling transactions, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received in connection with the proposed rule change, as amended.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organizations consents, the Commission will:

A. By order approve the proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NSX–2004–07 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, D.C. 20549–0609.

All submissions should refer to File No. SR–NSX–2004–07. This file number should be included in the subject line if e-mail is used. To help the

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arrangement under Interpretation .03 to Article II, Section 5.1 of the Exchange By-Laws is subject to the Exchange's jurisdiction and the requirement to adhere to all applicable Exchange By-Laws and Rules, just as any other member of the Exchange.

[6] For example, undeer the NSX's current requirements, an NSX member can execute a transaction on behalf of a non-member. However, for purposes of reporting by NSX to the NSCC for clearing and settlement, the NSX member cannot give-up the non-member's clearing ccount to NSX. Instead, the clearing and settlement information must be processed directly with the NSCC. Under the proposed rule change, an NSX member would have the option of giving up the non-member's clearing number to the NSX for reporting by NSX to the NSCC. This gives the NSX member the flexibility to process a non-member's order in the same manner in which it is permitted to process other NSX members' orders.

[7] The access authorization agreement is attached to Form 19b–4 as Exhibit 3.

[8] Telephone conversation between Jennifer M. Lamie, Assistant General Counsel and Secretary, NSX and Marisol Rubecindo, Attorney, Division of Market Regulation, Commission.

[9] 15 U.S.C. 78f(b).

[8] Telephone conversation between Jennifer M. Lamie, Assistant General Counsel and Secretary, NSX and Marisol Rubecindo, Attorney, Division of Market Regulation, Commission.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

Commission process and review comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to file number SR–NSX–2004–07 and should be submitted on before January 19, 2005.

For the Commission by the Division of Market Regulation, pursuant to the delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3865 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50912; File No. SR–NYSE–2004–61]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. to Rescind a Type of Order Known as an Institutional XPress® Order Through Amendments to Exchange Rules 13, 60 and 72

December 22, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 28, 2004, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. On December 3, 2004, the NYSE filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to rescind a type of order known as an Institutional XPress® Order (''XPress Order'') by amending NYSE Rules 13 (Definitions of Orders), 60 (Dissemination of Quotation) and 72 (Priority and Precedence of Bids and Offers).[4] The text of the proposed rule change is available at the Office of the Secretary, the NYSE, 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 include statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In SR–NYSE–99–24, the Commission approved the Exchange's amendments to NYSE Rules 13 and 72 to create a new type of order, the XPress® Order. In light of the Exchange's recent hybrid market filing,[5] the Exchange now seeks to rescind the XPress Order type, including the amendments made to NYSE Rules 13 and 72 in SR–NYSE–99–24. The Exchange believes that the goal of the XPress Order, clean executions by market participants when entering large-size orders in response to bids and offers which have been displayed for a minimum time period, would be satisfied by the Exchange's hybrid market initiative. In the pending hybrid market filing, the Exchange proposes enhancements to NYSE Direct+® that would esstentially accomplish the same thing as an XPress Order.[6]

The Exchange also proposes to rescind the amendments made in connection with the execution of XPress Orders in the NYSE LIQUIDITYQUOTE® filing.[7] Specifically, the Exchange proposes to rescind Supplementary Material .40 of NYSE Rule 13, which provides that a liquidity bid or offer, regardless of size, will be XPress eligible if it has been published for at least 15 seconds. In addition, the Exchange proposes to rescind NYSE Rule 60(d)(iii) which discusses the execution of XPress Orders when liquidity bids or offers are disseminated.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(5) of the Act[9] in particular, because it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated December 3, 2004 (''Amendment No. 1''). In Amendment No. 1, the NYSE changed the basis under which the proposed rule change was filed from Section 19(b)(3) of the Act to Section 19(b)(2) of the Act.

[4] *See* Securities Exchange Act Release Nos. 43763 (December 21, 2000), 65 FR 83120 (December 29, 2000) (SR–NYSE–99–24) and 47614 (April 2, 2003), 68 FR 17140 (April 8, 2003) (SR–NYSE–2002–55). *See also* Information Memo Nos. 01–16 (July 9, 2001) and 03–21 (May 15, 2003).

[5] *See* Securities Exchange Act Release Nos. 50173 (August 10, 2004), 69 FR 50407 (August 16, 2004) and 50667 (November 15, 2004), 69 FR 67980 (November 22, 2004) (SR–NYSE–2004–05).

[6] Pursuant to the proposed amendments in the hybrid market filing (*see supra* note 5), auto ex market orders, marketable limit orders and incoming ITS commitments to trade routed to the Display Book, regardless of size, would be eligible for automatic execution against the trading interest reflected in the Exchange's published quotation, with any unfilled balance ''sweeping'' the book, broker agency interest file and specialist interest file until executed, its limit price, if any, is reached, or a liquidity replenishment point is reached.

[7] *See* Securities Exchange Act Release No. 47614 and Information Memo 03–21, *supra* note 4.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send and e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2004–61 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NYSE√2004–61. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of the filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2004–61 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28481 Filed12–28–04; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50895; File No. SR–OCC–2004–11]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to Yield-Based Treasury Options

December 20, 2004.

I. Introduction

On June 8, 2004, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–OCC–2004–11 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was published in the **Federal Register** on October 5, 2004.[2] No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The proposed rule change updates two sections of OCC's By-Laws pertaining to yield-based Treasury options in order to conform those sections to the corresponding provisions of OCC's By-Laws governing index options.

Article XVI, Section 3(c) of OCC's By-Laws currently provides OCC with the authority to adjust outstanding options in a class of yield-based Treasury options in the event that an exchange decreases the multiplier. Section 3(c) will now provide for the possibility that an exchange might increase rather than decrease the multiplier and grants OCC the flexibility to adjust any outstanding options accordingly. This rule change is similar to a previously approved OCC rule change pertaining to the adjustment of index option contracts.[3]

Article XVI, Section 4 of OCC's By-Laws currently provides OCC with the authority to fix the exercise settlement amount for exercised yield-based Treasury option contracts ''in accordance with the best information available as to the correct settlement value of the underlying yield'' if OCC determines that the settlement value of the underlying yield is unreported or otherwise unavailable for purposes of calculating the settlement amount for exercised contracts. Until recently, the Chicago Board Options Exchange (''CBOE''), on which yield-based Treasury options are traded, had a rule setting forth a specific method for determining the settlement value of the yield in the event the reporting authority failed to supply a settlement value. The CBOE rule setting forth that method, a random poll of a minimum of ten primary government bond dealers, was eliminated on December 2, 2003, when the Commission accepted for immediate effectiveness a CBOE rule filing deleting it. In that filing, CBOE adopted a provision stating that the settlement value would be determined in accordance with OCC's By-Laws and Rules.[4]

The repeal of the CBOE rule prompted OCC to review its own rules governing the setting of exercise settlement values for yield-based Treasury options. OCC is now amending Article XVI, Section 4 to give OCC substantially the same discretion in fixing exercise settlement values for yield-based Treasury options as it has under Article XVII, Section 4 governing index options.[5] As noted in the order approving OCC's rule change for index options, OCC's authority to fix exercise settlement values in unusual market conditions should be sufficiently broad to ensure that such values are consistent with the settlement values established for related products in other markets whenever that result is deemed

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 50466, (September 29, 2004), 69 FR 59634.

[3] Securities Exchange Act Release No. 44184 (April 16, 2001), 66 FR 20342 (April 20, 2001) [File No. SR–OCC–99–12].

[4] Securities Exchange Act Release No. 48865 (December 2, 2003), 68 FR 68676 (December 9, 2003) [File No. SR–CBOE–2003–48].

[5] A draft supplement to the Options Disclosure Document (''ODD'') that describes the substance of the By-Laws changes proposed herein will be filed with the Commission pursuant to Rule 9b–1 under the Act. Implementation of this rule change will be coordinated with the distribution of the related ODD supplement.

to be in the best interest of investors.[6] While Article VI, Section 4(a)(2) as currently drafted is also broad, OCC believes that its authority should be expressed in language parallel to other By-Laws provisions that expressly acknowledge that a settlement price may be fixed based either on the last reported price before a market disruption or the next reported price following the disruption or by some other method.

As with index options, under revised Article XVI, Section 4(a)(2) the settlement value of yield-based Treasury options will be fixed by an adjustment panel consisting of representatives of the exchange or exchanges on which the affected series of options is traded. Also, under revised Section 4(a)(3), in the event the adjustment panel delays fixing a settlement value beyond the expiration date of the affected series, the normal exercise by exception procedures will not apply. Instead, options that are in the money by one dollar or more would be deemed to have been irrevocably exercised prior to the expiration time.

OCC believes that the proposed rule change is consistent with the purposes and requirements of Section 17A of the Act, as amended, because it is designed to promote the prompt and accurate clearance and settlement of securities transactions, foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, remove impediments to the mechanisms of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest. The proposed changes promote these objectives by providing OCC with flexibility in responding to unanticipated events.

III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote prompt and accurate clearance and settlement of securities transactions.[7] The proposed rule change will allow OCC to make an adjustment to the multiplier of yield-based Treasury options in coordination with such an adjustment by an exchange and more clearly defines the method OCC will use to make a settlement adjustment for yield-based Treasury options in the event the settlement value is not available. By aligning OCC's rules for yield-based Treasury option rules with OCC's rules for index options, which have been previously approved by the Commission, the proposed rule change is designed to add uniformity and certainty to OCC's rules and therefore should help to promote prompt and accurate clearance and settlement of securities transactions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–OCC–2004–11) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3862 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

[6] Securities Exchange Act Release No. 46561 (September 26, 2002), 67 FR 61943 (October 2, 2002) [File No. SR–OCC–2002–09].

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50911; File No. SR–Phlx–2004–89]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Changes to Its Automated Options Market (AUTOM) System

December 22, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on December 14, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II, and III, below, which items have been prepared by the Phlx. On December 17, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Exchange filed the proposal, as amended, as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act [4] and Rule 19b–4(f)(6) thereunder.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Form 19b–4 dated December 17, 2004 (''Amendment No. 1''). Amendment No. 1 replaces the original filing in its entirety.

[4] 15 U.S.C. 78s(b)(3)(A)(iii).

[5] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Exchange Rule 1080(c)(iii), to reflect changes to the Exchange's Book Sweep function, and Exchange Rule 1080(c)(iv), which sets forth various situations in which orders received over the Philadelphia Stock Exchange Automated Options Market (''AUTOM'') System [6] that would otherwise be eligible for automatic execution are instead handled manually by the specialist, to reflect that All-or-None (''AON'') Orders would now be eligible for automatic execution.

Below is the text of the proposed rule change. Proposed additions are *italicized;* proposed deletions are [bracketed].

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Rule 1080. Philadelphia Stock Exchange Automated Options Market (AUTOM) and Automatic Execution System (AUTO–X)

(a)–(b) No change.

(c) AUTO–X. * * *

(i)–(ii) No change.

(iii) *Quotations Interacting With Limit Orders on the Book.* [Book Sweep. Book Sweep is a feature of AUTOM which, when engaged, does the following:]

(A) Respecting non-Streaming Quote Options, when [the] *a* bid or offer *that is: (1)* Generated by the Exchange's Auto-Quote system (or by a proprietary quoting system provided for in Commentary .0[2]*1(b)* of this Rule called ''Specialized Quote Feed'' or ''SQF''); *and (2) priced at the National Best Bid or Offer (''NBBO''), and therefore would result in an execution at the NBBO (a ''Book Sweep Quote''),* matches or crosses the Exchange's best bid or offer in a particular series as established by

[6] AUTOM is the Exchange's electronic order delivery, routing, execution and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange's trading floor. Orders delivered through AUTOM may be executed manually, or certain orders are eligible for AUTOM's automatic execution features, AUTO–X, Book Sweep and Book Match. Equity option and index option specialists are required by the Exchange to participate in AUTOM and its features and enhancements. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist limit order book on the Exchange trading floor. *See* Exchange Rule 1080.

an order on the limit order book, orders on the limit order book in that series will be automatically executed and allocated among crowd participants signed onto the Wheel. *This feature of AUTOM is known as ''Book Sweep.''* If Book Sweep is not engaged at the time the [Auto-Quote or SQF bid or offer] *Book Sweep Quote* matches or crosses the Exchange's best bid or offer represented by a limit order on the book, the specialist may manually initiated the Book Sweep feature. Book Sweep shall be engaged when AUTO–X is engaged, and shall be disengaged when AUTO–X is disengaged in accordance with Rule 1080(c)(iv) and Rule 1080(e). Eligible orders on the limit order book will be automatically executed up to the size associated with the quote that matches or crosses such limit orders.

(B) Respecting Streaming Quote Options, when [the] *any* bid or offer generated by the Exchange's Auto-Quote system, SQF, or by an SQT (as defined in Rule 1014(b)(ii)) matches or crosses the Exchange's best bid or offer in a particular series as established by an order on the limit order book, orders on the limit order book in that series will be automatically executed and automatically allocated in accordance with Exchange rules. If Book Sweep is not engaged at the time the Auto-Quote, SQF, or SQT bid or offer matches or crosses the Exchange's best bid or offer represented by a limit order on the book, the specialist or SQT may manually initiate the Book Sweep feature.

(iv) Except as otherwise provided in this Rule, in the following circumstances, an order otherwise eligible for [AUTO–X] *automatic execution* will instead be manually handled by the specialist:

(A) the Exchange's disseminated market is crossed (*i.e.,* 2⅛ bid, 2 offer), or crosses the disseminated market of another options exchange;

(B) [all-or-none order;

(C)] the AUTOM System is not open for trading when the order is received (which is known as a pre-market order);

([D]*C*) the disseminated market is produced during an opening or other rotation;

([E]*D*) when the specialist posts a bid or offer that is better than the specialist's own bid or offer (except with respect to orders eligible for *''Book Sweep'' as described in Rule 1080(c)(iii) above, and* ''Book Match'' as described in Rule 1080(g)(ii) below);

([F]*E*) if the Exchange's bid or offer is not the NBBO;

([G]*F*) when the price of a limit order is not in the appropriate minimum trading increment pursuant to Rule 1034;

([H]*G*) when the bid price is zero respecting sell orders; and

([I]*H*) respecting non-Streaming Quote Options, when the number of contracts automatically executed within a 15 second period in an option (subject to a Pilot program through April 30, 2005) exceeds the specified disengagement size, a 30-second period ensues during which subsequent orders are handled manually. If the Exchange's disseminated size exceeds the specified disengagement size and an eligible order is delivered for a number of contracts that is greater than the specified disengagement size, such an order will be automatically executed up to the disseminated size, followed by an AUTO-X disengagement period of 30 seconds. If the specialist revises the quotation in such an option prior to the expiration of such 30-second period, eligible orders in such an option shall again be executed automatically.

The Exchange's systems are designed and programmed to identify the conditions that cause inbound orders to be ineligible for automatic execution. Once it is established that inbound orders are ineligible for automatic execution, Exchange staff has the ability to determine which of the above conditions occurred.

(d)–(k) No change.

Commentary: No change.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Exchange Rules 1080(c)(iii) and (iv) to reflect system changes to AUTOM that are intended to increase the number of orders that are handled and executed automatically on the Exchange. The purpose of Amendment No. 1 to the proposed rule change is to clarify the description of the functionality of the Book Sweep feature.

Book Sweep Functionality

The Exchange proposes to amend Exchange Rule 1080(c)(iii) to reflect an additional automated execution functionality of its ''Book Sweep'' feature of AUTOM. Book Sweep is a feature of AUTOM that automatically executes inbound quotations against limit orders resting on the limit order book under certain circumstances. The Book Sweep feature automates this process when Book Sweep is engaged, and the Exchange's disseminated price is a limit order on the limit order book priced at the National Best Bid or Offer (''NBBO'').

Currently, respecting options that are not traded on the Exchange's electronic trading platform for options, Phlx XL[7] (referred to as ''non-Streaming Quote Options''), when a quote in a particular option series that is generated by the Exchange's Auto-Quote feature of the AUTOM system [8] or by a proprietary quoting system called ''Specialized Quote Feed'' or ''SQF'' [9] matches or crosses a limit order resting on the limit order book when the price of such limit order is the NBBO, the limit order is automatically executed and allocated on the Exchange's ''Wheel.'' [10]

The proposed amendments to Exchange Rule 1080(c)(iii)(A) would clarify that, respecting non-Streaming Quote Options, when a bid or offer that is: (1) Generated by the Exchange's Auto-Quote system or SQF; and (2) priced at the NBBO, and therefore would result in an execution at the NBBO (a ''Book Sweep Quote''), matches or crosses the Exchange's best bid or offer in a particular series as established by an order on the limit order book, orders on the limit order book in that series will be automatically executed and allocated among crowd participants signed onto the Wheel.

Current Exchange Rule 1080(c)(iv)(E), which is proposed to be redesignated as Exchange Rule 1080(c)(iv)(D), provides that orders otherwise eligible for automatic execution are instead handled manually by the specialist when the specialist posts a bid or offer that is better than the specialist's own bid or offer (*i.e.,* a limit order on the book). The Exchange believes that the purpose of

[7] *See* Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 46612 (August 3, 2004) (SR–Phlx–2003–59).

[8] *See* Exchange Rule 1080, Commentary .01(a).

[9] *See* Exchange Rule 1080, Commentary .01(b)(i).

[10] *See* Exchange Rule 1080(g) and Option Floor Procedure Advices and Order and Decorum Regulations F–24.

the rule is to allow the specialist to handle the booked limit order manually, and to seek the best execution on behalf of the limit order, when the quotation that matches or crosses the limit order price is not qualified as a ''Book Sweep Quote.'' The proposed rule change to current Exchange Rule 1080(c)(iv)(E) would clarify that orders eligible for Book Sweep would not be handled manually.

Currently, respecting Streaming Quote Options traded on Phlx XL (in which the specialist and a category of market-making Exchange participant known as a Streaming Quote Trader (''SQT'') [11] submit independent, proprietary electronic quotations), when a contra-side quotation that is not submitted with a message that indicates that the sender intends to sweep the book matches or crosses the price of a limit order resting on the limit order book, the specialist must execute and allocate the order manually to the participant that submitted the particular electronic quote. The proposal would provide that, when any electronic contra-side quotation matches with a limit order on the limit order book at the NBBO (*i.e.,* regardless of whether the quote is submitted with a message that indicates that the sender intends to sweep the book), the AUTOM System will automatically execute and allocate the resulting trade.[12] The Exchange believes that this enhanced automated functionality should increase the number of automatic executions of transactions in Streaming Quote Options, and should assist SQTs that submit electronic proprietary quotations in Streaming Quote Options by automatically executing transactions as contra-side to the limit order book in situations where the SQTs' quoting and trading systems do not include features that enable such SQTs to submit quotes with an indication that the sender intends to sweep the book.

In order to correct a typographical error in the current rule text, the Exchange proposes to amend Exchange Rule 1080(c)(iii)(A) to reflect that the Exchange Rule that describes SQF is Commentary .01(b) to Exchange Rule 1080.

Automatic Execution of AON Orders

Currently, under the Exchange Rule 1080(c)(iv)(B), AON Orders [13] are not eligible for automatic execution and are instead handled manually by the specialist. The Exchange proposes to amend the rule to delete this provision. Therefore, when the Exchange's disseminated price is the NBBO, AON Orders, when they become due for execution when their price and size can be executed in full, would be executed and allocated automatically by the AUTOM System. Under this proposed system enhancement, AON Orders, if eligible for execution based on the price and size of the inbound contra-side quote or order, would be executed in order of priority based on the time the AON Order was received. If the inbound quote or order at the disseminated price is not of sufficient size to execute the resting AON Order in full, such resting AON Order would not be executed, and would remain on the limit order book until it is eligible for execution based on the price and size of the inbound quote or order, or canceled. The Exchange represents that this system change is intended to automate more executions on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act [14] in general, and furthers the objectives of section 6(b)(5) of the Act [15] in particular, in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest, by adopting changes to the AUTOM System that result in a greater number of orders that are handled and executed automatically.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule 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, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) thereunder.[17] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposed of the Act.[18]

The Exchange requests that the Commission waive the five business days pre-filing requirement and the 30-day operative delay under Rule 19b–4(f)(6)(iii).[19]

The Commission believes that the waiver of the five business days pre-filing requirement and the 30-day operative delay under Rule 19b–4(f)(6)(iii) is consistent with the protection of investors and the public interest, because the proposed rule change will increase the number of orders that are handled and executed automatically on the Exchange and should facilitate more efficient and immediate executions.[20] Accordingly, the Commission designates that the proposal shall become operative as of the date of this notice.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[11] *See* Exchange Rule 1014(b)(ii)(A).

[12] *See* Exchange Rule 1014(g)(vii) for a description of the allocation algorithm applicable to trades in Streaming Quote Options that are automatically executed.

[13] An AON Order is a market or limit order which is to be executed in its entirety or not at all. *See* Exchange Rule 1066(c)(4).

[14] 15 U.S.C. 78f(b)

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on December 17, 2004, the date the Exchange filed Amendment No. 1 to the proposed rule change. *See* 15 U.S.C. 78s(b)(3)(C).

[19] 17 CFR 240.19b–4(f)(6)(iii).

[20] For purposes only of waiving the operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2004–89 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–89. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–89 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28479 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–M

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50901; File No. SR–Phlx–2004–84]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. to Eliminate the Public Order Exposure System Functionality From Phlx Rule 229

December 21, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 26, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to eliminate the Public Order Exposure System (''POES'') functionality from Phlx Rule 229. The text of amended Exchange Rule 229 is set forth below. Brackets indicate deletions; *italics* indicate additions.

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Rule 229. Philadelphia Stock Exchange Automated Communication and Execution System (PACE)

Supplementary Material: * * *

.01—.04 No Change.

.05—[Public Order Exposure System—]Subject to Supplementary Material Section .07, all round-lot market orders up to 500 shares and PRL market orders up to 599 shares *entered after the opening will be automatically executed at the PACE Quote.* [Will be stopped at the PACE Quote at the time of entry into the system (''Stop Price'') and be subject to a delay of up to 30 seconds from being executed in order to receive an opportunity for price improvement. If such market order is not executed within the 30 second window, the order will be automatically executed at the Stop Price. If the PACE Quote at the time of order entry into the system reflects a point spread (the difference between the best bid and offer) of $.05 or less for equities trading in decimals, pursuant to Rule 134 or 125, that order will be executed immediately without the 30 second delay.]

* * *

.06—No Change.

.07—(a)-(b) No Change.

(c) Price Improvement for PACE Orders.

(i) Automatic Price Improvement—Where the specialist voluntarily agrees to provide automatic price improvement to all customers and all eligible market orders in a security, automatically executable market and marketable limit orders in New York Stock Exchange and American Stock Exchange listed securities received through PACE for 599 shares or less shall be provided with automatic price improvement from the PACE Quote when received either $.01 or a percentage of the PACE Quote when the order is received for equities trading in decimals beginning at 9:30 A.M., except where:

(A) A buy order would be improved to a price less than the last sale (except as provided in ([F]*E*) below) or a sell order would be improved to a price higher than the last sale (except as provided in ([E]*D*) below); or

(B) A buy order would be improved to the last sale price which is a downtick (except as provided in ([F]*E*) below) or a sell order would be improved to the last sale price which is an uptick (except as provided in ([E]*D*) below). The PACE System will determine whether the last sale price is a downtick or an uptick. The PACE System does not recognize changes from the previous day's close.

In these situations, the order is not eligible for automatic price improvement, and is, instead, automatically executed at the PACE Quote. A specialist may voluntarily agree to provide automatic price improvement to larger orders in a particular security to all customers under this provision.

A specialist may choose to provide automatic price improvement of: (i) $.01 where the PACE Quote is either $.05 or greater, or $.03 or greater, or (ii) where the PACE Quote is $.02 or greater, a percentage of the PACE Quote when the order is received, up to 50%, rounded to the nearest penny, and at least $.01, in a particular security to all customers.

(C) Automatic price improvement will not occur for odd-lot orders, nor where the execution price before or after the application of automatic price improvement would be outside the primary market high/low range for the day, if so elected by the entering member organization.

(D) [The POES window of Supplementary Material .05 above does

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

not apply where an order is subject to automatic price improvement or manual price protection.

(E)] Sell Order Enhancement I—A specialist may choose to give automatic price improvement to all sell orders of 100 shares or more, as determined by the specialist, in a particular security which would be improved to the last sale on an uptick; or

Sell Order Enhancement II—A specialist may choose to give automatic price improvement to all sell orders of 100 shares or more, as determined by the specialist, in a particular security which would be improved to a price higher than the last sale.

([F]*E*) Buy Order Enhancement—A specialist may choose to give automatic price improvement to all buy orders, as determined by the specialist, in any security that is exempted from or otherwise not subject to Securities Exchange Act Rule 10a–1.

(c)(ii)–(iv)—No Change

.08—.22—No Change

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to reduce the time between order receipt and execution for market orders, thereby improving order turnaround time, and to reduce the number of manual orders. Currently, Phlx Rule 229, Supplementary Material .05, provides that if the PACE[3] Quote[4] at the time of order entry into the system reflects a point spread (the difference between the best bid and offer) of more than $.05, round-lot market orders up to 500 shares and PRL[5] market orders up to 599 shares will be stopped at the PACE Quote at the time of entry into the system (''Stop Price'') and be subject to a delay of up to 30 seconds from being executed in order to receive an opportunity for price improvement. During that time, specialists may, but are not required to, improve the execution price of the order to a price better than the Stop Price. If such market order is not executed within the 30-second window, the order will be automatically executed at the Stop Price. If the PACE Quote at the time of order entry into the system reflects a point spread of $.05 or less, that order would be executed immediately without the 30-second delay.

Since the creation of POES,[6] the Exchange has adopted other means of price improvement known as automatic price improvement (''API'') and manual price protection that may apply in certain situations.[7] Pursuant to Phlx Rule 229, Supplementary Material .07(c)(i)(D), the POES window does not apply where an order is subject to API or manual price protection. However, some orders are still subject to the window, which means that these otherwise automatically executable orders drop to manual for a period of 30 seconds waiting for specialists to manually price improve them, after which they are executed. Eliminating the POES functionality will eliminate the 30 second waiting time for automatic execution and allow such orders to be automatically executed at the PACE quote. Specialists who are interested in offering automatic price improvement will still have the Exchange's API available to them on a symbol-by-symbol basis, as they do today.[8]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[9] in general, and furthers the objectives of Section 6(b)(5) of the Act[10] in particular, in that it should promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and protect investors and the public interest by improving order turnaround time and reducing the number of manual orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2004–84 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission,

[3] PACE is the Exchange's automated order routing, delivery, execution and reporting system for equities. *See* Phlx Rule 229.

[4] The PACE Quote means the best bid/ask quote among the American, Boston, National, Chicago, New York, Pacific, or Philadelphia Stock Exchanges, or the Intermarket Trading System/Computer Assisted Execution System (''ITS/CAES'') quote, as appropriate. *See* Phlx Rule 229.

[5] PRL means a combined round-lot and odd-lot order. *See* Phlx Rule 229.

[6] *See* Securities Exchange Act Release No. 35283 (January 26, 1995), 60 FR 6333 (February 1, 1995) (SR–Phlx–94–58).

[7] *See* Securities Exchange Act Release No. 39548 (January 13, 1998), 63 FR 3596 (January 23, 1998) (SR–Phlx–97–23).

[8] Additionally, manual price improvement will continue to be available to specialists when certain conditions are met. *See* Phlx Rule 229, Supplementary Material .07(c)(ii). According to the Phlx, because of the existence of these other means of price improvement (API and manual), the POES system is rarely used by the specialists as a method of price improvement. Telephone conversation between John Dayton, Assistant Secretary and Counsel, Phlx, and Angela Muehr, Attorney, Division of Market Regulation, Commission, on December 9, 2004.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR-Phlx-2004–84. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–84 and should be submitted on or before January 19, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3876 Filed 12–28–04; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–825]

Stainless Steel Sheet & Strip in Coils from Italy; Preliminary Results of the Full Sunset Review of the Countervailing Duty Order

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

SUMMARY: On June 1, 2004, the Department initiated a sunset review of the countervailing duty (''CVD'') order on stainless steel sheet & strip in coils (''SSSS'') from Italy pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five–Year (Sunset) Reviews*, 69 FR 30874 (June 1, 2004). On the basis of substantive responses filed by domestic and respondent interested parties, the Department is conducting a full sunset review. As a result of this review, the Department preliminarily finds that revocation of the countervailing duty order would likely lead to continuation or recurrence of countervailable subsidies at the levels indicated in the *Preliminary Results of Review* section of this notice.

EFFECTIVE DATE: December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Hilary Sadler, Esq., Office of Policy for Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230; telephone: (202) 482–4340.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2004, the Department initiated a sunset review of the countervailing duty (''CVD'') order on SSSS from Italy pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five–Year (Sunset) Reviews*, 69 FR 30874 (June 1, 2004). The Department received a notice of intent to participate from Allegheny Ludlum Corp. (''Allegheny Ludlum''), North America Stainless (''NAS''), Nucor Corporation, Local 3303 United Auto Workers, Zanesville Armco Independent Organization, and the United Steelworkers of America, AFL–CIO/CLC (''USWA''), the domestic interested parties (collectively ''domestic interested parties''), within the applicable deadline (June 16, 2004) specified in section 351.218(d)(1)(i) of the *Sunset Regulations*. However, NAS does not support continuation of this countervailing duty order. *See* Notice of Intent to Participate from the Domestic Interested Parties at footnote 1 (June 16, 2004). All domestic interested parties claimed interested–party status under section 771(9)(C) and (D) of the Act, as a U.S. producer of the domestic like product or a certified union whose workers are engaged in the production of the subject merchandise in the United States.

On July 1, 2004, we received a complete substantive response from the domestic interested parties within the 30–day deadline specified in section 351.218(d)(3)(i) of the Department's Regulations. *See* Substantive Response of the Domestic Interested Parties (July 1, 2004).

The Department received a complete substantive response to the notice of initiation on behalf of three respondent interested parties: the Government of Italy (''GOI''), the Delegation of the European Commission (''EC''), and TKAST. We received substantive responses from all respondent interested parties expressing their willingness to participate in this review. *See* Responses of the GOI (unpaginated), June 30, 2004, (''GOI Response''); EC (unpaginated), June 30, 2004, (''EC Response''). TKAST, a foreign producer and exporter of the subject merchandise claimed interested party status under section 771(9)(A) of the Act. See Substantive Response of TKAST at 2 (July 1, 2004) (''TKAST Response''). All respondent interested parties note that they have participated in this proceeding.

We received rebuttal comments from the domestic interested parties on July 9, 2004; however, we did not receive rebuttal comments from the respondent interested parties.

In a sunset review, the Department normally will find that there is adequate response to conduct a full sunset review where respondent interested parties account for more than 50 percent, by volume, of total exports of subject merchandise to the United States. *See* 19 CFR 351.218(e)(1)(ii)(A). TKAST accounted for more than the 50 percent threshold that the Department normally considers to be an adequate response under 19 CFR section 351.218(e)(1)(ii)(A). On July 13, 2004, the Department determined that the responses by TKAST, the only respondent company in this review, the GOI, and the EC provided an adequate basis for a full review. *See* Memorandum for James J. Jochum, Assistant Secretary, Import Administration, from Ronald K. Lorentzen, Acting Director, Office of Policy, Re: Sunset Review of Stainless Steel Sheet & Strip in Coils from Italy; Adequacy of Respondent Interested Party Response to the Notice of Initiation, July 21, 2004. Therefore, the Department is conducting a full sunset review in accordance with 19 CFR 351.218(e)(2)(i).

Scope of Review

For purposes of this review, the product covered by this order is certain stainless steel sheet and strip in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject sheet and strip is a flat–rolled product in coils that is greater than 9.5 mm in width and less

[11] 17 CFR 200.30–3(a)(12).

than 4.75 mm in thickness, and that is annealed or otherwise heat treated and pickled or otherwise descaled. The subject sheet and strip may also be further processed (e.g., cold–rolled, polished, aluminized, coated, etc.) provided that it maintains the specific dimensions of sheet and strip following such processing.

The merchandise subject to these orders is classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') at the following subheadings: 7219.13.00.30, 7219.13.00.50, 7219.13.00.70, 7219.13.00.80, 7219.14.00.30, 7219.14.00.65, 7219.14.00.90, 7219.32.00.05, 7219.32.00.20, 7219.32.00.25, 7219.32.00.35, 7219.32.00.36, 7219.32.00.38, 7219.32.00.42, 7219.32.00.44, 7219.33.00.05, 7219.33.00.20, 7219.33.00.25, 7219.33.00.35, 7219.33.00.36, 7219.33.00.38, 7219.33.00.42, 7219.33.00.44, 7219.34.00.05, 7219.34.00.20, 7219.34.00.25, 7219.34.00.30, 7219.34.00.35, 7219.35.00.05, 7219.35.00.15, 7219.35.00.30, 7219.35.00.35, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.12.10.00, 7220.12.50.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.20.70.05, 7220.20.70.10, 7220.20.70.15, 7220.20.70.60, 7220.20.70.80, 7220.20.80.00, 7220.20.90.30, 7220.20.90.60, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise covered by these orders is dispositive.

Excluded from the scope of these orders are the following: (1) sheet and strip that is not annealed or otherwise heat treated and pickled or otherwise descaled; (2) sheet and strip that is cut to length; (3) plate (i.e., flat–rolled stainless steel products of a thickness of 4.75 mm or more); (4) flat wire (i.e., cold–rolled sections, with a prepared edge, rectangular in shape, of a width of not more than 9.5 mm); and (5) razor blade steel. Razor blade steel is a flat–rolled product of stainless steel, not further worked than cold–rolled (cold–reduced), in coils, of a width of not more than 23 mm and a thickness of 0.266 mm or less, containing, by weight, 12.5 to 14.5 percent chromium, and certified at the time of entry to be used in the manufacture of razor blades. *See* Chapter 72 of the HTSUS, ''Additional U.S. Note'' 1(d).

In response to comments by interested parties the Department has determined that certain specialty stainless steel products are also excluded from the scope of these orders. These excluded products are described below:

Flapper valve steel is defined as stainless steel strip in coils containing, by weight, between 0.37 and 0.43 percent carbon, between 1.15 and 1.35 percent molybdenum, and between 0.20 and 0.80 percent manganese. This steel also contains, by weight, phosphorus of 0.025 percent or less, silicon of between 0.20 and 0.50 percent, and sulfur of 0.020 percent or less. The product is manufactured by means of vacuum arc remelting, with inclusion controls for sulphide of no more than 0.04 percent and for oxide of no more than 0.05 percent. Flapper valve steel has a tensile strength of between 210 and 300 ksi, yield strength of between 170 and 270 ksi, plus or minus 8 ksi, and a hardness (Hv) of between 460 and 590. Flapper valve steel is most commonly used to produce specialty flapper valves in compressors.

Also excluded is a product referred to as suspension foil, a specialty steel product used in the manufacture of suspension assemblies for computer disk drives. Suspension foil is described as 302/304 grade or 202 grade stainless steel of a thickness between 14 and 127 microns, with a thickness tolerance of plus–or-minus 2.01 microns, and surface glossiness of 200 to 700 percent Gs. Suspension foil must be supplied in coil widths of not more than 407 mm and with a mass of 225 kg or less. Roll marks may only be visible on one side, with no scratches of measurable depth. The material must exhibit residual stresses of 2 mm maximum deflection and flatness of 1.6 mm over 685 mm length.

Certain stainless steel foil for automotive catalytic converters is also excluded from the scope of these orders. This stainless steel strip in coils is a specialty foil with a thickness of between 20 and 110 microns used to produce a metallic substrate with a honeycomb structure for use in automotive catalytic converters. The steel contains, by weight, carbon of no more than 0.030 percent, silicon of no more than 1.0 percent, manganese of no more than 1.0 percent, chromium of between 19 and 22 percent, aluminum of no less than 5.0 percent, phosphorus of no more than 0.045 percent, sulfur of no more than 0.03 percent, lanthanum of less than 0.002 or greater than 0.05 percent, and total rare earth elements of more than 0.06 percent, with the balance iron.

Permanent magnet iron–chromium-cobalt alloy stainless strip is also excluded from the scope of these orders. This ductile stainless steel strip contains, by weight, 26 to 30 percent chromium and 7 to 10 percent cobalt, with the remainder of iron, in widths 228.6 mm or less, and a thickness between 0.127 and 1.270 mm. It exhibits magnetic remanence between 9,000 and 12,000 gauss, and a coercivity of between 50 and 300 oersteds. This product is most commonly used in electronic sensors and is currently available under proprietary trade names such as ''Arnokrome III.''[1]

Certain electrical resistance alloy steel is also excluded from the scope of these orders. This product is defined as a non–magnetic stainless steel manufactured to American Society of Testing and Materials (ASTM) specification B344 and containing, by weight, 36 percent nickel, 18 percent chromium, and 46 percent iron, and is most notable for its resistance to high–temperature corrosion. It has a melting point of 1390 degrees Celsius and displays a creep rupture limit of 4 kilograms per square millimeter at 1000 degrees Celsius. This steel is most commonly used in the production of heating ribbons for circuit breakers and industrial furnaces, and in rheostats for railway locomotives. The product is currently available under proprietary trade names, such as ''Gilphy 36.''[2]

Certain martensitic precipitation–hardenable stainless steel is also excluded from the scope of these orders. This high–strength, ductile stainless steel product is designated under the Unified Numbering System (UNS) as S45500–grade steel, and contains, by weight, 11 to 13 percent chromium and 7 to 10 percent nickel. Carbon, manganese, silicon and molybdenum each comprise, by weight, 0.05 percent or less, with phosphorus and sulfur each comprising, by weight, 0.03 percent or less. This steel has copper, niobium, and titanium added to achieve aging and will exhibit yield strengths as high as 1700 Mpa and ultimate tensile strengths as high as 1750 Mpa after aging, with elongation percentages of 3 percent or less in 50 mm. It is generally provided in thicknesses between 0.635 and 0.787 mm, and in widths of 25.4 mm. This product is most commonly used in the manufacture of television tubes and is currently available under

[1] ''Arnokrome III'' is a trademark of the Arnold Engineering.

[2] ''Gilphy 36'' is a trademark of Imphy, S.A.

proprietary trade names, such as ''Durphynox 17.''[3]

Finally, three specialty stainless steels typically used in certain industrial blades and surgical and medical instruments are also excluded from the scope of these orders. These include stainless steel strip in coils used in the production of textile cutting tools (e.g., carpet knives).[4] This steel is similar to AISI grade 420 but containing, by weight, 0.5 to 0.7 percent of molybdenum. The steel also contains, by weight, carbon of between 1.0 and 1.1 percent, sulfur of 0.020 percent or less, and includes between 0.20 and 0.30 percent copper and between 0.20 and 0.50 percent cobalt. This steel is sold under proprietary names, such as ''GIN4 Mo.'' The second excluded stainless steel strip in coils is similar to AISI 420–J2 and contains, by weight, carbon of between 0.62 and 0.70 percent, silicon of between 0.20 and 0.50 percent, manganese of between 0.45 and 0.80 percent, phosphorus of no more than 0.025 percent, and sulfur of no more than 0.020 percent. This steel has a carbide density on average of 100 carbide particles per 100 square microns. An example of this product is ''GIN5'' steel. The third specialty steel has a chemical composition similar to AISI 420 F, with carbon of between 0.37 and 0.43 percent, molybdenum of between 1.15 and 1.35 percent, but lower manganese of between 0.20 and 0.80 percent, phosphorus of no more than 0.025 percent, silicon of between 0.20 and 0.50 percent, and sulfur of no more than 0.020 percent. This product is supplied with a hardness of more than Hv 500 guaranteed after customer processing, and is supplied as, for example, ''GIN6''. ''GIN4 Mo,'' ''GIN5'' and ''GIN6'' are the proprietary grades of Hitachi Metals America, Ltd.

Analysis of Comments Received:

All issues raised in the substantive responses and rebuttals by parties to this sunset review are addressed in the ''Issues and Decision Memorandum'' (''Decision Memo'') from Ronald K. Lorentzen, Acting Director, Office of Policy, Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated December 17, 2004, which is hereby adopted by this notice. The issues discussed in the accompanying Decision Memo include the likelihood of continuation or recurrence of countervailable subsidies, the net subsidy likely to prevail were the order revoked, and the nature of the subsidy. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in the Central Records Unit, room B–099, of the main Commerce building.

In addition, a complete version of the Decision Memo can be accessed directly on the Web at www.ia.ita.doc.gov/frn, under the heading ''Italy.'' The paper copy and electronic version of the Decision Memo are identical in content.

Preliminary Results of Review:

The Department notes that on November 7, 2003, the U.S. Trade Representative requested the Department, pursuant to section 129(b)(4) of the Uruguay Round Agreements Act, to implement the determination in the Section 129 Memo. *See Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act: Countervailing Measures Concerning Certain Steel Products From the European Communities*, 68 FR 64858, (November 17, 2003). Accordingly, the Department revised the cash deposit rates for TKAST and ''all others'' to reflect the impact that privatization had on non–recurring, allocable subsidies for the countervailing duty order on SSSS from Italy. *Id.* We have preliminarily determined to report these revised rates to the ITC.

We preliminarily determine that revocation of the countervailing duty order on SSSS from Italy would be likely to lead to continuation or recurrence of countervailable subsidies at the rates listed below:

Producers/Exporters	Net Countervailable Subsidy (percent)
TKAST	0.80
Arinox	0.34
All Others	1.61

Nature of the Subsidy

Consistent with section 752(a)(6) of the Act, the Department will provide to the ITC information concerning the nature of the subsidy, and whether the subsidy is a subsidy described in Article 3 or Article 6.1 of the Subsidies Agreement. No receipt of benefits under these countervailable programs are contingent upon exports or the substitution of domestic over imported goods; therefore, these programs do not fall within the definition of a subsidy under Article 3 of the Subsidies Agreement. Furthermore, our review of the determinations on the record does not lead us to conclude that these programs fall within the definition of a subsidy under Article 6.1. We note that as of January 1, 2000, Article 6.1 has ceased to apply (see Article 31 of the Subsidies Agreement).

Any interested party may request a hearing within 30 days of publication of this notice in accordance with 19 CFR 351.310(d)(i). Any hearing, if requested, will be held on February 16, 2004. Interested parties may submit case briefs no later than February 8, 2005, in accordance with 19 CFR 351.309(c)(1)(i). Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than February 14, 2004, in accordance with 19 CFR 351.309(d)(i). The Department will issue a notice of final results of this sunset review, which will include the results of its analysis of issues raised in any such briefs, not later than April 27, 2005.

This five–year (''sunset'') review and notice are in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: December 17, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. E4–3863 Filed 12–28–04; 8:45 am]

Billing Code: 3510–DS–S

[3] ''Durphynox 17'' is a trademark of Imphy, S.A.

[4] This list of uses is illustrative and provided for descriptive purposes only.

SOCIAL SECURITY ADMINISTRATION

Work Incentives Assistance Program: Grants to State Protection and Advocacy Systems To Provide Protection and Advocacy Services to Social Security Beneficiaries With Disabilities; Awards Notification

AGENCY: Social Security Administration.

ACTION: Notice.

SUMMARY: The Social Security Administration announces the awarding of Work Incentives Assistance Program Grants to State Protection and Advocacy Systems for the period December 1, 2004 through November 30, 2005. The purpose of this program is to provide individuals with disabilities who receive Social Security Disability Insurance or Supplemental Security Income benefits, information and advice about obtaining vocational rehabilitation and employment services. The purpose is also to provide advocacy or other services that beneficiaries with a disability may need to secure, maintain, or regain gainful employment.

The following grants are being awarded for Fiscal Year 2005:

State or Territory	Award
Alabama	$107,243
Alaska	100,000

State or Territory	Award
Arizona	100,000
Arkansas	100,000
California	439,035
Colorado	100,000
Connecticut	100,000
Delaware	100,000
Florida	245,288
Georgia	130,301
Hawaii	100,000
Idaho	100,000
Illinois	167,305
Indiana	100,000
Iowa	100,000
Kansas	100,000
Kentucky	115,761
Louisiana	100,000
Maine	100,000
Maryland	100,000
Massachusetts	104,768
Michigan	163,605
Minnesota	100,000
Mississippi	100,000
Missouri	100,000
Montana	100,000
Nebraska	100,000
Nevada	100,000
New Hampshire	100,000
New Jersey	100,000
New Mexico	100,000
New York	319,006
North Carolina	146,570
North Dakota	100,000
Ohio	177,910
Oklahoma	100,000
Oregon	100,000
Pennsylvania	203,256
Rhode Island	100,000
South Carolina	100,000
South Dakota	100,000
Tennessee	117,012
Texas	237,941
Utah	100,000
Vermont	100,000
Virginia	100,000
Washington	100,000
West Virginia	100,000
Wisconsin	100,000
Wyoming	100,000
District of Columbia	100,000
Puerto Rico	100,000
American Samoa	50,000
Guam	50,000
Northern Mariana Islands	50,000
Virgin Islands	50,000
Native American Program	50,000

FOR FURTHER INFORMATION CONTACT: Jennifer DeBoy, 410–965–8658.

SUPPLEMENTARY INFORMATION: The Request for Applications was originally published as Program Announcement No. SSA–OESP–04–1. The authority for these grants is found in section 1150 of the Social Security Act, as added by section 122 of Public Law 106–170 (the Ticket to Work and Work Incentives Improvement Act of 1999), and amended by sections 404 and 477 of Public Law 108–203. This section, State Grants for Work Incentives Assistance to Disabled Beneficiaries, authorized the Commissioner to make payments only to the designated Protection and Advocacy Systems established under title I of the Developmental Disabilities Assistance and Bill of Rights Act (subsequently replaced by title I of the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public Law 106–402). Formula-based award amounts are derived from the Social Security Administration's disability population statistics for each State and Territory.

Dated: December 21, 2004.

Martin H. Gerry,

Deputy Commissioner for Disability and Income Security Programs.

[FR Doc. 04–28471 Filed 12–28–04; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

Benefits Planning, Assistance and Outreach (BPAO) Meeting

AGENCY: Social Security Administration (SSA).

ACTION: Notice of meeting.

DATES: January 13, 2005, 12 p.m.–4 p.m.

ADDRESSES: International Trade Center (ITC) Bldg., Conference Room 839, 500 E Street, SW., Washington, DC 20254.

SUPPLEMENTARY INFORMATION:

Type of meeting: This is an informational meeting open to all interested parties. Interested parties are invited to participate by coming to the address listed above or by teleconferencing. Public comment will be taken.

Purpose: SSA announces a meeting to solicit public input regarding the reauthorization of the Benefits Planning, Assistance and Outreach (BPAO) Program. Section 1149(d) of the Social Security Act (as added by section 121 of the Ticket to Work and Work Incentives Improvement Act (TWWIAA) of 1999, Public Law (Pub. L.) 106–170) required SSA to establish community based benefits planning, assistance and outreach projects in every State, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands. Section 407 of the Social Security Protection Act (Pub. L. 108–203) recently extended the authorization of these programs.

SSA will solicit public input during this meeting regarding the new BPAO Request for Application (RFA) process, including what services should be provided by projects in support of beneficiaries, with disabilities, in their return to work efforts and what are the preferred characteristics of the organizations providing such services. Interested parties may also submit input in writing at *http://www.socialsecurity.gov/work.*

Since seating may be limited, persons interested in providing comments at the meeting should contact SSA Project Officer, Odessa Doaty, via e mail at: *Odessa.Doaty@ssa.gov* or by calling: (410) 966–8333 prior to the meeting date.

The full agenda for the meeting will be posted on the Internet at *http://www.socialsecurity.gov/work*, at least one week before the meeting, or can be received in advance electronically or by fax upon request. Teleconference call-in information will also be available at that time for interested parties who would like to participate through this venue.

Contact Information: Anyone requiring information regarding the meeting should contact Odessa Doaty, SSA Project Officer, at (410) 966–8333. Transcripts will be kept of the proceedings and will be available for public inspection at *http://www.socialsecurity.gov/work* no later than thirty (30) days following the meeting.

If accommodations are needed, please contact Odessa Doaty no later than ten (10) business days prior to the meeting. Ms. Doaty may be contacted by:

- Mail address: Odessa Doaty, Social Security Administration, 6401 Security Blvd., Room 107 Altmeyer Bldg, Baltimore, MD 21235.
- Phone: (410) 966–8333.
- Fax : (410) 966–1278.
- E-mail: Odessa.Doaty@ssa.gov.

Dated: December 16, 2004.

Martin H. Gerry,

Deputy Commissioner for Disability and Income Security Programs.

[FR Doc. 04–28470 Filed 12–28–04; 8:45 am]

BILLING CODE 4191–02–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

United States-Israel Free Trade Area Implementation Act; Designation of Qualifying Industrial Zones

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Under the United States-Israel Free Trade Area Implementation Act (''IFTA Act''), articles of qualifying industrial zones encompassing portions of Israel and Jordan or Israel and Egypt are eligible to receive duty-free treatment. Effective upon publication of this notice, the United States Trade Representative, pursuant to authority

delegated by the President, is designating the Greater Cairo zone, Alexandria zone, and Suez Canal zone as qualifying industrial zones under the IFTA Act.

FOR FURTHER INFORMATION CONTACT: Edmund Saums, Director for Middle East Affairs, (202) 395–4987, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

SUPPLEMENTARY INFORMATION: Pursuant to authority granted under section 9 of the United States-Israel Free Trade Area Implementation Act of 1985 (''IFTA Act''), as amended (19 U.S.C. 2112 note), Presidential Proclamation 6955 of November 13, 1996 (61 FR 58761) proclaimed certain tariff treatment for articles of the West Bank, the Gaza Strip, and qualifying industrial zones. In particular, the Presidential Proclamation modified general notes 3 and 8 of the Harmonized Tariff Schedule of the United States: (a) To provide duty-free treatment to qualifying articles that are the product of the West Bank, the Gaza Strip or a qualifying industrial zone and are entered in accordance with the provisions of section 9 of the IFTA Act; (b) to provide that articles of Israel may be treated as though they were articles directly shipped from Israel for the purposes of the United States-Israel Free Trade Area Agreement (''the Agreement'') even if shipped to the United States from the West Bank, the Gaza Strip, or a qualifying industrial zone, if the articles otherwise meet the requirements of the Agreement; and (c) to provide that the cost or value of materials produced in the West Bank, the Gaza Strip, or a qualifying industrial zone may be included in the cost or value of materials produced in Israel under section 1(c)(i) of Annex 3 of the Agreement and that the direct costs of processing operations performed in the West Bank, the Gaza Strip, or a qualifying industrial zone may be included in the direct costs of processing operations performed in Israel under section 1(c)(ii) of Annex 3 of the Agreement.

Section 9(e) of the IFTA Act defines a ''qualifying industrial zone'' as an area that ''(1) encompasses portions of the territory of Israel and Jordan or Israel and Egypt; (2) has been designated by local authorities as an enclave where merchandise may enter without payment of duty or excise taxes; and (3) has been specified by the President as a qualifying industrial zone.''

Presidential Proclamation 6955 delegated to the United States Trade Representative the authority to designate qualifying industrial zones.

The United States Trade Representative has previously designated qualifying industrial zones under Section 9 of the IFTA Act on March 13, 1998 (63 FR 12572), March 19, 1999 (64 FR 13623), October 15, 1999 (64 FR 56015), October 24, 2000 (65 FR 64472), December 12, 2000 (65 FR 77688), June 15, 2001 (66 FR 32660), and January 28, 2004 (69 FR 4199).

The governments of Israel and Egypt jointly requested in a letter submitted to the United States Trade Representative on December 7, 2004, the designation as qualifying industrial zones of areas comprising a Greater Cairo zone, Alexandria zone, and Suez Canal zone. The names and locations of the factories comprising these three zones are specified on maps and materials submitted by Egypt and Israel and on file with the Office of the U.S. Trade Representative. Israel and Egypt have agreed that merchandise may enter, without payment of duty or excise taxes, areas under their respective customs control that comprise the Greater Cairo zone, Alexandria zone, and Suez Canal zone. In addition, Israel and Egypt have agreed to a ''Protocol Between the Government of the State of Israel and the Government of the Arab Republic of Egypt On Qualifying Industrial Zones' that provides for the operation and administration of these zones.

Accordingly, the Greater Cairo zone, Alexandria zone, and Suez Canal zone meet the criteria under sections 9(e)(1) and (2) of the IFTA Act.

Therefore, pursuant to the authority delegated to me by Presidential Proclamation 6955, I hereby designate the areas occupied by the factories that comprise the Greater Cairo zone, Alexandria zone, and Suez Canal zone, as specified on maps and materials received from Egypt and Israel, as qualifying industrial zones under section 9 of the IFTA Act, effective upon the date of publication of this notice, applicable to articles shipped from these qualifying industrial zones after such date.

Dated: December 14, 2004.

Robert B. Zoellick,

United States Trade Representative.

[FR Doc. 04–28445 Filed 12–28–04; 8:45 am]

BILLING CODE 3190–W5–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34630]

MRC Regional Railroad Authority—Trackage Rights Exemption—Lines of the State of South Dakota

MRC Regional Railroad Authority (MRC), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from the State of South Dakota (the State)[1] overhead trackage rights over a line of railroad extending between milepost 654 near Mitchell, SD, and milepost 511.90 in Sioux City, IA, including such yard tracks, sidetracks, and connecting tracks (existing or to be constructed) as are reasonable: (a) To interchange railcars with The Burlington Northern and Santa Fe Railway Company (BNSF) and Dakota, Minnesota & Eastern Railroad Corporation at Mitchell; (b) to access the State-owned line extending westerly from Napa Junction, SD, to Platte, SD; and (c) to interchange railcars with BNSF, Union Pacific Railroad Company, and Canadian National Railway Company at Sioux City. MRC will also acquire from the State limited local trackage rights on the Mitchell-Sioux City Line: (i) to move loaded cars of corn, soybeans, and wheat originating at points on the line between Mitchell and Kadoka, SD,[2] and terminating at the Mitchell Elevator in Mitchell and the Beardsley Elevator in Beardsley, SD; and (ii) to move empty cars via the reverse route. The total distance of the trackage rights to be acquired is approximately 142.1 miles.

MRC certifies that its projected revenues as a result of the MRC-South Dakota transaction will not result in MRC becoming a Class I or Class II rail carrier, and further certifies that its projected revenues will not exceed $5 million. The MRC-South Dakota transaction was scheduled to be consummated on or after December 17, 2004.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke does not automatically stay the transaction.

[1] The trackage rights will be granted by the State acting by and through the South Dakota State Railroad Board and the South Dakota Department of Transportation, Office of Railroads.

[2] The previously abandoned Mitchell-Kadoka Line, which is now owned by the State, has been leased to MRC. And MRC, in turn, has subleased the Mitchell-Kadoka Line to Dakota Southern Railway Company (DSRC), which operates over the line.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34630, must be filed with the Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on MRC's representative: Kenneth W. Cotton, Wipf & Cotton Law Offices, LLC, 107 South Main Street, Wagner, SD 57380.

The notice of exemption filed with respect to the MRC-South Dakota transaction in this docket is related to a notice of exemption concurrently filed in a related docket: STB Finance Docket No. 34630 (Sub-No. 1), *Dakota Southern Railway Company—Trackage Rights Exemption—State of South Dakota and MRC Regional Railroad Authority*. The notice of exemption filed in the related docket contemplates the operation of MRC's Mitchell-Sioux City Line trackage rights by DSRC on behalf of MRC.

MRC and DSRC have advised that the Mitchell-Sioux City Line, which is owned by the State, is now operated on behalf of the State by BNSF, pursuant to a 1986 Operating Agreement. MRC and DSRC have also advised: that, under the Operating Agreement, the State has the right to grant trackage rights on the Mitchell-Sioux City Line subject to certain BNSF consent; that, although the State has the right to grant trackage rights to MRC for operations by MRC's third-party operator (DSRC), BNSF has not consented to the grant of those rights; and that the failure to provide this consent is now the subject of litigation between the State and BNSF in *The Burlington Northern and Santa Fe Railway Company* v. *State of South Dakota*, Case No. 04–470 (S.D. 6th Circuit). MRC and DSRC have further advised that they recognize that BNSF consent may have to be obtained, either voluntarily or through litigation, before DSRC can commence trackage rights operations on the Mitchell-Sioux City Line. MRC and DSRC have suggested, however, that, inasmuch as the Board's authority respecting the notices filed in this docket and in the related docket is ''permissive'' in nature, the filing of the notices in the two dockets is appropriate as a ''prelude'' to obtaining any necessary consent.

By letter filed December 17, 2004, BNSF has advised that it has not given its consent, and does not intend to give its consent, to the third-party trackage rights operation contemplated by MRC and DSRC. BNSF has further advised that, in its view, the filings by MRC and DSRC in this docket and in the related docket are intended to improperly influence the pending state court litigation. BNSF has asked that the Board stress that issuance by the Board of the notices filed in this docket and in the related docket: does not constitute any finding by the Board concerning either the Board's jurisdiction over these transactions or DSRC's right to operate over the line without BNSF's consent; and does not provide any basis for MRC or DSRC to claim that the Board has permitted DSRC to operate over the line in the absence of a final decision by the courts that DSRC has a legal right to conduct such operations.

In view of the ongoing litigation concerning the right of the State to grant the trackage rights contemplated in this docket and in the related docket, it seems best to note that the Board has made no determination, one way or the other, concerning either the right of the State to grant these trackage rights without BNSF's consent or the right of DSRC to operate over the line without BNSF's consent. The contractual dispute respecting the scope of the rights retained by or granted to the State and/or BNSF under the 1986 Operating Agreement must be resolved in a court of competent jurisdiction.

Board decisions and notices are available on its Web site at ''*http://www.stb.dot.gov*.''

Decided: December 21, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–28336 Filed 12–28–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34630 (Sub–No. 1)]

Dakota Southern Railway Company—Trackage Rights Exemption—State of South Dakota and MRC Regional Railroad Authority

The State of South Dakota (the State) and MRC Regional Railroad Authority (MRC) have agreed to grant overhead trackage rights to Dakota Southern Railway Company (DSRC) over a State-owned line of railroad extending between milepost 654 near Mitchell, SD, and milepost 511.90 in Sioux City, IA, including such yard tracks, sidetracks, and connecting tracks (existing or to be constructed) as are reasonable: (a) To interchange railcars with The Burlington Northern and Santa Fe Railway Company (BNSF) and Dakota, Minnesota & Eastern Railroad Corporation at Mitchell; (b) to access the State-owned line extending westerly from Napa Junction, SD, to Platte, SD; and (c) to interchange railcars with BNSF, Union Pacific Railroad Company, and Canadian National Railway Company at Sioux City. The State and MRC have also agreed to grant to DSRC limited local trackage rights on the Mitchell-Sioux City Line: (i) to move loaded cars of corn, soybeans, and wheat originating at points on the DSRC-operated line between Mitchell and Kadoka, SD, and terminating at the Mitchell Elevator in Mitchell and the Beardsley Elevator in Beardsley, SD; and (ii) to move empty cars via the reverse route. The total distance of the trackage rights to be granted to DSRC is approximately 142.1 miles. The DSRC–MRC transaction contemplated by the parties was scheduled to be consummated on or after December 17, 2004.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

The notice of exemption filed in this docket was filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke does not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34630 (Sub-No. 1), must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on DSRC's President: George Alexander Huff, IV, Dakota Southern Railway Company, 408 East Prospect Street, Chamberlain, SD 57325.

The notice of exemption filed with respect to the DSRC–MRC transaction in this docket is related to a notice of exemption concurrently filed in a related docket: STB Finance Docket No. 34630, *MRC Regional Railroad Authority—Trackage Rights Exemption—Lines of the State of South Dakota*. The notice of exemption filed in the related docket contemplates MRC's acquisition from the State of the trackage rights that MRC intends to grant to DSRC.

MRC and DSRC have advised that the Mitchell-Sioux City Line, which is

owned by the State, is now operated on behalf of the State by BNSF, pursuant to a 1986 Operating Agreement. MRC and DSRC have also advised: that, under the Operating Agreement, the State has the right to grant trackage rights on the Mitchell-Sioux City Line subject to certain BNSF consent; that, although the State has the right to grant trackage rights to MRC for operations by MRC's third-party operator (DSRC), BNSF has not consented to the grant of those rights; and that the failure to provide this consent is now the subject of litigation between the State and BNSF in *The Burlington Northern and Santa Fe Railway Company* v. *State of South Dakota*, Case No. 04–470 (S.D. 6th Circuit). MRC and DSRC have further advised that they recognize that BNSF consent may have to be obtained, either voluntarily or through litigation, before DSRC can commence trackage rights operations on the Mitchell-Sioux City Line. MRC and DSRC have suggested, however, that, inasmuch as the Board's authority respecting the notices filed in this docket and in the related docket is ''permissive'' in nature, the filing of the notices in the two dockets is appropriate as a ''prelude'' to obtaining any necessary consent.

By letter filed December 17, 2004, BNSF has advised that it has not given its consent, and does not intend to give its consent, to the third-party trackage rights operation contemplated by MRC and DSRC. BNSF has further advised that, in its view, the filings by MRC and DSRC in this docket and in the related docket are intended to improperly influence the pending state court litigation. BNSF has asked that the Board stress that issuance by the Board of the notices filed in this docket and in the related docket: does not constitute any finding by the Board concerning either the Board's jurisdiction over these transactions or DSRC's right to operate over the line without BNSF's consent; and does not provide any basis for MRC or DSRC to claim that the Board has permitted DSRC to operate over the line in the absence of a final decision by the courts that DSRC has a legal right to conduct such operations.

In view of the ongoing litigation concerning the right of the State to grant the trackage rights contemplated in this docket and in the related docket, it seems best to note that the Board has made no determination, one way or the other, concerning either the right of the State to grant these trackage rights without BNSF's consent or the right of DSRC to operate over the line without BNSF's consent. The contractual dispute respecting the scope of the rights retained by or granted to the State and/or BNSF under the 1986 Operating Agreement must be resolved in a court of competent jurisdiction.

Board decisions and notices are available on its Web site at ''*http://www.stb.dot.gov*.''

Decided: December 21, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–28335 Filed 12–28–04; 8:45 am]

BILLING CODE 4915–01–P



Federal Register

Wednesday,
December 29, 2004

Part II

Department of Housing and Urban Development

Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants Fiscal Year 2004; Correction; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4921–C–02]

Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants Fiscal Year 2004; Correction

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of funding availability; correction.

SUMMARY: On November 3, 2004, HUD published the Notice of Funding Availability (NOFA) for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization and Demolition Grants for Fiscal Year 2004. This notice announces several corrections to the NOFA.

FOR FURTHER INFORMATION CONTACT: Lar Gnessin, Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington DC, 20410–5000; telephone (202) 708–0614 extension 2676 (this is not a toll-free number). Hearing-or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: .

On November 3, 2004, HUD published (69 FR 64136) the Notice of Funding Availability (NOFA) for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization and Demolition Grants for Fiscal Year 2004. This notice announces corrections to the NOFA.

Subsequent to publication, the Department discovered that some references had been inconsistently used in the NOFA and appendices. Corrections to incorrect references are made in this document. This notice also makes a clarification to the description of calculating matching funds. Further clarification is made in the milestone chart that describes, in general, a timeline for the HOPE VI grant cycle. In addition, the notice clarifies that as part of the determination of capacity of existing HOPE VI grantees, production achievement numbers will be taken from the HOPE VI Quarterly Progress Report for the quarter ending September 30, 2004.

In addition, the Department discovered that two required submission items that are described in the NOFA were inadvertently left off the application checklist. Consequently, this notice explains that the checklist is no longer a required submission of the application. Although the application checklist is not required, HUD recommends that applicants utilize the suggested Table of Contents, Appendix 1 to this Notice, to help ensure that they have included all necessary documents with their applications. For a complete list of required narrative exhibits and forms, see pages 64149 and 64150 of the November 3, 2004, NOFA publication.

After publication, HUD took notice that the explanation of Housing Choice Voucher utilization rate was unclear. Therefore, this notice also clarifies for applicants how to determine the Housing Choice Voucher utilization rate. Similarly, HUD determined that the NOFA definition of ''project-based affordable housing units'' needed clarification and is made clear in this correction notice. Other clarifications are included in this notice to assist applicants in understanding the NOFA. Finally, this correction notice includes additional detailed application submission information in appendices 2 and 3.

Accordingly, the Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants for Fiscal Year 2004, published in the **Federal Register** on November 3, 2004 (69 FR 64135) is corrected as follows:

1. On page 64138, in the middle column, revise paragraph III.B.1.c. to read as follows: ''c. In accordance with Section 24(c) of the Act, for purposes of calculating the amount of matching funds required by Sections a. and b. above, you may not include amounts from HOPE VI program funding, including HOPE VI Revitalization, HOPE VI Demolition, and HOPE VI Neighborhood Networks grants. You may include funding from other public housing sources, *e.g.*, Capital Funds, other federal sources, any state or local government source and any private contributions. You may also include the value of donated material or buildings, the value of any lease on a building, the value of the time and services contributed by volunteers, and the value of any other in-kind services or administrative costs provided.''

2. On page 64139, in the middle column, paragraph III.C.1.e., remove the phrase, ''(community building, etc.)''

3. On page 64139, in the third column, paragraph III.C.1.i., page 64150, in the third column, paragraph IV.B.4.f., and on page 64156, in the middle column, paragraph V.A.1.c.(1)(iii):

a. Revise the Milestone table to read as follows:

Milestone	Date
Grant Award	May 2, 2005.
Grant Agreement Execution.	August 1, 2005.
HUD's written request for Supplemental Submissions.	September 1, 2005.
HUD's approval of Supplemental Submissions.	January 2, 2006.

b. Remove the paragraph that follows immediately the Milestone table. ''If grant award takes place after October 1, 2004, the grantee's program schedule may be changed in the Supplemental Submissions to account for the period of time between October 1, 2004, and the actual date of grant award.'' and add in its place, ''If grant award takes place after May 2, 2005, the grantee's program schedule may be changed in the Supplemental Submissions to account for the period of time between May 2, 2005, and the actual date of grant award.''

4. On page 64140, in the third column, remove paragraph III.C.2.a.(2).

5. On page 64141, in the first column, revise paragraph III.C.2.b.(3) to read as follows:

''(3) Resident Involvement in the Revitalization Program Certification.'' You must certify that you have involved affected public housing residents at the beginning and during the planning process for the revitalization program, prior to submission of your application. If you have not included affected residents in the planning process, your application will not be rated or ranked and will be ineligible for funding. See Section III.C.4. of this NOFA for minimum training and meeting requirements and Section IV.B. of this NOFA for documentation requirements.

6. On page 64149, in the second column, remove paragraph IV.B.2.a.(3); Form HUD–52800, ''HOPE VI Revitalization Application Checklist,'' as this form is no longer a mandatory part of the application. Although the application checklist is not required, HUD recommends that applicants utilize the suggested Table of Contents, Appendix 1 to this Notice, to help ensure that they have included all necessary documents with their applications. For additional information about required narrative exhibits and forms, see pages 64149 and 64150 of the November 3, 2004 NOFA publication.

7. On page 64149, in the last column, remove paragraph IV.B.2.b.(17).

8. On page 64150, in the first column, add a new paragraph IV.B.2.c. after paragraph IV.B.2.b.(32)(d) to read as follows: ''Additional detailed application submission information is

included in Appendix 2 to this Notice, ''HOPE VI Revitalization Application Submission Instructions,'' and Appendix 3 to this Notice, ''Instructions for HOPE VI Application Data Forms.''

9. On page 64150, in the first column, paragraph IV.B.4.d., This documentation is for the Need rating factor, not a threshold. Move paragraph IV.B.4.d. from its current position to page 64151, column 3, and label it paragraph IV.B.6.b.(3).

10. On page 64150, in the middle column, There are two paragraphs labeled ''(3)'' The paragraph beginning with, ''(3) Applicants must ensure that their obligation and expenditure information was updated in LOCCS * * *'' will remain as stated. Revise the paragraph beginning with, ''(3) For MTW PHAs that do not record capital funds obligations in LOCCS * * *'' by removing the paragraph label ''(3)'' and replacing it with the paragraph label ''(4)''.

11. On page 64151, in the middle column, revise paragraph IV.B.5.c. to read as follows: ''c. Relocation Plan Certification. (1) You must certify that the HOPE VI Relocation plan has been completed and that it conforms to the URA requirements as described in Sections III.C.4. and V.A.6. of this NOFA. If, after the deficiency cure period, this certification is not properly included in your application, the application will not be rated or ranked and will be ineligible for funding.''

12. On page 64153, in the third column, remove paragraph IV.B.6.f.(2).

13. On page 64153, in the third column, revise paragraph IV.B.6.j. by adding the following sentence at the end of the paragraph: ''You must answer the questions in either Part A or Part B of the form, but not both.''

14. On page 64155, in the middle column, revise paragraph IV.E.6.c. by removing the phrase ''* * * Control and Safe Harbor Standards can be found on the Grants.gov web site.'' and replacing it with, ''* * * Control and Safe Harbor Standards can be found on HUD's HOPE VI web site.''

15. On page 64156, in the second and third columns, revise paragraph V.A.1.d.(2) by removing the last sentence and replacing it with the following: ''Production achievement numbers will be taken from the HOPE VI Quarterly Progress Report for the quarter ending September 30, 2004.''

16. On page 64157, in the middle column, add a new paragraph V.A.1.h.(4) after paragraph V.A.1.h.(3) to read as follows: ''(4) For MTW PHA applicants: (a) If you are in compliance with your MTW Agreement, you will receive 2 points. (b) If you are not in compliance with your MTW Agreement, you will receive 0 points.''

17. On page 64157, in the middle column, add a new paragraph V.A.1.i.(4) after paragraph V.A.1.i.(3) to read as follows: ''(4) For MTW PHA applicants: ''(4) For MTW PHA applicants: (a) If you are in compliance with your MTW Agreement, you will receive 2 points. (b) If you are not in compliance with your MTW Agreement, you will receive 0 points.''

18. On page 64158, in the first column. There are two paragraphs labeled ''c.'' The paragraph heading, ''c. Need for HOPE VI Funding—8 points.'' remains as stated. Revise the paragraph heading, ''c. Need for Affordable Accessible Housing in the Community—3 Points.'' to read as follows: ''d. Need for Affordable Accessible Housing in the Community—3 Points.''

19. On page 64158, in the middle column, revise the second sentence of paragraph V.A.2.d.(2) to read as follows: ''* * * In figuring the Housing Choice Voucher utilization rate, determine and provide the percentage of HCV units out of the total number authorized or the percentage of HCV funds expended out of the total amount authorized, whichever percentage is higher * * *.''

20. On page 64158, in the middle column, revise paragraph V.A.2.d.(2) by adding at the end: ''For Sections (3), (4) and (5) below, you will be rated based upon either (a) or (b), whichever is determined to be the higher of the two percentages. The lower of the two percentages will not affect your rating.''

21. On page 64158, in the middle column, revise paragraph V.A.2.d.(6) to read as follows: ''(6) You will receive 0 Points if both the utilization rate of your Housing Choice Voucher program and the occupancy rate of your public housing inventory are less than 93 percent.''

22. On page 64158, in the third column, revise paragraph V.A.3.a. by adding at the end, ''In determining Leverage ratios, HUD will include as Leverage the match amounts that are required by Section III.B. of this NOFA.''

23. On page 64159, in the first column, revise paragraph V.A.3.d.(1) to read as follows: ''(1) You will receive 2 Points if the ratio of the amount of HOPE VI funds requested for physical development activities to the amount of your documented anticipatory resources is 1:0.1 or higher. The clause, ''HOPE VI funds requested for physical development activities'' is defined as your total requested amount of funds minus your requested CSS, administration amounts, and relocation. HUD will presume that your combined CSS and administration amounts are the total of Budget Line Items 1408 (excluding Management Improvements), 1410, and 1495 on the form HUD–52825–A, ''HOPE VI Budget'' that is included in your application.''

24. On page 64160, in the first column, revise paragraph V.A.6. by adding at the end, ''For all applicants, whether you have completed, or have yet to complete, relocation of all residents of the targeted project, your HOPE VI Relocation Plan must include the three goals set out in Section 24, as described in Sections a.(1)(a), (b) and (c) below.''

25. On page 64160, in the first column, remove paragraph V.A.6.a.(2).

26. On page 64160, in the first column, revise paragraph V.A.6.b. through d. to read as follows: ''b. You will receive 4 Points for this Factor if: Your Relocation Plan complies with only two of the goals in (a) through (c) above. c. You will receive 2 Points for this Factor if: Your Relocation Plan complies with only one of the requirements in (a) through (c) above. d. You will receive 0 Points for this Factor if: (1) Your Relocation Plan does not comply with any of the requirements in (a) through (c) above; or (2) Your application does not address this factor to an extent that makes HUD's rating of this factor possible.''

27. On page 64161, in the middle column, revise paragraph V.A.8.a.(1)(a) to read as follows: ''project-based affordable housing units'' are defined as on-site and off-site housing units where there are affordable-housing use restrictions on the unit, *e.g.*, public housing, project-based HCV (Section 8) units, LIHTC units, HOME units, affordable homeownership units, etc.''

28. On page 64161, in the third column, remove paragraphs V.A.8.a.(1)(c) and (d).

29. On page 64161, in the third column, revise paragraph V.A.8.a.(2) by adding at the end, ''* * * In figuring the Housing Choice Voucher utilization rate, determine and provide the percentage of HCV units out of the total number authorized or the percentage of HCV funds expended out of the total amount authorized, whichever percentage is higher * * *.''

30. On page 64164, in the middle column, revise paragraph V.B.5. by removing the citation to the ''FY2003 HOPE VI appropriation'' and adding in its place a citation to ''FY2004 HOPE VI appropriation.''

31. On page 64164, in the third column, revise paragraph VI.B.2. to read as follows: ''2. Timeliness of Development Activity. Grantees must proceed within a reasonable timeframe,

as indicated below. In determining reasonableness of such timeframe, HUD will take into consideration those delays caused by factors beyond your control. These timeframes must be reflected in the form of a program schedule, in accordance with the threshold requirement at Section III.C.1.i. of this NOFA and the Rating Factor requirement at Section V.A.1.c. of this NOFA.''

32. On page 64166, in the third column, revise paragraph VII.B.1. to read as follows: ''1. Technical corrections to this NOFA will be posted to the Grants.gov/Find website, to *http://www.hud.gov/offices/adm/grants/otherhud.cfm* and to HUD's HOPE VI website.''

33. On page 64168, remove form HUD–52800, ''HOPE VI Revitalization Application Checklist,'' as this form is no longer a mandatory part of the application. Although the application checklist is not required, HUD recommends that applicants utilize the suggested Table of Contents, Appendix 1 to this Notice, to help ensure that they have included all necessary documents with their applications. For a complete list of required narrative exhibits and forms, see pages 64149 and 64150 of the November 3, 2004 NOFA publication.

34. On page 64199, form HUD–52785, Attachment 23; In the first paragraph below the public reporting burden statement, remove the reference to ''Section VII.(A)(2)'' and add in its place a reference to ''Section III.C.4.j.'' In the paragraph below, ''Date of HOPE VI Resident Training Session,'' remove the reference to ''Section VII.(A)(3)'' and add in its place a reference to ''Section III.C.4.j.''

35. On page 64200, form HUD–52787, Attachment 31; In the first paragraph below the public reporting burden statement, remove the reference to ''Section XII.(B)(4)'' and add in its place a reference to ''Section V.A.9.d.'' For the checklist item beginning, ''The PHA has held 5 or more public planning sessions * * *,'' remove the sentence, ''No more than three of these meetings may be the same as those certified to in Attachment 23.''

Dated: December 20, 2004.

Michael Liu,

Assistant Secretary for Public and Indian Housing.

BILLING CODE 4210–33–P

APPENDIX 1

HOPE VI REVITALIZATION APPLICATION SUGGESTED TABLE OF CONTENTS

NARRATIVE EXHIBITS		Application Page Number
Exhibit A:	**SUMMARY INFORMATION**	
A.1	Executive Summary	_____
A.2	Physical Plan	_____
A.3	Hazard Reduction	_____
A.4	Demolition	_____
A.5	Disposition	_____
A.6	Site Improvements	_____
A.7	Site Conditions	_____
A.8	Separability	_____
A.9	Proximity	_____
Exhibit B:	**CAPACITY**	
B.1	Most Recent PHAS and SEMAP Ratings	_____
B.2	Development Capacity of Developer	_____
B.3	Development Capacity of Applicant	_____
B.4	Capacity of Existing HOPE VI Revitalization Grantees	_____
B.5	CSS Program Capacity	_____
B.6	Property Management Capacity	_____
B.7	PHA Plan	_____
Exhibit C:	**NEED**	
C.1	Need for Revitalization: Severe Physical Distress of the PH Site	_____
C.2	Need for Revitalization: Impact of the Severely Distressed Site on the Surrounding Neighborhood	_____
C.3	Need for HOPE VI Funds	_____
C.4	Previously-Funded Sites	_____
C.5	Need for Affordable Housing in the Community	_____

Exhibit D: RESIDENT AND COMMUNITY INVOLVEMENT

D.1 Resident and Community Involvement _____

Exhibit E: COMMUNITY AND SUPPORTIVE SERVICES

E.1 Community and Supportive Services _____

E.2 Endowment Trust _____

Exhibit F: RELOCATION

F.1 Housing Choice Voucher Needs _____

F.2 Relocation Plan _____

Exhibit G: FAIR HOUSING AND EQUAL OPPORTUNITY

G.1 Accessibility _____

G.2 Universal Design _____

G.3 Fair Housing _____

G.4 Section 3 _____

Exhibit H: WELL-FUNCTIONING COMMUNITIES

H.1 Unit Mix and Need for Affordable Housing _____

H.2 Off Site Housing _____

H.3 Homeownership Housing _____

Exhibit I: SOUNDNESS OF APPROACH

I.1 Appropriateness of Proposal _____

I.2 Appropriateness and Feasibility of the Plan _____

I.3 Neighborhood Impact and Sustainability of the Plan _____

I.4 Design _____

I.5 Evaluation _____

ATTACHMENTS	Application Page Number
1: Application Data Form: Cover Sheet	
2: Application Data Form: Existing Units, Occupancy, Vacancy	
3: Application Data Form: Relocation, Income, & Non-Dwelling Structures	
4. Application Data Form: Proposed Unit Mix Post-Revitalization	
5: Application Data Form: Units, Accessibility, Concentration	
6: Application Data Form: Self-Sufficiency	
7: Application Data Form: Sources and Uses	
8: HOPE VI Budget Form	
9: TDC/Grant Limitations Worksheet	
10: Extraordinary Site Costs Certification	
11: Cost Certification	
12: City Map	
13: Developer Certification	
14: Property Management Certification	
15: Program Schedule	
16: Certification of Severe Physical Distress	
17: Photographs of the Severely Distressed Housing	
18: Neighborhood Conditions	
19: Physical Development Resources	
20: CSS Resources	
21: Anticipatory Resources	
22: Collateral Resources	
23: Resident Training and Public Meeting Certification	
24: Commitments with CSS Providers	
25: HOPE VI Revitalization Relocation Plan Certification	
26: Deleted	
27: Documentation of Site Control for Off-Site Public Housing	

28: Documentation of Site Control, Environmental, & Neighborhood Standards _____

29: Preliminary Market Assessment Letter _____

30: Certification of Zoning Approval or Documentation _____

31: Project Readiness Certification _____

32: Current Site Plan _____

33: Photographs of Architecture in the Surrounding Community _____

34: Conceptual Site Plan _____

35: Conceptual Building Elevations _____

36: Evaluation Commitment Letter(s) _____

37: Portions of the PHA Plan _____

38. Logic Model, form HUD-96010 _____

39. America's Affordable Communities Initiative, form HUD-27300 _____

40: HOPE VI Revitalization Application Certifications (4pg. Form) _____

41: Standard Forms and Certifications

- Applicant Assurances and Certifications (HUD-424-B) _____
- Standard Form LLL, as applicable, "Disclosure of Lobbying Activities" _____
- HUD-2880, "Applicant/Recipient Disclosure/Update Report _____
- HUD-52515, "Funding Application, Section 8 Tenant-Based Assistance Rental Certificate Program, Rental Voucher Program," as applicable _____

HOPE VI REVITALIZATION APPLICATION SUBMISSION INSTRUCTIONS

GENERAL INSTRUCTIONS

A. Application Preparation

The preparation of an approvable HOPE VI Revitalization application is time-consuming and can involve significant costs. You are cautioned that only applications with strong showings of readiness, need, and capacity will be selected.

1. Your application must be complete and you must present all items in a manner that is succinct and clear. Respond to *every requirement and question posed.* Many applicants lose crucial points because they do not adequately respond to a question, because language is unclear, and/or because there are inconsistencies in numbers or data in different parts of the application.

2. If you have not already done so, you are advised to enter into a meaningful planning process with affected residents and the surrounding community to achieve a consensus plan at application submission. Take careful note of the Resident Training Session and Public Meeting requirements in the NOFA. Be sure to advertise and document those meetings carefully. You will receive additional points under the Project Readiness rating factor if you conduct additional meetings.

3. Immediately contact public, private, and nonprofit entities, agencies, and organizations from which you plan to obtain letters, materials, or documents. This includes service providers, banks, state housing finance agencies, and other sources of financial assistance.

4. Note the requirement of a certification of severe physical distress by an independent, certified engineer or architect. If you request funds to pay for extraordinary site costs, you will also need to have an independent certified engineer or architect justify and verify those costs.

5. Specific formatting and documentation instructions are provided in the NOFA itself, and will be strictly enforced. You should carefully review Section IV of the NOFA to make sure you adhere to the various application submission, content, formatting and documentation requirements.

6. If you are proposing a mixed-finance project, you should obtain and review a copy of the Mixed Finance Guidebook by calling the Public Housing Clearinghouse at 800-955-2232. Be sure to ask for the Mixed Finance Guidebook (not the HOPE VI Grant Implementation Guidebook, which has been replaced by the HOPE VI website).

B. Application Content and Organization. Provide application materials in the following order:

1. Acknowledgement of Application Receipt (HUD-2993). The very first page of your application is the Acknowledgement of Receipt form. Print or type your name and address inside the box provided. When HUD receives your application, this receipt will be detached from your application and mailed to you to indicate that your application

was received. Please rely on this receipt and/or your overnight tracking number to determine whether your application was received. If you would like to have the receipt faxed to you, please include your fax number on the form.

2. Application for Federal Assistance (SF-424). You must use a SF-424, not a HUD-424. The CFDA number for the HOPE VI Program is 14.866. This form is included in this HOPE VI Application. Please be sure to enter your DUNS number on the form in the space provided.

3. HOPE VI Revitalization Application Table of Contents. The HOPE VI Application Table of Contents, attached at the back of these instructions, lists Narrative Exhibits, Attachments, and Standard Certifications that should be contained in the application. It is designed both to assist you in ensuring that all required elements of an application are included, and to be used as a table of contents for your completed application. After you have completed your application, please enter the page numbers of the Narrative Exhibits and Attachments and include the completed Table of Contents behind your SF-424.

4. The Narrative Exhibits constitute specific aspects of your Revitalization Plan and respond to the rating criteria in the HOPE VI Revitalization NOFA. The Narrative Exhibits make up the first part of the application. All narrative pages must be numbered sequentially and conform to the page number and format requirements of the NOFA.

5. Attachments must be located behind the Narrative Exhibits. Information in the Attachments may not substitute for information requested in a Narrative Exhibit. Attachments include photographs, maps, illustrations, Application Data Forms, letters committing financial support, etc. Videos and resumes are specifically prohibited. Fill out the Application Data Forms as completely as possible, using the instructions posted on the HOPE VI website and best estimates if necessary. Do not fill in fields blocked in gray. Be sure that all numbers and data throughout the Narrative Exhibits and Attachments are consistent. For more detailed information on the Data Forms, instructions are provided on the HOPE VI website where the NOFA is posted.

6. Standard certifications and forms must be placed at the end of the application, in the order provided for in Section IV of the NOFA and on the Application Table of Contents (guide below). Standard certifications and forms include the HOPE VI Revitalization Applicant Certifications (4 pages, to be signed by the Board Chair) and other HUD and Standard forms as identified below.

DETAILED INSTRUCTIONS FOR COMPLETING NARRATIVE EXHIBITS AND ATTACHMENTS

EXHIBIT A: SUMMARY INFORMATION

A.1 Executive Summary. Provide an Executive Summary, not to exceed three pages. Describe your Revitalization Plan, as clearly and thoroughly as possible. Do not argue for the need for the HOPE VI grant, but explain what you would do if you received a grant. Briefly describe why the targeted project is severely distressed, provide the number of units, and indicate how

many of the units are occupied. Describe specific plans for the revitalization of the site. Include income mix, basic features (such as restoration of streets), and any mixed use or non-housing components. If you are proposing off site replacement housing, provide the number and type of units and describe the off site locations. Describe any homeownership components included in your Plan, including numbers of units. Briefly summarize your plans for community and supportive services. State the amount of HOPE VI funds you are requesting, and list the other resources you will use for your mixed-finance development, briefly indicating the strength of those financial commitments. Identify whether you have procured a developer or whether you will act as your own developer.

A.2 Physical Plan. Describe your planned physical revitalization activities:

a. rehabilitation of severely distressed public housing units in accordance with Sections I(D)(4) and III(C)(4) of the NOFA (pages 64137 and 64141 of the NOFA as published in the Federal Register).

b. development of public housing replacement rental housing, both on-site and off-site, in accordance with Sections I(D)(5) and III(C)(4)(b) of the NOFA (pgs. 64137 and 64141).

c. Indicate whether you plan to use PATH technologies in the construction of replacement housing, in accordance with Section III(C)(4)(f) of the NOFA (pg. 64142).

d. market rate housing units (see Sections III(C)(1)(e), pg. 64139, and III(C)(3)(b)(1), pg. 64141, for threshold requirements).

e. units to be financed with low-income housing tax credits

f. replacement homeownership assistance for displaced public housing residents or other public housing-eligible low-income families, in accordance with Sections I(D)(6) and III(C)(4)(c) of the NOFA (pgs. 64137 and 64141). Also describe any market-rate homeownership units planned, sources and uses of funds. Describe the relationship between the HOPE VI activities and costs and the development of homeownership units, both public housing and market rate. If you are selected for funding, you will be required to submit a Homeownership Proposal (homeownership term sheet).

g. Rehabilitation or new construction of community facilities primarily intended to facilitate the delivery of community and supportive services for residents of the targeted development and residents of off-site replacement housing. Describe the type and amount of such space and how the facilities will be used in CSS program delivery or other activities.

h. Land acquisition and infrastructure and site improvements associated with developing economic development facilities, in accordance with Sections I(D)(7) and III(C)(4)(d) (pgs. 64137 and 64142) of the NOFA. Note that HOPE VI grant funds may not be used to pay hard development costs or to buy equipment for retail or commercial facilities.

A.3 Hazard Reduction. Review Sections I(D), III(C)(4), and IV(E) of the NOFA (pgs. 64137, 64141, and 64154). For units to be rehabilitated or demolished, describe the extent of any required abatement of environmentally hazardous materials such as asbestos.

A.4 Demolition. Review Sections I(D)(2) and III(C)(4)(a) of the NOFA (pgs. 64137 and 64141). Describe your plans for demolition, including the buildings (dwelling and non-dwelling units) proposed to be demolished, the purpose of the demolition, and the use of the site after demolition. If the proposed demolition was previously approved as a Section 18 demolition application, state the date the Section 18 demolition application was submitted to HUD and the date it was approved by HUD. Indicate whether you plan to implement the concept of Deconstruction, as described in Section III(C)(4)(f)(2) of the NOFA (pg. 64142).

A.5 Disposition. Review Sections I(D)(3) and III(C)(4) of the NOFA (pgs. 64137 and 64141). Describe the extent of any planned disposition of any portion of the site. Cite the number of units or acreage to be disposed, the method of disposition (sale, lease, trade), and the status of any disposition application made to HUD.

A.6 Site Improvements. Review Sections I(D), III(C)(4), and IV(E) of the NOFA (pgs. 64137, 64141, and 64154). Describe any proposed on-site improvements, including infrastructure requirements, changes in streets, etc. Describe all public improvements needed to ensure the viability of the proposed project with a narrative description of the sources of funds available to carry out such improvements.

A.7 Site Conditions. Review Sections I(D), III(C)(4), and IV(E) of the NOFA (pgs. 64137, 64141, and 64154). Describe the conditions of the site to be used for replacement housing. Listing all potential contamination or danger sources (e.g. smells, fire heat, explosion and noise) that might be hazardous or cause discomfort to residents, PHA personnel, or construction workers. List potential danger sources, including commercial and industrial facilities, brownfields and other sites with potentially contaminated soil, commercial airports and military airfields. Note any facilities and/or activities within one mile of the proposed site.

A.8 Separability. Review Section III(C)(1)(j) of the NOFA (pg. 64139), and, if applicable, address the separability of the revitalized building(s).

A.9 Proximity. If applicable, describe how two contiguous projects meet the requirements of Section III(C)(1)(c)(1) of the NOFA, or how a scattered site project meets the requirements of Section III(C)(1)(c)(2) of the NOFA (pg. 64139).

EXHIBIT B: CAPACITY

B.1 PHAS and SEMAP. Respond to the PHAS Rating Factor V(A)(1)(h) of the NOFA (pg. 64157) and the SEMAP Rating Factor V(A)(1)(i) (pg. 64157), providing the most recent ratings as of the application due date. See Section IV(B) for documentation requirements. If you are a Moving to Work participant and are not required to report/be scored in PHAS or SEMAP under the terms of your MTW Agreement, you must provide information on what your PHAS and SEMAP ratings would be in accordance with your MTW Agreement.

B.2 Development Capacity of Developer. Respond to Rating Factor V(A)(1)(b) of the NOFA (pg. 64156). See Section IV(B) for documentation requirements.

B.3 Development Capacity of Applicant. Respond to Rating Factor V(A)(1)(c) of the NOFA (pg. 64156). See Section IV(B) for documentation requirements.

B.4 Capacity of Existing HOPE VI Revitalization Grantees. Respond to Rating Factor V(A)(1)(d) of the NOFA (pg. 64156). This rating factor applies only to PHAs with existing HOPE VI Revitalization grants from fiscal years 1993-2001. Production achievement numbers will be taken from the HOPE VI Quarterly Progress Reports for the quarter ending September 30, 2004. See Section IV(B) for documentation requirements.

B.5 CSS Program Capacity. Respond to Rating Factor V(A)(1)(e) of the NOFA (pg. 64156). See Section IV(B) for documentation requirements.

B.6 Property Management Capacity. Respond to Rating Factor V(A)(1)(f) of the NOFA (pg. 64157). See Section IV(B)(6) for documentation requirements.

B.7 PHA Plan. Respond to Rating Factor V(A)(1)(g) of the NOFA (pg. 64157). See Section IV(B) for documentation requirements.

EXHIBIT C: NEED

C.1 Need for Revitalization: Severe Physical Distress of the Public Housing Site. Respond to Rating Factor V(A)(2)(a) of the NOFA (pg. 64157). See Section IV(B) for documentation requirements.

C.2 Need for Revitalization: Impact of the Severely Distressed Site on the Surrounding Neighborhood. Respond to Rating Factor V(A)(2)(b) of the NOFA (pg. 64157). See Section IV(B) for documentation requirements.

C.3 Need for HOPE VI Funding (Obligation of Capital Funds). Respond to Rating Factor V(A)(2)(c) of the NOFA (pg. 64158). If you are a Moving to Work participant and are not required to enter obligations into LOCCS, review Section IV(B)(6)(b)(3) (formerly labeled as Section IV(B)(4)(d) prior to technical correction) of the NOFA (pg. 64150) and provide a certification of your obligation rate of your FY 1999-2004 Capital Funds in order to earn points under Section V(A)(2)(c). If you are not a participant in MTW, you must provide information on your Capital Funds in accordance with Section IV(B)(6)(b)(3) (formerly labeled as Section IV(B)(4)(d)) and Section V(A)(2)(c). The portion of the PHA Plan that lists the planned uses of your FY 1999-2004 Capital Funds should be placed in Attachment 37. See Section IV(B) for other documentation requirements.

C.4 Previously-Funded Sites. Respond to Section III(C)(1)(h) of the NOFA (pg. 64139). See Section IV(B) for documentation requirements.

C.5 Need for Affordable, Accessible Housing in the Community. Respond to Rating Factor V(A)(2)(d) of the NOFA (pg. 64158). See Section IV(B) for documentation requirements.

EXHIBIT D: RESIDENT AND COMMUNITY INVOLVEMENT

D.1 Resident and Community Involvement. Respond to Rating Factor V(A)(4) of the NOFA (pg. 64159). See Section IV(B) for documentation requirements.

EXHIBIT E: COMMUNITY AND SUPPORTIVE SERVICES

E.1 Community and Supportive Services. Respond to Section V(A)(5) of the NOFA (pg. 64159). See Section IV(B) for documentation requirements.

E.2 Endowment Trust. Review Section III(C)(4)(k) and Section V(A)(5) of the NOFA (pgs. 64144 and 64159). If you plan to place CSS funds in an Endowment Trust, state the dollar amount and percentage of the entire grant that you plan to place in the Trust. See Section IV(B) for documentation requirements.

EXHIBIT F: RELOCATION

F.1 Housing Choice Voucher Needs. Review Section III(C)(4)(n) and V(A)(6) of the NOFA (pgs. 64147 and 64160). State the number of Housing Choice Vouchers that will be required for relocation if this HOPE VI application is approved, both in total and the number needed for FY 2005. Indicate the number of units and the bedroom breakout. As applicable, attach a Housing Choice Voucher application behind the Standard Forms tab of your application. See Section IV(B) for documentation requirements.

F.2 Relocation Plan. Review Sections III(C)(2)(b)(2) and III(C)(4)(n) of the NOFA (pg. 64147) and respond to Rating Factor V(A)(6) (pg. 64160). For additional guidance on developing a relocation plan, refer to CPD Notice 02-08 ("Guidance on the Application of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), as amended, in HOPE VI Projects"). See Section IV(B) for documentation requirements.

EXHIBIT G: FAIR HOUSING AND EQUAL OPPORTUNITY

G.1 Accessibility: Respond to Rating Factor V(A)(7)(a)(1) of the NOFA (pg. 64160). See Section IV(B) for documentation requirements.

G.2 Universal Design: Respond to Rating Factor V(A)(7)(a)(2) of the NOFA (pg. 64160). See Section IV(B) for documentation requirements.

G.3 Fair Housing: Respond to Rating Factor V(A)(7)(b)(1) of the NOFA (pg. 64161). See Section IV(B) for documentation requirements.

G.4 Section 3: Respond to Rating Factor V(A)(7)(b)(2) of the NOFA (pg. 64161). See Section IV(B) for documentation requirements.

EXHIBIT H: WELL-FUNCTIONING COMMUNITIES

H.1 Unit Mix and Need for Affordable Housing. Respond to Rating Factor V(A)(8)(a) of the NOFA (pg. 64161).

H.2 Off-Site Housing. Respond to Rating Factor V(A)(8)(b) of the NOFA (pg. 64162)..

H.3 Homeownership Housing. Respond to Rating Factor V(A)(8)(c) of the NOFA (pg. 64162).

EXHIBIT I: SOUNDNESS OF APPROACH

I.1 Appropriateness of Proposal. Respond to Section III(C)(1)(b) of the NOFA (pg. 64138). See Section IV(B) for documentation requirements.

I.2 Appropriateness and Feasibility of the Plan. Respond to Rating Factor V(A)(9)(b) of the NOFA (pg. 64162).

I.3 Neighborhood Impact and Sustainability of the Plan. Respond to Rating Factor V(A)(9)(c) of the NOFA(pg. 64162).

I.4 Design. Describe the features of your proposed design and respond to Rating Factor V(A)(9)(e) of the NOFA (pg. 64163).

1.5 Evaluation. Respond to Rating Factor V(A)(9)(f) of the NOFA (pg. 64163).

ATTACHMENTS

Detailed instructions for Attachments 1 through 7, Application Data Forms, are attached at the end of these instructions.

Attachment 1: Application Data Form: Cover Sheet

Attachment 2: Application Data Form: Existing Units, Occupancy, Vacancy

Attachment 3: Application Data Form: Relocation, Income, and Non-Dwelling Structures

Attachment 4: Application Data Form: Proposed Unit Mix Post-Revitalization

Attachment 5: Application Data Form: Planned Units, Accessibility, Concentration

Attachment 6: Application Data Form: Self-Sufficiency

Attachment 7: Application Data Form: Sources and Uses

Attachment 8: HOPE VI Budget Form. Provide the proposed HOPE VI budget on form HUD-52825-A, parts I and II. This form can be found in the HOPE VI website, FY 2004 funding page. Guidance on preparing a HOPE VI budget can be found on the Grant Administration page of the HOPE VI web site. See Section IV(B) for documentation requirements.

Attachment 9: TDC/Grant Limitations Worksheet (HUD form 52797). Review Section IV(E), specifically IV(E)(3),(4),(5) and (6) of the NOFA (pgs. 64154-64155) and complete this Total Development Cost/Grant Limitations Worksheet, as provided in this Application. An electronic version of the worksheet in Excel is available on the HOPE VI web site.

See Section IV(B) for documentation requirements.

Attachment 10: Extraordinary Site Costs Certification. If you request funds to pay for extraordinary site costs in accordance with Section IV(E)(5)(b)(5) of the NOFA (pg. 64155), complete this Attachment 10, as provided in this Application (page 64193), and submit the required documentation indicated. See Section IV(B) for documentation requirements.

Attachment 11: Cost Certification. Provide a certification of cost estimates in accordance with Sections III(C)(3)(a)(1) and IV(E)of the NOFA (pg. 64141 and 64155). This certification may be in the form of a letter. See Section IV(B) for documentation requirements.

Attachment 12: City Map. Provide a to-scale city map that clearly identify the following in the context of existing city streets, the central business district, other key city sites, and census tracts:

- the existing development;
- replacement neighborhoods, if available;
- off-site properties to be acquired, if any;
- the location of the Federally-designated Empowerment Zone or Enterprise Community (if applicable); and
- other useful information to place the project in the context of the city, county, or municipality and other revitalization activity underway or planned.

If you request funds for more than one project or for scattered site housing, the map must clearly show that the application meets the site and unit requirements of Sections III(C)(4(m) of the NOFA. Do not submit a foldout map. This is the only Attachment that may be submitted on 8-1/2" by 14" paper. See Section IV(B) for documentation requirements.

Attachment 13: Developer Certification. In accordance with Section III(C)(2)(a)(1) of the NOFA (pg. 64140), provide a certification that you have either procured a developer in accordance with the requirements set by HUD or that you will act as your own developer. This certification may be in the form of a letter. See Section IV(B) for documentation requirements.

Attachment 14: Property Management Certification. Provide a certification that you and/or your selected Property Manager will implement the operation and management principles and policies identified in Section III(C)(2)(b)(1) (and Section III(C)(4)(h)) of the NOFA (pgs. 64140 and 64143). This certification may be in the form of a letter. See Section IV(B) for documentation requirements.

Attachment 15: Program Schedule. Review Sections III(C)(1)(i) and VI(B)(2) of this NOFA (pgs. 64139 and 64164) and provide a program schedule accordingly. See Section IV(B) for documentation requirements. Please note that your program schedule MUST contain all timeframe requirements listed in Section VI(B)(2). Further, in accordance with Section VI(B)(2)(e), the program schedule MUST indicate the date on which the development proposal for EACH phase of the revitalization plan will be submitted to HUD.

Attachment 16: Certification of Severe Physical Distress. In accordance with Sections I(C)(4) and III(C)(3)(a)(2) of the NOFA (pgs. 64136 and 64141), an engineer or architect must complete Attachment 16, as provided in this NOFA (page 64194). No backup documentation is required for this certification. See Section IV(B) for documentation requirements.

Attachment 17: Photographs of the Severely Distressed Housing. Review Rating Factor V(A)(2)(a) (pg. 64157) of the NOFA and submit photographs of the targeted severely distressed public housing that illustrate the extent of physical distress. See Section IV(B) for documentation requirements.

Attachment 18: Neighborhood Conditions. Submit documentation described in Rating Factor V(A)(2)(b)of the NOFA (pg. 64157). Such documentation may include crime statistics, photographs or renderings, socio-economic data, trends in property values, evidence of property deterioration and abandonment, evidence of underutilization of surrounding properties, and other indications of neighborhood distress and/or disinvestment. See Section IV(B) for documentation requirements.

Attachment 19: Physical Development Resources (HUD form 52797). In accordance with Rating Factor V(A)(3)(b) of the NOFA (pg. 64158), complete this Attachment 19, as provided in this application, by entering the dollar value of each resource that will be used for physical development. For each resource entered, you must submit backup documentation in Attachment 19. See Section IV(B) for documentation requirements.

Attachment 20: CSS Resources (HUD form 52797). In accordance with Rating Factor V(A)(3)(c) of the NOFA (pg. 64158), complete this Attachment 20, as provided in this Application, by entering the dollar value of all resources that will be used for CSS activities. For each resource entered, submit backup documentation in Attachment 20. See Section IV(B) for documentation requirements.

Attachment 21: Anticipatory Resources (HUD form 52797). Complete Attachment 21, as provided in this Application, by entering the dollar value of all anticipatory resources as described in Rating Factor V(A)(3)(d) (pg. 64159). For each resource entered, submit backup documentation in Attachment 21. See Section IV(B) for documentation requirements.

Attachment 22: Collateral Resources (HUD form 52797). Complete Attachment 22, as provided in this Application, by entering the dollar value of all collateral resources as described in Rating Factor V(A)(3)(e) (pg. 64159). For each resource entered, submit backup documentation behind Attachment 22. See Section IV(B) for documentation requirements.

Attachment 23: Resident Training and Public Meeting Certification (HUD form 52785). Review Section III(C)(2)(b)(3) (see technical correction for new language) of the NOFA (pg. 64141) and complete Attachment 23, as provided in this application. See Section III(C)(4)(j) for Resident and Community Involvement requirements. See Section IV(B) for documentation requirements.

Attachment 24: Commitments with CSS Providers. In accordance with Section V(A)(5)(e) of the NOFA (pg. 64159), provide letters from CSS providers that have made

commitments to participate in your CSS activities if you are awarded a HOPE VI Revitalization grant under the NOFA. See Section IV(B) for documentation requirements.

Attachment 25: HOPE VI Revitalization Relocation Plan Certification. In accordance with Sections III(C)(2)(b)(2) and III(C)(4)(n) of the NOFA (pgs. 64140 and 64147), submit a certification that you have completed a HOPE VI Relocation Plan in conformance with the URA. HUD may use this certification in its evaluation of Rating Factor V(A)(6) (pg. 64160). This certification may be in the form of a letter. Refer to CPD Notice 02-08 for additional guidance, including a template. The HOPE VI Relocation Plan Guide should not be submitted; only the certification should be in the application. This Attachment is not applicable if the targeted project is vacant as of the application due date. See Section IV(B) for documentation requirements.

Attachment 26: Certification of Completed Relocation. If applicable, submit a certification in accordance with Section III(C)(2)(b)(2)(b) (pg. 64140) and Section V(A)(6) (pg. 64160) of the NOFA. You must include this certification if you are trying to evidence that your site was vacant at the time applications were due, in order to meet the threshold at III(C)(2)(b)(2)(b) and earn maximum points under the rating factor at V(A)(6). This certification may be in the form of a letter. See Section IV(B) for documentation requirements.

Attachment 27: Documentation of Site Control for Off-Site Public Housing. If applicable, provide evidence of site control for rental replacement units or land, in accordance with Section III(C)(l) of the NOFA (pg. 64140). See Section IV(B) for documentation requirements.

Attachment 28: Documentation of Site Control, Environmental, and Site & Neighborhood Standards. If applicable, provide a certification that the site(s) acquired for off-site public housing meet site control, environmental and site and neighborhood standards, as provided in Section V(A)(8)(b)(2) of the NOFA (pg. 64162). This certification may be in the form of a letter. See Section IV(B) for documentation requirements.

Attachment 29: Preliminary Market Assessment Letter. In accordance with Section III(C)(3)(b)(1) of the NOFA (pg. 64141), if you include market rate housing, in your Revitalization Plan, you must demonstrate that there is a demand for the housing units of the type, number, and size proposed in the location you have chosen. In your application you must provide a preliminary market assessment letter prepared and signed by an independent, third party, credentialed market resource firm or professional that describes its assessment of the market for the proposed residential market rate units, and any community facilities, economic development, and retail structures. See Section IV(B) for documentation requirements.

Attachment 30: Certification of Zoning Approval or Documentation. Respond to Section III(C)(1)(m) of the NOFA. See Section IV(B) for documentation requirements.

Attachment 31: Project Readiness Certification (HUD form 52787). Complete Attachment 31, as provided in this application, by indicating which of the items in Rating Factor V(A)(9)(d) of the NOFA have been completed. See Section IV(B) for documentation requirements.

Attachment 32: Current Site Plan, which shows the various buildings of the project and identifies which buildings are to be rehabilitated, demolished, or disposed of. See Section IV(B) for documentation requirements.

Attachment 33: Photographs of Architecture in the Surrounding Community. Provide photographs in conjunction with Rating Factor V(A)(9)(e) (Design) of the NOFA (pg. 64163). See Section IV(B) for documentation requirements.

Attachment 34: Conceptual Site Plan, which indicates where proposed construction and rehabilitation activities will take place and any planned acquisition of adjacent property and/or buildings. Review Section V(A)(9)(e) (pg. 64163). See Section IV(B) for documentation requirements.

Attachment 35: Conceptual Building Elevations. Review Section V(A)(9)(e) (pg. 64163). See Section IV(B) for documentation requirements.

Attachment 36: Evaluation Commitment Letter(s). Review Section V(A)(9)(f) of the NOFA and provide the requested commitment letter(s) that addresses the indicated evaluation areas.

Attachment 37: Portions of the PHA Plan. Review Rating Factor V(A)(2)(c) and the documentation requirements at IV(B)(4)(d).

Attachment 38: Logic Model, form HUD-96010. See Section IV(B) for documentation requirements.

Attachment 39: America's Affordable Communities Initiative, form HUD-27300. See Section IV(B) for documentation requirements.

Attachment 40: HOPE VI Revitalization Applicant Certifications (HUD form 52800). These certifications (4 page document) must be signed by the Chairman of the Board of the PHA, NOT the Executive Director. See Section IV(B) for documentation requirements.

Attachment 41: Standard Forms and Certifications. See Section IV(B) for documentation requirements. The following Standard/HUD Forms should be placed in this order:

- Applicant Assurances and Certifications (HUD-424-B)
- Disclosure of Lobbying Activities (SF-LLL), as applicable
- Applicant/Recipient Disclosure/Update Report (HUD-2880)
- Funding Application, Section 8 Tenant-Based Assistance Rental Certificate Program, Rental Voucher Program (HUD-52515), if applicable

HOPE VI REVITALIZATION APPLICATION SUGGESTED TABLE OF CONTENTS

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A.3	Hazard Reduction	_____
A.4	Demolition	_____
A.5	Disposition	_____
A.6	Site Improvements	_____
A.7	Site Conditions	_____
A.8	Separability	_____
A.9	Proximity	_____
Exhibit B:	**CAPACITY**	
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B.2	Development Capacity of Developer	_____
B.3	Development Capacity of Applicant	_____
B.4	Capacity of Existing HOPE VI Revitalization Grantees	_____
B.5	CSS Program Capacity	_____
B.6	Property Management Capacity	_____
B.7	PHA Plan	_____
Exhibit C:	**NEED**	
C.1	Need for Revitalization: Severe Physical Distress of the PH Site	_____
C.2	Need for Revitalization: Impact of the Severely Distressed Site on the Surrounding Neighborhood	_____
C.3	Need for HOPE VI Funds	_____
C.4	Previously-Funded Sites	_____
C.5	Need for Affordable Housing in the Community	_____
Exhibit D:	**RESIDENT AND COMMUNITY INVOLVEMENT**	
D.1	Resident and Community Involvement	_____

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E.1 Community and Supportive Services _____

E.2 Endowment Trust _____

Exhibit F: RELOCATION

F.1 Housing Choice Voucher Needs _____

F.2 Relocation Plan _____

Exhibit G: FAIR HOUSING AND EQUAL OPPORTUNITY

G.1 Accessibility _____

G.2 Universal Design _____

G.3 Fair Housing _____

G.4 Section 3 _____

Exhibit H: WELL-FUNCTIONING COMMUNITIES

H.1 Unit Mix and Need for Affordable Housing _____

H.2 Off Site Housing _____

H.3 Homeownership Housing _____

Exhibit I: SOUNDNESS OF APPROACH

I.1 Appropriateness of Proposal _____

I.2 Appropriateness and Feasibility of the Plan _____

I.3 Neighborhood Impact and Sustainability of the Plan _____

I.4 Design _____

I.5 Evaluation _____

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1: Application Data Form: Cover Sheet _____

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5: Application Data Form: Units, Accessibility, Concentration _____

6: Application Data Form: Self-Sufficiency _____

7: Application Data Form: Sources and Uses _____

8: HOPE VI Budget Form _____

9: TDC/Grant Limitations Worksheet _____

10: Extraordinary Site Costs Certification _____

11: Cost Certification _____

12: City Map _____

13: Developer Certification _____

14: Property Management Certification _____

15: Program Schedule _____

16: Certification of Severe Physical Distress _____

17: Photographs of the Severely Distressed Housing _____

18: Neighborhood Conditions _____

19: Physical Development Resources _____

20: CSS Resources _____

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22: Collateral Resources _____

23: Resident Training and Public Meeting Certification _____

24: Commitments with CSS Providers _____

25: HOPE VI Revitalization Relocation Plan Certification _____

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28: Documentation of Site Control, Environmental, & Neighborhood Standards _____

29: Preliminary Market Assessment Letter _____

30: Certification of Zoning Approval or Documentation _____

31: Project Readiness Certification _____

32: Current Site Plan _____

33: Photographs of Architecture in the Surrounding Community _____

34: Conceptual Site Plan _____

35: Conceptual Building Elevations _____

36: Evaluation Commitment Letter(s) _____

37: Portions of the PHA Plan _____

38. Logic Model, form HUD-96010 _____

39. America's Affordable Communities Initiative, form HUD-27300 _____

40: HOPE VI Revitalization Application Certifications (4pg. Form) _____

41: Standard Forms and Certifications

- Applicant Assurances and Certifications (HUD-424-B) _____
- Standard Form LLL, as applicable, "Disclosure of Lobbying Activities" _____
- HUD-2880, "Applicant/Recipient Disclosure/Update Report _____
- HUD-52515, "Funding Application, Section 8 Tenant-Based Assistance Rental Certificate Program, Rental Voucher Program," as applicable _____

Appendix 3 Instructions for HOPE VI Application Data Forms
Attachment 1: Cover Sheet & Data Summary Box Instructions

Begin by completing the "Applicant Information" section.

The Data Summary box, at the bottom of Attachment 1, is a summary of the information provided throughout the application.

THE DATA SUMMARY BOX SHOULD BE COMPLETED LAST.

These attachments will be available on the Internet, in Microsoft Excel. The website address is:

www.hud.gov/hopevi

If you choose to download the Microsoft Excel worksheets, your computer will complete the information required in the Data Summary box for you. You will not need to calculate this information.

Downloading the Microsoft Excel file will save you time!

However, if you are unable to complete these worksheets in Microsoft Excel, Figure 1 illustrates where the correct equations are in the instructions.

Figure 1: Data Summary Box

Data Summary

	Existing	*Post-Revitalization*
Number of replacement public housing units (on/off-site, including Affordable Lease/Purchase, Affordable Fee Simple Homeownership, and Second Mortgage Only – excluding rehabilitated units)		**See #1**
Number of non-public housing, subsidized units (on/off-site, including homeownership)		**See #2**
Number of market-rate units (no income restrictions)		**See #3**
Number of other units		**See #4**
TOTAL NUMBER OF POST-DEVELOPMENT UNITS		**See #5**
Number of units to be rehabilitated (excluding acquisition with rehab)		**See #6**
Number of newly constructed on-site units (including acquisition with rehab)		**See #7**
Number of newly constructed off-site units (including acquisition with rehab)		**See #8**
Number of occupied units (at time of application)	**See #9**	
Number of vacant units (at time of application)	**See #10**	

Data Summary Box Instructions

Data Summary #1

	Existing	*Post-Development*
Number of replacement public housing units (on/off-site, including Affordable Lease/Purchase, Affordable Fee Simple Homeownership and Second Mortgage Only – excluding rehabilitated units)		**#1**

To calculate this number, do the following:

1. **From Attachment 5 SUM:**

[Total ACC On-site] + [Total ACC Off-site] + [Affordable Lease/Purchase On-site] + [Affordable Lease/Purchase Off-site] + [Affordable Fee Simple On-site] + [Affordable Fee Simple Off-site] + [Second Mortgage Only On-site] + [Second Mortgage Only Off-site]

2. **Then from Attachment 4 SUBTRACT:**

[Grand Total Rehabilitated ACC Units] + [Grand Total Rehabilitated HOPE VI or PH funded Homeownership]

3. **This EQUALS**

Number of replacement public housing units (on/off-site, including Affordable Lease/Purchase, Affordable Fee Simple Homeownership and Second Mortgage--excluding rehabilitated units)

The white boxes in Figure 1 and Figure 2 (below) correspond to this equation.

Figure 1: Excerpt from Attachment 5: Units, Accessibility, and Concentration

Planned Units

Rental Units: ACC							
PH Only		*PH/LIHTC*		*PH/Other*		*Total ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Rental Units: Non-ACC							
LIHTC		*CDBG, HOME, or other subsidy*		*No Income Restrictions*		*Total Non-ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Homeownership Units											
Affordable Lease/Purchase with H6/PH funds		*Affordable Fee Simple Homeownership with H6/PH funds*		*Second Mortgage Only with H6/PH funds*		*HO with other subsidies (No H6/PH funds)*		*Market Rate (No subsidies)*		*Total Homeowner-ship*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Figure 2: Excerpt from Attachment 4: Proposed Unit Mix Post-Revitalization

Building Type: New Construction						***Building Type: Rehabilitation***					
Size	***Sq. Ft.***	***ACC Units****	***Non-ACC Units*** **	***H6 or PH funded HO***	***Other HO***	***Size***	***Sq. Ft.***	***ACC Units****	***Non-ACC Units*** **	***H6 or PH funded HO***	***Other HO***
0 BR						**0 BR**					
1 BR						**1 BR**					
2 BR						**2 BR**					
3 BR						**3 BR**					
4 BR						**4 BR**					
5 BR						**5 BR**					
6 BR						**6 BR**					
Total						***Total***					
Grand Total											

Data Summary #2

	Existing	*Post-Development*
Number of non-public housing, subsidized units (On/off-site, including homeownership)		**#2**

To calculate this number, do the following:

1. From Attachment 5, ADD:

[Non-ACC LIHTC On-site] + [Non-ACC LIHTC Off-site] + [Non-ACC CDBG, HOME On-site] + [Non-ACC CDBG, HOME Off-site] + [Homeownership with other subsidies (No HOPE VI or PH funds) On-site] + [Homeownership with other subsidies (No HOPE VI or PH funds) Off-site]

The white boxes in Figure 3 correspond to this equation.

Figure 3: Excerpt from Attachment 5: Units, Accessibility, and Concentration

Planned Units

Rental Units: ACC							
PH Only		*PH/LIHTC*		*PH/Other*		*Total ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Rental Units: Non-ACC							
LIHTC		*CDBG, HOME, or other subsidy*		*No Income Restrictions*		*Total Non-ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Homeownership Units											
Affordable Lease/Purchase with H6/PH funds		*Affordable Fee Simple Homeownership with H6/PH funds*		*Second Mortgage Only with H6/PH funds*		*HO with other subsidies (No H6/PH funds)*		*Market Rate (No subsidies)*		*Total Homeowner-ship*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Data Summary #3

	Existing	*Post-Development*
Number of market-rate units (no income restrictions)		**#3**

In order to calculate this, do the following:

1. From Attachment 5, ADD:

[Non-ACC No Income Restrictions On-site] + [Non-ACC No Income Restrictions Off-site] + [Market Rate On-site] + [Market Rate Off-site]

The white boxes in Figure 4 correspond to this equation.

Figure 4: Excerpt from Attachment 5: Units, Accessibility, and Concentration

Planned Units

Rental Units: ACC							
PH Only		*PH/LIHTC*		*PH/Other*		*Total ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Rental Units: Non-ACC							
LIHTC		*HOME*		*No Income Restrictions*		*Total Non-ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Homeownership Units											
Affordable Lease/Purchase with H6/PH funds		*Affordable Fee Simple Homeownership with H6/PH funds*		*Second Mortgage Only with H6/PH funds*		*HO with other subsidies (No H6/PH funds)*		*Market Rate (No subsidies)*		*Total Homeowner-ship*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Data Summary #4

	Existing	*Post-Development*
Number of other units		**#4**

In order to calculate this, do the following:

1. From Attachment 5, ADD:

[Total Other Units On-site] + [Total Other Units Off-site]

The white boxes in Figure 5 correspond to this equation.

Figure 5: Excerpt from Attachment 5: Units, Accessibility, and Concentration

Planned Units

Rental Units: ACC							
PH Only		*PH/LIHTC*		*PH/Other*		*Total ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Rental Units: Non-ACC							
LIHTC		*CDBG, HOME, or other subsidy*		*No Income Restrictions*		*Total Non-ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Homeownership Units											
Affordable Lease/Purchase with H6/PH funds		*Affordable Fee Simple Homeownership with H6/PH funds*		*Second Mortgage Only with H6/PH funds*		*HO with other subsidies (No H6/PH funds)*		*Market Rate (No Subsidies)*		*Total Homeowner-ship*	
On-site	*Off-site*	*On-site*	*Off-site*	*On -site*	*Off-site*	*On-site*	*Off -site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Data Summary #5

	Existing	*Post-Development*
TOTAL NUMBER OF POST-DEVELOPMENT UNITS		**#5**

To calculate this number, add the numbers from the first four rows in the Data Summary box.

The white boxes in Figure 6 indicate this.

Figure 6: Excerpt from Data Summary box

	Existing	*Post-Development*
Number of replacement public housing units (on/off-site, including Affordable Lease/Purchase, Affordable Fee Simple Homeownership and Second Mortgage – excluding rehabilitated units)		
Number of non-public housing, subsidized units (on/off site, including homeownership)		
Number of market-rate units (no income restrictions)		
Number of other units		
TOTAL NUMBER OF POST-DEVELOPMENT UNITS		

Data Summary #6

	Existing	*Post-Development*
Number of units to be rehabilitated (excluding acquisition with rehab)		**#6**

In order to calculate this, do the following:

1. **From Attachment 4, ADD:**

[Grand Total of Rehabilitated ACC Units] + [Grand Total of Rehabilitated Non-ACC Units] + [Grand Total of Rehabilitated HOPE VI/PH funded Homeownership] + [Grand Total of Rehabilitated Other Homeownership]

The white boxes in Figure 7 correspond to this equation.

Figure 7: Excerpt from Attachment 4: Proposed Unit Mix Post-Revitalization

Building Type: New Construction						*Building Type: Rehabilitation*					
Size	*Sq. Ft.*	*ACC Units**	*Non-ACC Units***	*H6/ PH funded HO*	*Other Homeownership*	*Size*	*Sq. Ft.*	*ACC Units**	*Non-ACC Units***	*H6/PH funded HO*	*Other Homeownership*
0 BR						**0 BR**					
1 BR						**1 BR**					
2 BR						**2 BR**					
3 BR						**3 BR**					
4 BR						**4 BR**					
5 BR						**5 BR**					
6 BR						**6 BR**					
Total						*Total*					
Grand Total											

Data Summary #7

	Existing	*Post-Development*
Number of newly constructed on-site units (including acquisition with rehab)		#7

In order to calculate this, do the following:

1. From Attachment 5, ADD:

[Total ACC On-site] + [Total Non-ACC On-site] + [Total Homeownership On-site] + [Total Other Units On-site]

This is your total On-site number.
The white boxes in Figure 8 indicate this.

2. From Attachment 4, ADD:

[Grand Total New ACC Units] + [Grand Total New Non-ACC Units] + [Grand Total HOPE VI or PH funded Homeownership] + [Grand Total New Other Homeownership Units]

This is your total New Construction number.
The white boxes in Figure 9 indicate this.

NOTE: Any units from the Affordable Lease/Purchase Homeownership program funded with HOPE VI or public housing funds should be included in one of the ACC columns, either New Construction or Rehabilitation.

Compare the total On-Site number to the total New Construction number and enter the LESSER value in the Data Summary box.

Data Summary #7 continued

Figure 8: Excerpt from Attachment 5: Units, Accessibility, and Concentration

Planned Units

Rental Units: ACC							
PH Only		*PH/LIHTC*		*PH/Other*		*Total ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Rental Units: Non-ACC							
LIHTC		*CDBG, HOME, or other subsidy*		*No Income Restrictions*		*Total Non-ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Homeownership Units											
Affordable Lease/Purchase with H6/PH funds		*Affordable Fee Simple Homeownership with H6/PH funds*		*Second Mortgage Only with H6/PH funds*		*HO with other subsidies (No H6/PH funds)*		*Market Rate (No subsidies)*		*Total Homeowner-ship*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Other Units (operating subsidy only, etc.)							
Type:		*Type:*		*Type:*		*Type:*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Figure 9: Excerpt from Attachment 4: Proposed Unit Mix Post-Revitalization

Building Type: New Construction						*Building Type: Rehabilitation*					
Size	*Sq. Ft.*	*ACC Units**	*Non-ACC Units***	*H6/ PH funded HO*	*Other Homeownership*	*Size*	*Sq. Ft.*	*ACC Units**	*Non-ACC Units***	*H6/PH funded HO*	*Other Homeownership*
0 BR						**0 BR**					
1 BR						**1 BR**					
2 BR						**2 BR**					
3 BR						**3 BR**					
4 BR						**4 BR**					
5 BR						**5 BR**					
6 BR						**6 BR**					
Total						*Total*					
Grand Total											

Data Summary #8

	Existing	*Post-Development*
Number of newly constructed off-site units (including acquisition with rehab)		**#8**

In order to calculate this, do the following:

1. From Attachment 5, ADD:

[Total ACC Off-site] + [Total Non-ACC Off-site] + [Total Homeownership Off-site] + [Total Other Units Off-site]

This is your total Off-Site number.

The white boxes in Figure 10 indicate this.

2. From Attachment 4, ADD:

[Grand Total New ACC Units] + [Grand Total New Non-ACC Units] + [Grand Total New HOPE VI/PH funded Homeownership] + [Grand Total New Other Homeownership Units]

This is your total New Construction number.

The white boxes in Figure 11 indicate this.

NOTE: Any units from the Affordable Lease/Purchase Homeownership program funded with HOPE VI or public housing funds should be included in one of the ACC columns, either New Construction or Rehabilitation.

Compare the total Off-Site number to the total New Construction number and enter the LESSER value in the Data Summary box.

Data Summary #8 continued

Figure 10: Excerpt from Attachment 5: Units, Accessibility, and Concentration

Planned Units

Rental Units: ACC							
PH Only		*PH/LIHTC*		*PH/Other*		*Total ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Rental Units: Non-ACC							
LIHTC		*CDGB, HOME, or other subsidy*		*No Income Restrictions*		*Total Non-ACC*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Homeownership Units											
Affordable Lease/Purchase with H6/PH funds		*Affordable Fee Simple Homeownership with H6/PH funds*		*Second Mortgage Only with H6/PH funds*		*HO with other subsidies (No H6/PH funds)*		*Market Rate (No subsidies)*		*Total Homeowner-ship*	
On-site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Other Units (operating subsidy only, etc.)							
Type:		*Type:*		*Type:*		*Type:*	
On -site	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*	*On-site*	*Off-site*

Figure 11: Excerpt from Attachment 4: Proposed Unit Mix Post-Revitalization

Building Type: New Construction						***Building Type: Rehabilitation***					
Size	***Sq. Ft.***	***ACC Units****	***Non-ACC Units*** **	***H6/ PH funded HO***	***Other Homeownership***	***Size***	***Sq. Ft.***	***ACC Units****	***Non-ACC Units*** **	***H6/PH funded HO***	***Other Homeownership***
0 BR						**0 BR**					
1 BR						**1 BR**					
2 BR						**2 BR**					
3 BR						**3 BR**					
4 BR						**4 BR**					
5 BR						**5 BR**					
6 BR						**6 BR**					
Total						***Total***					
Grand Total											

Data Summary #9

	Existing	*Post-Development*
Number of occupied units (at time of application)	**#9**	

From Attachment 2:

The Grand Total box for the "Number Occupied" column.

The white box in Figure 12 indicates this.

Figure 12: Excerpt from Attachment 2: Existing Units, Occupancy, and Vacancy

Existing Units at Time of Grant Application

Building Type	***Size***	***Number Occupied***	***Number Vacant***	***Total Units***	***Converted To Non-Dwelling***	***Demo Planned***
Row	**0 BR**					
	1 BR					
	2 BR					
	3 BR					
Grand Total						

Data Summary #10

	Existing	*Post-Development*
Number of vacant units (at time of application)	**#10**	

From Attachment 2:

The Grand Total box for the "Number Vacant" column.

The white box in Figure 13 indicates this.

Figure 13: Excerpt from Attachment 2: Existing Units, Occupancy, and Vacancy

Existing Units at Time of Grant Application

Building Type	*Size*	*Number Occupied*	*Number Vacant*	*Total Units*	*Converted to Non-Dwelling*	*Demo Planned*
Row	**0 BR**					
	1 BR					
	2 BR					
	3 BR					
Grand Total						

A) Attachment 2: Existing Units, Occupancy, and Vacancy Instructions

1. Complete this page by first filling in the number of occupied and vacant units according to building and bedroom types.

Figure 14: Excerpt from Attachment 2: Existing Units, Occupancy, and Vacancy

Existing Units at Time of Grant Application

Building Type	*Size*	*Number Occupied*	*Number Vacant*	*Total Units*
Row	**0 BR**			

2. Next, reading across the rows, add the Number Occupied + Number Vacant for the Total Units. Do this for all building and bedroom types.

Figure 15: Excerpt from Attachment 2: Existing Units, Occupancy, and Vacancy

Existing Units at Time of Grant Application

Building Type	*Size*	*Number Occupied*	*Number Vacant*	*Total Units*	*Converted to Non-Dwelling*	*Demo Planned*
Row	**0 BR**					

3. Of the Total Units, provide the number that will be converted to non-dwelling units and the number that will be demolished (per building and bedroom type). This will not necessarily equal your Total Units.

Figure 16: Excerpt from Attachment 2: Existing Units, Occupancy, and Vacancy

Existing Units at Time of Grant Application

Building Type	*Size*	*Number Occupied*	*Number Vacant*	*Total Units*	*Converted to Non-Dwelling*	*Demo Planned*
Row	**0 BR**					
Grand Total						

4. Finally, sum all the columns for the Grand Total row.

Attachment 3: Relocation, Income, and Non-Dwelling Structures Instructions

The information provided in the "Relocation/Occupancy" section should account for all occupied units reported in Attachment 2: Existing Units, Occupancy, and Vacancy. If a family is moved within the development, this should be recorded as a "move within public housing (on- and off-site)."

The section "returning households" refers only to those families that were on-site prior to revitalization and that will be moved back to the development after revitalization.

If resident households are separated at the time of relocation and the PHA provides relocation assistance to each of the resulting households individually, each is counted as a separate relocation.

If a household is moved more than once during the course of the HOPE VI project, it is counted as <u>one</u> relocation. Report <u>only</u> the number of households that are relocated, not the number of relocations that take place during the duration of the HOPE VI project.

In the "Household Income" section, report a percentage (%) and not a dollar amount. Provide only one percentage, not a range (e.g., <u>do not</u> report 30-45%).

Finally, complete the "Resident Profile" and "Non-Dwelling Structure Summary."

Attachment 4: Proposed Unit Mix Post-Revitalization Instructions

Complete this form by providing all of the requested information concerning new construction and rehabilitation, according to building type and bedroom number.

Any ACC unit being developed under the Affordable Lease/Purchase program funded with HOPE VI or public housing funds should be recorded on this attachment as ACC in either the New Construction or Rehabilitation column.

The numbers you provide for new construction should include the following:

- **New units which are to be built;**
- **Existing units that are purchased with the intention of being dwelling units; and**
- **Existing units that are purchased with the intention of being rehabilitated.**

Only those units that are already owned or controlled by your PHA and are being rehabilitated should be included in the "Rehabilitation" columns.

The information on Attachment 4 must equal the following information on Attachment 5.

Please ensure that the following are true:

[Attachment 4, New Construction ACC] + [Attachment 4, Rehabilitation ACC] = [Attachment 5, Total ACC On-site] + [Attachment 5, Total ACC Off-site] + [Affordable Lease/Purchase Homeownership On-site] + [Affordable Lease/Purchase Homeownership Off-site]

[Attachment 4, New Construction Non-ACC] + [Attachment 4, Rehabilitation Non-ACC] = [Attachment 5, Total Non-ACC On-site] + [Attachment 5, Total Non-ACC Off-site]

[Attachment 4, Grand Total New Construction HOPE VI or PH funded Homeownership] + [Attachment 4, Grand Total Rehabilitation HOPE VI or PH funded Homeownership] = [Attachment 5, Affordable Fee Simple Homeownership with HOPE VI or PH funds On-site] + [Attachment 5, Affordable Fee Simple Homeownership with HOPE VI or PH funds Off-site] + [Attachment 5, Second Mortgage Only with HOPE VI or PH funds On-site] + [Attachment 5, Second Mortgage Only with HOPE VI or PH funds Off-site]

B) Attachment 5: Units, Accessibility, and Concentration Instructions

Complete this attachment by first filling in the planned number of ACC rental units, Non-ACC rental units, and Homeownership units by way of the categories provided.

If an ACC unit is to be developed under the Affordable Lease/Purchase program using HOPE VI or public housing funds, it should be accounted for within Homeownership in the Affordable Lease/Purchase box.

Record the number of newly constructed and rehabilitated rental, homeownership, and lease/purchase units available to each special needs category. This should include both ACC and Non-ACC units. If you have units that do not fit into any of the categories, record them in the other units box (include a description in the *Type* field).

For Accessibility, put in the percentage that each construction category is of the total unit type in the development.

Finally, record the appropriate information concerning concentration of density and very low-income families – both pre- and post-development.

When reporting a percentage, do not report a range (e.g., do not report 35-45%). Report a single percentage.

Attachment 6: Self-Sufficiency Instructions

Complete items A through J by filling in all boxes that are associated with each statement. Do not fill in any shaded boxes.

Complete item K by filling in the projected spending for each applicable category from each funding source. HOPE VI Funds should include only HOPE VI Revitalization Grant dollars. HOPE VI Demolition Grants should be included in "Other Funds."

Complete item L by describing your Self-Sufficiency programs and by listing partners associated with this component of the HOPE VI project.

Attachment 7: Sources and Uses Instructions

THE TOTAL HOPE VI USES MUST EXACTLY EQUAL THE HOPE VI IMPLEMENTATION GRANT
(The first line under Sources)

THE TOTAL USES MUST EXACTLY EQUAL THE TOTAL SOURCES
FAILURE TO DO SO WILL LOWER YOUR SCORE

MATH WILL BE CHECKED

The column labeled "HOPE VI Uses ($)" should equal your proposed HOPE VI budget.

The column labeled "Non-HOPE VI Uses" should equal your proposed budget for all other funds for the HOPE VI project (e.g., all leveraged funds). For the purposes of this program, the HOPE VI Demolition grants are considered leveraged funds and are, therefore, Non-HOPE VI funds and should be accounted for in the Non-HOPE VI Uses column.

The "Total" column is the sum of the HOPE VI Uses and Non-HOPE VI Uses columns. Sum across rows, line item by line item, as well as down columns for the totals.

You must budget a single dollar amount for each budget line item. Do not show a range of dollars (e.g., $500,000-$750,000). Also, it is insufficient to include statements such as "included in above amount" in lieu of a dollar figure. If an amount is included in another amount, break it out and budget it exactly.

The Sources column is concerned with all sources of funding received by the PHA for the HOPE VI project. The first line, HOPE VI, refers to the HOPE VI Revitalization Grant, which is different from the HOPE VI Demolition Grants. The first line of the "Sources" column must equal your HOPE VI Revitalization Grant. The HOPE VI Demolition Grants are accounted for as a separate line item in the Sources column.

[FR Doc. 04–28217 Filed 12–21–04; 2:47 pm]
BILLING CODE 4210–33–C

Federal Register

Wednesday,
December 29, 2004

Part III

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 601

Retirement Plans; Cash or Deferred Arrangements Under Section 401(k) and Matching Contributions or Employee Contributions Under Section 401(m) Regulations; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 601

[TD–9169]

RIN 1545–AX26 and 1545–AX43

Retirement Plans; Cash or Deferred Arrangements Under Section 401(k) and Matching Contributions or Employee Contributions Under Section 401(m) Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance for certain retirement plans containing cash or deferred arrangements under section 401(k) and providing for matching contributions or employee contributions under section 401(m). These regulations affect sponsors of plans that contain cash or deferred arrangements or provide for employee or matching contributions, and participants in these plans.

DATES: Effective Date: These regulations are effective December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, R. Lisa Mojiri-Azad or John T. Ricotta at (202) 622–6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1669. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

The estimated annual burden per respondent varies from .033 hour to 2.5 hours, depending on the individual circumstances, with an estimated average of 1 hour, 10 minutes.

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Books or records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains final regulations setting forth the requirements (including the nondiscrimination requirements) for cash or deferred arrangements under section 401(k) and for matching contributions and employee contributions under section 401(m) of the Internal Revenue Code (Code).

Comprehensive final regulations under sections 401(k) and 401(m) of the Code were last published in the **Federal Register** in TD 8357 (published August 9, 1991) and TD 8376 (published December 2, 1991) and amended by TD 8581 published on December 22, 1994 (the pre-SBJPA regulations). Since 1994, many significant changes have been made to sections 401(k) and 401(m) by the Small Business Job Protection Act of 1996, Public Law 104–188 (110 Stat. 1755) (SBJPA), the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788) (TRA '97), and the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 38) (EGTRRA).

The most substantial changes to the statutory provisions of section 401(k) and section 401(m) were made to the methodology for testing the amount of elective contributions, matching contributions, and employee contributions for nondiscrimination. Section 401(a)(4) prohibits discrimination in contributions or benefits in favor of highly compensated employees, within the meaning of section 414(q) (HCEs). Section 401(k) provides a special nondiscrimination test for elective contributions under a cash or deferred arrangement that is part of a profit-sharing plan, stock bonus plan, pre-ERISA money purchase plan, or rural cooperative plan, called the actual deferral percentage (ADP) test. Section 401(m) provides a parallel test for matching contributions and employee contributions under a defined contribution plan, called the actual contribution percentage (ACP) test. These special nondiscrimination standards are provided in recognition of the fact that the amount of elective contributions and employee contributions (and corresponding matching contributions) is determined by the employee's utilization of the contribution opportunity offered under the plan. This is in contrast to the situation in other defined contribution plans where the amount of contributions is determined by the amount the employer decides to contribute.

Sections 401(k) and 401(m) provide alternative methods for satisfying the applicable nondiscrimination rules: a mathematical comparison and a number of design-based methods. The inherent variation in the amount of contributions among employees, and the fact that the economic situation of HCEs may make them more likely to make elective or employee contributions, means that the usual nondiscrimination test under section 401(a)(4)—under which, for each HCE with a contribution level, there must be a specified number of nonhighly compensated employees (NHCEs) with equal or greater contributions—is not appropriate. Instead, average rates of contributions are used in the ADP and ACP tests (with a built-in differential permitted for HCEs) and minimum standards for nonelective or matching contributions are provided in the design-based alternatives.

Prior to the enactment of SBJPA, sections 401(k) and 401(m) provided only for mathematical comparison. Specifically, the ADP and ACP tests compare the average of the rates of contributions of the HCEs to the average of the rates of contributions of the NHCEs. For this purpose, the rate of contributions for an employee is the amount of contributions for an employee divided by the employee's compensation for the plan year. These tests are satisfied if the average rate of HCE contributions does not exceed 1.25 times the average rate of contributions of the NHCEs. Alternatively, these tests are satisfied if the average rate of HCE contributions does not exceed the average rate of contributions of the NHCEs by more than 2 percentage points and is no more than 2 times the average rate of contributions of the NHCEs. To the extent that these tests are not satisfied, the statute provides for correction through distribution to HCEs (or forfeiture of nonvested matching contributions) or, to the extent provided in regulations, recharacterization of elective contributions as after-tax contributions. In addition, to the extent provided in regulations, nonelective contributions can be made to NHCEs and elective contributions and certain matching contributions can be moved between the ADP and ACP tests, in order the reduce the discrepancy between the average rates of

contribution for the HCEs and the NHCEs.

SBJPA added design-based alternative methods of satisfying the ADP and ACP tests. Under these methods, if a plan meets certain contribution and notice requirements, the plan is deemed to satisfy the nondiscrimination rules without regard to actual utilization of the contribution opportunity offered under the plan. These regulations reflect this change and the other changes that were made to sections 401(k) and 401(m) under SBJPA, TRA '97 and EGTRRA since the issuance of the pre-SBJPA regulations.

SBJPA made the following significant changes affecting section 401(k) and section 401(m) plans:

- The ADP test and ACP test were amended to allow the use of prior year data for NHCEs.
- The method of distributing to correct failures of the ADP test or ACP test was changed to require distribution to the HCEs with the highest contributions.
- Tax-exempt organizations and Indian tribal governments are permitted to maintain section 401(k) plans.
- Safe harbor alternatives to the ADP test and ACP test were introduced in order to provide design-based methods to satisfy the nondiscrimination tests.
- The SIMPLE 401(k) plan (an alternative design-based method to satisfy the nondiscrimination tests for small employers that corresponds to the provisions of section 408(p) for SIMPLE IRA plans by providing for smaller contributions) was added.
- A special testing option was provided for plans that permit participation before employees meet the minimum age and service requirements, in order to encourage employers to permit employees to start participating sooner.

TRA '97 made the following significant changes affecting section 401(k) and section 401(m) plans:

- Grandfathered state and local governmental plans are treated as automatically satisfying the ADP and ACP tests.
- Matching contributions for self-employed individuals are no longer treated as elective contributions.

EGTRRA made the following significant changes affecting section 401(k) and section 401(m) plans:

- Catch-up contributions were added to provide for additional elective contributions for participants age 50 or older.
- The Secretary is directed to change the section 401(k) regulations to shorten the period of time that an employee is stopped from making elective contributions under the safe harbor rules for hardship distributions.
- Beginning in 2006, section 401(k) plans will be permitted to allow employees to designate their elective contributions as ''Roth contributions'' that will generally be subject to taxation under the rules applicable to Roth IRAs under section 408A.
- Section 401(k) plans using the design-based safe harbor and providing no additional contributions in a year are exempted from the top-heavy rules of section 416.
- Distributions from section 401(k) plans are permitted upon ''severance from employment'' rather than ''separation from service.''
- The multiple use test formerly specified in section 401(m)(9) is repealed.
- Faster vesting is required for matching contributions.
- Matching contributions are taken into account in satisfying the top-heavy requirements of section 416.

In addition, since publication of the pre-SBJPA regulations, a number of items of guidance affecting section 401(k) and section 401(m) plans addressing these statutory changes and other issues have been released by the IRS, including:

- Notice 97–2 (1997–1 C.B. 348) provides initial guidance on prior year ADP and ACP testing and guidance on correction of excess contributions and excess aggregate contributions, including distribution to the HCEs with the highest contributions.
- Rev. Proc. 97–9 (1997–1 C.B. 624) provides model amendments for SIMPLE 401(k) plans.
- Notice 98–1 (1998–1 C.B. 327) provides additional guidance on prior year testing issues.
- Notice 98–52 (1998–2 C.B. 632) and Notice 2000–3 (2000–1 C.B. 413) provides guidance on safe harbor section 401(k) plans.
- Rev. Rul. 2000–8 (2000–1 C.B. 617) addresses the use of automatic enrollment features in section 401(k) plans.
- Notice 2001–56 (2001–2 C.B. 277) and Notice 2002–4 (2002–1 C.B. 298) provided initial guidance related to the changes made by EGTRRA.

These items of guidance, with some modification, were incorporated into the proposed regulations under section 401(k) and section 401(m) which were published in the **Federal Register** on July 17, 2003. 68 FR 42476.

On November 12, 2003, a public hearing was held on the proposed regulations. After consideration of the comments, these final regulations adopt the provisions of the proposed regulations with certain modifications, the most significant of which are highlighted below.

Explanation of Provisions

1. Rules Applicable to All Cash or Deferred Arrangements

Section 401(k)(1) provides that a profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan will not fail to qualify under section 401(a) merely because it contains a qualified cash or deferred arrangement. As under the proposed regulations, § 1.401(k)–1 sets forth the general definition of a cash or deferred arrangement (CODA), the additional requirements that a CODA must satisfy in order to be a qualified CODA, and the treatment of contributions made under a qualified or nonqualified CODA.

As under the proposed regulations, the final regulations define a CODA as an arrangement under which employees can make a cash or deferred election with respect to contributions to, or accruals or benefits under, a plan intended to satisfy the requirements of section 401(a). A cash or deferred election is any direct or indirect election by an employee (or modification of an earlier election) to have the employer either: (1) Provide an amount to the employee in the form of cash or some other taxable benefit that is not currently available; or (2) contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation. These final regulations retain the definition of a CODA from the proposed regulations, with some minor modifications. First, the exclusion of an arrangement under which employees make after-tax contributions from the definition of a CODA does not encompass an arrangement under which employees make designated Roth contributions.[1] Second, the final regulations clarify that the regulatory provision specifying that compliance with section 401(k) and section 402(e)(3) is the only means of providing a cash or deferred election to an employee without violating the constructive receipt rules is limited to cash or deferred elections under which the contribution or accrual is made under a qualified plan or trust.

As under the proposed regulations, these final regulations incorporate prior guidance on automatic enrollment and thus reflect the fact that a CODA can specify that the default that applies in the absence of an affirmative election by

[1] A designated Roth contribution is an elective contribution that is included in income. The Treasury and the IRS expect to issue guidance on designated Roth contributions in the near future.

an employee can be a contribution to a trust, as described in Rev. Rul. 2000–8. Although the facts of Rev. Rul. 2000–8 specified a certain percentage of compensation that would apply as a default, the percentage chosen was merely illustrative. Thus, the final regulations do not constrain the choice of default provisions.[2] However, in order to be a qualified CODA, as indicated in Rev. Rul. 2000–8, it is cash in lieu of the default employer contribution.

These final regulations also clarify the rules relating to one-time irrevocable elections that are not treated as cash or deferred elections. First, the final regulations replace the requirement that the election be made upon commencement of employment or first becoming eligible under the plan or any plan of the employer with the requirement that the election be made no later than first becoming eligible under the plan or any other plan of the employer. Second, the final regulations define any other plan of the employer for this purpose to mean any plan or arrangement that is described in section 219(g)(5)(D), which includes a section 457(b) governmental plan and a section 403(b) plan, as well as a qualified plan.

The final regulations retain the rule that a contribution is made pursuant to a cash or deferred election only if the contribution is made after the relevant election. Thus, a contribution made in anticipation of an employee's election is not treated as an elective contribution. A number of commentators indicated that the rule in the proposed regulation requiring that elective contributions not precede the services to which they relate (or the date when the compensation would otherwise be paid, if earlier than the date when the services are performed) was too broad. Some of these commentators suggested the addition of an exception to cover instances where the employer has administrative reasons for depositing the contributions before the employee's services or pay day (for example, the temporary absence of the bookkeeper responsible for transmitting funds to the plan), while others suggested loosening the rule where the early contribution does not result in an accelerated deduction.

After considering these comments, the IRS and Treasury have concluded that the prefunding of elective contributions and matching contributions is inconsistent with sections 401(k) and 401(m) and that the restrictions on the timing of contributions are consistent with the fundamental premise of elective contributions (*i.e.*, these are contributions that are paid to the plan as a result of an employee election not to receive those amounts in cash). Accordingly, the final regulations generally provide that contributions are made pursuant to a cash or deferred election only if the contributions are made after the employee's performance of services which relate to the compensation that, but for the election, would have been paid to the employee. Amounts contributed in anticipation of future performance of services generally are not treated as elective contributions under these final regulations. Thus, an employer is not able to prefund elective contributions in order to accelerate the deductions for elective contributions; and employer contributions made under the facts in Notice 2002–48 (2002–2 C.B.139) are no longer permitted to be taken into account under the ADP test or the ACP test and would not satisfy any plan requirement to provide elective contributions or matching contributions.

The proposed regulations contained an exception to the rule precluding the funding of elective contributions before the performance of services in the situation where the compensation would also have been paid, but for the election, before the performance of services and that exception has been retained in the final regulations. After consideration of the administrative concerns raised by the comments, these final regulations also include an exception for occasional bona fide administrative considerations. Under this exception, employer contributions will not fail to satisfy the regulatory requirements relating to the timing of elective contributions merely because contributions for an occasional pay period are made before the services with respect to that pay period are performed, provided that the early contributions are made for bona fide administrative considerations and are not made early with a principal purpose of accelerating deductions. In addition, the final regulations include changes to the rules precluding the prefunding of matching contributions discussed below.

One commentator asked for clarification of the interaction between these timing rules and the rule under the regulations that treats a self-employed individual's earned income as being currently available on the last day of the individual's taxable year and whether this last day rule precludes a partner from making elective contributions during the year through a reduction in the partner's draw. The restriction on the timing of contributions is not intended to prevent a partner from deferring amounts that are paid to the partner throughout the year on account of services performed by the partner during the year, and the final regulations have been modified to clarify this point. However, self-employed individuals who take advantage of this opportunity to defer amounts during the year must make sure that the amount contributed during the year will not exceed the limits (such as the limits of section 415) that will apply to the individual, based on the individual's actual earned income for the relevant period.

2. Qualified CODAs

A. General Rules Relating to Qualified CODAs

Elective contributions under a qualified CODA are treated as employer contributions for purposes of the Internal Revenue Code.[3] Elective contributions under a qualified CODA generally are not included in the employee's gross income at the time the cash would have been received (but for the cash or deferred election) or at the time contributed to the plan. Elective contributions under a qualified CODA are included in the employee's gross income, however, if the contributions are in excess of the section 402(g) limit for a year, are designated Roth contributions (under section 402A, effective for tax years beginning after December 31, 2005), or are recharacterized as after-tax contributions as part of a correction of an ADP test failure.

A CODA is not qualified unless it is part of a profit sharing plan, stock bonus plan, pre-ERISA money purchase plan, or rural cooperative plan and provides for an election between contributions to the plan or payments directly in cash.

[2] The Department of Labor has advised Treasury and the IRS that, under Title I of the Employee Retirement Income Security Act of 1974 (''ERISA'') (88 Stat. 829), Public Law 93–406, fiduciaries of a plan must ensure that the plan is administered prudently and solely in the interest of plan participants and beneficiaries. While ERISA section 404(c) may serve to relieve certain fiduciaries from liability when participants or beneficiaries exercise control over the assets in their individual accounts, the Department of Labor has taken the position that a participant or beneficiary will not be considered to have exercised control when the participant or beneficiary is merely apprised of investments that will be made on his or her behalf in the absence of instructions to the contrary. *See* 29 CFR 2550.404c–1 and 57 FR 46924.

[3] The Department of Labor has advised Treasury and the IRS that its view is that amounts a participant pays to or has withheld by an employer, whether pursuant to a cash or deferred election or otherwise, for contribution to an employee benefit plan constitute participant contributions for purposes of Subtitle A and Part 4 of Subtitle B of Title I of ERISA.

In addition, a CODA is not qualified unless it meets the following requirements: (1) The elective contributions under the CODA satisfy either the ADP test set forth in section 401(k)(3) or one of the design-based alternatives in section 401(k)(11) or (12); (2) elective contributions under the CODA are nonforfeitable at all times; (3) elective contributions are distributable only on the occurrence of certain events, including attainment of age 59½, hardship, death, disability, severance from employment, or termination of the plan; (4) the group of employees eligible to participate in the CODA satisfies the coverage requirements of section 410(b)(1); (5) no other benefit (other than matching contributions and certain other specified benefits) is conditioned, directly or indirectly, upon the employee's making or not making elective contributions under the CODA; and (6) no more than 1 year of service is required for eligibility to elect to make a cash or deferred election.

Subject to certain exceptions, State and local governmental plans are not allowed to include a qualified CODA. Plans sponsored by Indian tribal governments and rural cooperatives are allowed to include a qualified CODA.

B. Nondiscrimination Rules Applicable to Qualified CODAs

As under the proposed regulations, these final regulations provide that the special nondiscrimination standards set forth in section 401(k) (the ADP test, the ADP safe harbor and the SIMPLE 401(k) plan) are the exclusive means by which a qualified CODA can satisfy the nondiscriminatory amount of contribution requirement of section 401(a)(4). Pursuant to section 401(k)(3)(G), a State or local governmental plan is deemed to satisfy the ADP test.

These final regulations retain the rule that the plan must satisfy the requirements of § 1.401(a)(4)–4 with respect to benefits, rights and features in addition to the requirements that contributions satisfy the nondiscrimination requirements of section 401(k). In addition to stating that the availability of each level of elective contribution is a right or feature subject to the requirements of section 401(a)(4), the final regulations point out that the right to make a designated Roth contribution is a right or feature.

The proposed regulations included an anti-abuse rule which provided that a plan will not be treated as satisfying the requirements of section 401(k) if there are repeated changes to plan testing procedures or plan provisions that have the effect of distorting the ADP so as to increase significantly the permitted deferrals for HCEs, or otherwise manipulate the nondiscrimination rules of section 401(k), if a principal purpose of the changes was to achieve such a result.

Several commentators suggested eliminating the anti-abuse rule in the proposed regulations. One of these commentators suggested that the proposed regulation's restrictions on ADP testing (including the restriction on the use of targeted QNECs and changes in testing method discussed below) made the anti-abuse rule unnecessary and noted that there may be legitimate reasons (for example, change in participant demographics or merger of plans for administrative reasons) for changes to a section 401(k) plan's testing procedures. Another commentator suggested that the anti-abuse rule be replaced with guidance addressing various specific abusive transactions.

After considering these comments, IRS and Treasury have determined that the need for rules to prevent abuse associated with changes in plan testing procedures or other plan provisions to inflate inappropriately the ADP for NHCEs or to otherwise manipulate the nondiscrimination provisions of section 401(k) outweighs the concerns raised by these commentators. In addition, IRS and Treasury do not believe that the anti-abuse provisions of the proposed regulations constrain legitimate testing procedure changes. Therefore, these final regulations retain the anti-abuse provisions of the proposed regulations.

C. Aggregation and Disaggregation of Plans

As under the proposed regulations, these final regulations consolidate the rules regarding identification of CODAs and plans for purposes of demonstrating compliance with the requirements of section 401(k) and retain the rule that all CODAs included in a plan are treated as a single CODA for purposes of applying the nondiscrimination tests. For this purpose, a plan is generally defined by reference to § 1.410(b)–7(a) and (b) after application of the mandatory disaggregation rules of § 1.410(b)–7(c) (other than the mandatory disaggregation of section 401(k) and section 401(m) plans) and permissive aggregation rules of § 1.410(b)–7(d), as modified under these regulations. For example, if a plan covers collectively bargained employees and noncollectively bargained employees, the elective contributions for the separate groups of employees must be treated separately for nondiscrimination under section 401(k). As under the proposed regulations, the final regulations retain the special rules in the pre-SBJPA regulations that permit the aggregation of certain employees in different collective bargaining units and the prohibition on restructuring under § 1.401(a)(4)–9(c).

The proposed regulations included a change to the treatment of a CODA under a plan that includes an ESOP. Under the pre-SBJPA regulations, such a plan must be disaggregated into the ESOP and non-ESOP portions and apply two separate ADP and ACP tests: one for elective contributions going into the ESOP portion (and invested in employer stock) and one for elective contributions going in the non-ESOP portion of the plan. The proposed regulations eliminated the disaggregation of the ESOP and non-ESOP portions of a single section 414(l) plan for purposes of ADP and ACP testing and allowed an employer to permissively aggregate two section 414(l) plans, one that is an ESOP and one that is not.

Commentators responded favorably to this change. Therefore, the final regulations retain the rule of the proposed regulations that eliminates the disaggregation of the ESOP and non-ESOP portions for the ADP and ACP tests. Several of these commentators suggested that plans be permitted to implement this change before the effective date of the regulations. After considering these comments, the IRS and Treasury have determined that it would not be in the best interest of plan administration to allow this change to be made before the effective date of the entire regulations. However, as discussed below, a plan is permitted to implement this change for plan years that end after December 29, 2004, provided the plan applies all the rules of these final regulations, to the extent applicable, for that plan year and all subsequent plan years

These final regulations retain the proposed regulations' requirement that a single testing method must apply to all CODAs under a plan (after application of the aggregation and disaggregation rules as modified). This has the effect of restricting an employer's ability to aggregate section 414(l) plans for purposes of section 410(b) if those plans apply inconsistent testing methods. For example, a plan that applies the ADP test of section 401(k)(3) may not be aggregated with a plan that uses the ADP safe harbor of section 401(k)(12) for purposes of section 410(b). However, the final regulations make clear that if a plan is disaggregated into separate plans under the rules of section 410(b), each separate plan can apply a different testing method. Thus, for example, if an

employer maintaining a plan that covers otherwise excludible employees is using the optional rule of section 410(b)(4)(B) to determine whether the plan satisfies the requirements of section 410(b), then the plan is treated as comprising two separate plans for purposes of section 410(b) and the plan covering the employees who have satisfied the minimum age and service requirements of section 410(a)(1)(A) can use the ADP safe harbor of section 401(k)(12), while the plan covering the remaining employees uses the ADP test of section 401(k)(3).

D. Requirement That the Elective Contributions Be Immediately Nonforfeitable

The final regulations reflect the statutory requirement that elective contributions to a qualified CODA be immediately nonforfeitable. However, the final regulations clarify that the reference to these contributions being ''disregarded for purposes of applying section 411(a) to other contributions'' is limited to being disregarded for purposes of section 411(a)(2). Thus, for example, elective contributions under a qualified CODA are taken into account for purposes of determining whether a participant is a nonvested participant for purposes of section 411(a)(6)(D)(iii).

E. Restrictions on Withdrawals

As discussed above, a qualified CODA must provide that elective contributions may only be distributed after certain events, including hardship and severance from employment. EGTRRA amended section 401(k)(2)(B)(i)(I) by replacing ''separation from service'' with ''severance from employment.'' This change eliminated the ''same desk rule'' as a standard for distributions under section 401(k) plans.

In addition, EGTRRA amended section 401(k)(10) by deleting disposition by a corporation of substantially all of the assets of a trade or business and disposition of a corporation's interest in a subsidiary, leaving termination of the plan as the only distributable event described in section 401(k)(10). Further, EGTRRA directs the Secretary of the Treasury to revise the regulations relating to distributions under section 401(k)(2)(B)(i)(IV) to provide that the period during which an employee is prohibited from making elective and employee contributions following a hardship distribution is 6 months (instead of 12 months as required under § 1.401(k)–1(d)(2)(iv)(B)(*4*) of the pre-SBJPA regulations).[4] Finally, section 662 of EGTRRA amended section 404(k)(2) to allow a deduction for dividends paid on employer securities held by an ESOP if those dividends are reinvested in employer securities pursuant to an election by the participant or beneficiary to reinvest the dividends or have them paid in cash. Section 662 of EGTRRA is effective for taxable years of a corporation beginning on or after January 1, 2002.

Notice 2001–56, Notice 2002–2 (2002–1 C.B. 285), and Notice 2002–4 provided guidance on these EGTRRA changes to the distribution rules for elective contributions. That guidance was generally incorporated in the proposed regulations. These final regulations adopt the rules in the proposed regulations but clarify that the requirement that a participant must have obtained all distributions currently available under all qualified plans of the employer in order to qualify for a hardship distribution applies equally to a distribution of an ESOP dividend. This implements the rule set forth in Notice 2002–2.

Comments were requested on whether a change in status from a common law employee to a leased employee described in section 414(n) should be treated as a severance from employment that would permit a distribution to be made. After reviewing the comments, these final regulations do not add the change to leased employee to the list of distributable events and retain the use of the section 410(b) definition of employee for purposes of section 401(k). Because an individual who is a leased employee (as defined in section 414(n)) is treated as an employee of the recipient of the individual's services for purposes of section 410(b) (unless the safe harbor plan requirements described in section 414(n)(5) are met), the individual does not incur a severance from employment as a result of becoming a leased employee.

In addition to the statutory changes, the rules relating to hardship distributions were reorganized in the proposed regulations in order to clarify certain ambiguities, including the relationship between the generally applicable rules, employee representations, and the safe harbors provided under the pre-SBJPA regulations. The final regulations adopt the rules in the proposed regulations with some minor modifications. In response to comments, the final regulations add funeral expenses and certain expenses relating to the repair of damage to the employee's principal residence to the list of events that are deemed to be immediate and heavy financial needs.

The pre-SBJPA regulations and the proposed regulations treated medical expenses for an employee's spouse or dependent described in section 152 as a deemed heavy and financial need. The Working Families Tax Relief Act of 2004 (118 Stat. 1166), Public Law 108–311, modified section 152's definition of dependent, effective for tax years beginning in 2005. These final regulations revise the proposed regulations to disregard certain provisions in section 152's definition of dependent in the case of post-secondary educational expenses. These final regulations also revise the proposed regulations to treat expenses for (or necessary to obtain) medical care that would be deductible under section 213(d) (determined without regard to whether the expenses exceed 7.5% of adjusted gross income) as a deemed heavy and financial need. These changes have the effect of allowing medical expenses and post-secondary educational expenses for an employee, spouse, or dependent (without regard to the change in the definition of dependent under the Working Families Tax Relief Act of 2004) to be treated as a deemed heavy and financial need. The modifications in these final regulations also effectively expand the definition of dependent for medical expenses to include a non-custodial child who is subject to the special rule of section 152(e), but would exclude nonprescription drugs or medicine (other than insulin). Prior to the effective date of these regulations with respect to a plan, a sponsor can continue to interpret the plan terms and the pre-SBJPA regulations without regard to the statutory change in the definition of dependent.

Some commentators asked for specific guidance on the documentation and verification requirements for a hardship distribution. The final regulations do not address this issue. However, taxpayers are reminded that section 6001 requires that they keep the records necessary to demonstrate compliance with the qualification requirements of section 401 and the rules of section 401(k) and 401(m).

F. Other Rules for Qualified CODAs

The final regulations retain the additional requirements set forth in the

[4] Under section 402(c), as amended by the IRS Restructuring and Reform Act of 1998, Public Law 105–206 (112 Stat. 685), and EGTRRA, a hardship distribution is not an eligible rollover distribution. While the change affects distributions from a section 401(k) plan, there is no specific reference to the change in these regulations because these regulations are under sections 401(k) and (m).

pre-SBJPA regulations that a CODA must satisfy in order to be qualified, with some minor modifications. First, in order to be a qualified CODA, the arrangement must provide an employee with an effective opportunity to elect to receive the amount in cash no less than once during the plan year. Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including adequacy of notice of the availability of the election, the period of time before the cash is currently available during which an election may be made, and any other conditions on elections.

The final regulations also require a plan to provide for satisfaction of one of the specific nondiscrimination alternatives described in section 401(k). As with the pre-SBJPA regulations, the plan may accomplish this by incorporating by reference the ADP test of section 401(k)(3) and the regulations under proposed § 1.401(k)–2(a) and (b), if that is the nondiscrimination alternative being used. If, with respect to the nondiscrimination alternative being used, there are optional choices available, the plan must provide which of the optional choices will apply. For example, a plan that uses the ADP test of section 401(k)(3) must specify whether it is using the current year testing method or prior year testing method. Additionally, a plan that uses the prior year testing method must specify whether the ADP for eligible NHCEs for the first plan year is 3% or the actual ADP for the eligible NHCEs for the first plan year. The final regulations also provide that the Commissioner may, in guidance of general applicability, specify the default options that will apply under the plan if the nondiscrimination test is incorporated by reference in accordance with the final regulations.

Additionally, a plan that uses the safe harbor method must specify whether the safe harbor contribution will be the nonelective safe harbor contribution or the matching safe harbor contribution and is not permitted to provide that ADP testing will be used if the requirements for the safe harbor are not satisfied. The safe harbors are intended to provide employees with a minimum threshold in benefits in exchange for easier compliance for the plan sponsor. It would be inconsistent with this approach to providing benefits to allow an employer to deliver smaller benefits to NHCEs and revert to testing. Accordingly, if, at the beginning of the plan year, a plan contains an allocation formula that includes safe harbor matching or nonelective contributions, these regulations clarify that, except to the extent permitted under § 1.401(k)–3 and § 1.401(m)–3, the plan may not be amended to revert to testing for the plan year.

The final regulations retain the existing rules relating to the section 401(k)(4)(A) prohibition on having benefits (other than a match) contingent on making or not making an elective contribution. These final regulations also reflect the amendment to section 416(c)(2)(A) (under which matching contributions can be taken into account for purposes of satisfying the top-heavy minimum contribution requirement without violating the prohibition on making benefits contingent on making or not making elective contributions), the amendment of section 401(k)(4)(B) by SBJPA (allowing tax exempt organizations to maintain section 401(k) plans), and the enactment of section 402(g)(8) (providing that matching contributions with respect to partners and sole proprietors are no longer treated as elective contributions).

3. The Actual Deferral Percentage (ADP) Test

A. General Rules Relating to the ADP Test

Section 1.401(k)–2 sets forth the rules for a CODA that is applying the ADP test contained in section 401(k)(3). Under the ADP test, the percentage of compensation deferred for the eligible HCEs is compared annually to the percentage of compensation deferred for eligible NHCEs, and if certain limits are exceeded by the HCEs, corrective action must be taken by the plan. Correction can be made through the distribution of excess contributions, the recharacterization of excess contributions, or additional employer contributions.

Section 401(k)(3)(A), as amended by SBJPA, generally provides for the use of prior year data in determining the ADP of NHCEs, while current year data is used for HCEs. This testing option is referred to as the prior year testing method. Alternatively, a plan may provide for the use of current year data for determining the ADPs for both NHCEs and HCEs, which is known as the current year testing method. The regulations use the term applicable year to describe the year for which the ADP is determined for the NHCEs.

Section 401(k)(3)(F), as added by SBJPA, provides that a plan benefiting otherwise excludable employees and that, pursuant to section 410(b)(4)(B), is being treated as two separate plans for purposes of section 410(b), is permitted to disregard NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A). Thus, the regulations permit such a plan to perform the ADP test by comparing the ADP for all eligible HCEs for the plan year and the ADP of eligible NHCEs for the applicable year, disregarding all NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A). Because section 401(k)(3)(F) is permissive, the final regulations follow the proposed regulations and do not eliminate the existing testing option under which a plan benefiting otherwise excludable employees is disaggregated into separate plans where the ADP test is performed separately for all eligible employees who have completed the minimum age and service requirements of section 410(a)(1)(A) and for all eligible employees who have not completed the minimum age and service requirements.

B. Elective Contributions Used in the ADP Test

The regulations generally follow the proposed regulations in defining which elective contributions are reflected in the ADP test and which ones are not. Thus, these regulations reflect the rule contained in the regulations under section 414(v), under which catch-up contributions that are in excess of a statutory limit or an employer-provided limit are not taken into account under the ADP test. See § 1.414(v)–1. The final regulations add a comparable rule for additional elective contributions that are made by reason of an eligible employee's qualified military service pursuant to section 414(u). The final regulations retain the rule that elective contributions must be paid to the trust within 12 months after the end of the plan year. However, for plans subject to Title I of ERISA, contributions must be paid to the trust much sooner in order to satisfy the Department of Labor's regulations relating to when elective contributions become plan assets.

Section 401(k)(3) provides that the actual deferral ratio (ADR) of an HCE who is eligible to participate in 2 or more CODAs of the same employer is calculated by treating all CODAs in which the employee is eligible to participate as one CODA. These final regulations adopt the provision in the proposed regulations that provides that the ADR for each HCE participating in more than one CODA is determined by aggregating the HCE's elective contributions that are within the plan year of the CODA being tested.

C. Additional Employer Contributions Used in the ADP Test

The final regulations generally retain the rules in the proposed regulations permitting a plan to take qualified nonelective contributions or qualified matching contributions (*i.e.*, nonelective or matching contributions that satisfy the vesting and distribution limitations of section 401(k)(2)(B) and (C)) into account under the ADP test, except as described below. Thus, an employer whose CODA has failed the ADP test can correct this failure by making additional qualified nonelective contributions (QNECs) or qualified matching contributions (QMACs) for its NHCEs.

As under the pre-SBJPA regulations, these final regulations provide that QNECs must satisfy four requirements in addition to the vesting and distribution rules described above before they can be taken into account under the ADP test: (1) The amount of nonelective contributions, including the QNECs that are used under the ADP test or the ACP test, must satisfy section 401(a)(4); (2) the amount of nonelective contributions, excluding the QNECs that are used under the ADP test or the ACP test, must satisfy section 401(a)(4); (3) the plan to which the QNEC or QMAC is made must be a plan that can be aggregated with the plan maintaining the CODA; and (4) the QNECs or QMACs must not be contingent on the performance of services after the allocation date and must be contributed within 12 months after the end of the plan year within which the contribution is to be allocated.[5] Thus, in the case of a plan using prior year ADP testing, any QNECs that are to be allocated to the NHCEs for the prior plan year must be contributed before the last day of the current plan year in order to be taken into account.

Some plans provide a correction mechanism for a failed ADP test that targets QNECs to certain NHCEs in order to reduce the total contributions to NHCEs under the correction. Under the method that minimizes the total QNECs allocated to NHCEs under the correction, the employer makes a QNEC to the extent permitted by the section 415 limits to the NHCE with the lowest compensation during the year in order to raise that NHCE's ADR. If the plan still fails to pass the ADP test, the employer continues expanding the group of NHCEs who receive QNECs to the next lowest-paid NHCE until the ADP test is satisfied. By using this bottom-up leveling technique, the employer can pass the ADP test by contributing small amounts of money to NHCEs who have very low compensation for the plan year (for example, an employee who terminated employment in early January with $300 of compensation). This is because of the fact that the ADP test is based on an unweighted average of ADRs and a small dollar (but high percentage of compensation) contribution to a terminated or other partial-year employee has a larger impact on the ADP test than the same contribution to a full-year employee.

The IRS and Treasury have been concerned that, by using this type of technique, employers may pass the ADP test by making high percentage QNECs to a small number of employees with low compensation rather than providing contributions to a broader group of NHCEs. In addition, the legislative history to EGTRRA expresses Congressional intent that the Secretary of the Treasury will use his existing authority to address situations where qualified nonelective contributions are targeted to certain participants with lower compensation in order to increase the ADP of the NHCEs. (*See* EGTRRA Conference Report, H.R. Conf. Rep. 107–84, 240).

Accordingly, the proposed regulations added a new requirement that a QNEC must satisfy in order to be taken into account under the ADP test. This requirement, designed to limit the use of targeted QNECs, generally prohibited a plan from counting QNECs for purposes of the ADP test to the extent that QNECs are more than double the QNECs at least half of the other NHCEs are receiving, when expressed as a percentage of compensation.

The restriction on targeting QNECs is implemented by providing that a QNEC for an NHCE that exceeds 5% of compensation could be taken into account for the ADP test only to the extent the contribution, when expressed as a percentage of compensation, does not exceed two times the plan's representative contribution rate. The plan's representative contribution rate is defined as the lowest contribution rate (*i.e.*, the sum of QNECs made and QMACs taken into account for an employee divided by the employee's compensation) among a group of NHCEs that is half of all the eligible NHCEs under the arrangement (or the lowest contribution rate among all eligible NHCEs under the arrangement who are employed on the last day of the year, if greater).

While some commentators applauded the restriction on targeted QNECs, a number of commentators suggested that certain types of contributions be exempted from the definition of targeted QNECs. In particular, commentators suggested that QNECs equal to a flat dollar amount that are made to all NHCEs and QNECs that are made in connection with an employer's obligation to pay a prevailing wage under the Davis-Bacon Act (46 Stat. 1494), Public Law 71–798, Service Contract Act of 1965 (79 Stat. 1965), Public Law 89–386, or similar legislation should be able to be taken into account under the ADP test (even though such contributions create widely different contribution percentages among the NHCE population) because they are not ''targeted''.

After reviewing the comments, the IRS and Treasury believe that the restrictions on targeting QNECs should apply essentially as they were proposed. While flat dollar QNEC contributions may not have the appearance of targeting, allowing those contributions to skew the results of the ADP test undermines the integrity of the ADP test. However, the final regulations provide more flexibility for QNECs that are made in connection with an employer's obligation to pay a prevailing wage under the Davis-Bacon Act (46 Stat. 1494), Public Law 71–798, Service Contract Act of 1965 (79 Stat. 1965), Public Law 89–286, or similar legislation by allowing a QNEC of up to 10% of compensation to be taken into account under the ADP test in such a case.

The final regulations under section 401(m) provide parallel restrictions on QNECs taken into account in ACP testing, and a QNEC cannot be taken into account under both the ADP and ACP test (including for purposes of determining the representative contribution rate). As discussed more fully below, the final regulations generally retain the proposed regulations limitation on targeting matching contributions, which limits the extent to which QMACs can be targeted as a means of avoiding the restrictions on targeted QNECs.

D. Correction

Section 401(k)(8)(C), as amended by SBJPA, provides that, for purposes of correcting a plan's failure to meet the nondiscrimination requirements of section 401(k)(3), the distribution of excess contributions is made on the basis of the amount of the contributions

[5] With respect to this timing requirement, it should be noted that in order to be taken into account for purposes of section 415(c) for a limitation year, the contributions will need to be made within the time frame set forth in the regulations under section 415 (generally, no later than 30 days after the end of the section 404(a)(6) period applicable to the taxable year with or within which the limitation year ends).

by, or on behalf of, each HCE. The final regulations implement this correction procedure in the same manner as set forth in Notice 97–2. Thus, the total amount of excess contributions is determined using the rules under the pre-SBJPA regulations (*i.e.*, based on high percentages). Then, that total amount is apportioned among the HCEs by assigning the excess to be distributed first to those HCEs who have the greatest dollar amount of contributions taken into account under the ADP test (as opposed to the highest deferral percentage). If these amounts are distributed or recharacterized in accordance with these regulations, the plan complies with the ADP test for the plan year with no obligation to recalculate the ADP test.

The final regulations generally follow the rules in the proposed regulations on the determination of net income attributable to excess contributions. However, the regulatory language regarding the calculation of gap period income (*i.e.*, income for the period after the plan year) has been clarified to specify that gap period income needs to be included only to the extent the employee is or would be credited with allocable gain or loss on those excess contributions for that period, if the total account were to be distributed. In addition, in response to administrative concerns raised by comments, the final regulations provide that a distribution of excess contributions is not required to include the income allocable to the excess contributions for a period that is no more than 7 days before the distribution. As under the pre-SBJPA regulations, the determination of the income for the gap period could be based on the income determined using the alternative method for the aggregate of the plan year and the gap period or using 10% of the income for the plan year (determined under the alternative method) for each month in the gap period.

The final regulations retain the rules in the proposed regulations regarding the timing and tax treatment of distributions of excess contributions, coordination with the distribution of excess deferrals and the treatment of matches attributable to excess contributions. However, the final regulations clarify that if excess contributions are distributed, they are includible in income on the dates the elective contributions would have been received by the employee had the employee originally elected to receive the amounts in cash, treating the excess contributions that are being distributed as the first elective contributions for the plan year.

4. Safe Harbor Section 401(k) Plans

Section 401(k)(12) provides a design-based safe harbor method under which a CODA is treated as satisfying the ADP test if the arrangement meets certain contribution and notice requirements. Section 1.401(k)–3 of these final regulations, which sets forth the requirements for these arrangements, generally follows the rules set forth in Notice 98–52 and Notice 2000–3. Thus, a plan satisfies the section 401(k) safe harbor if it makes specified QMACs for all eligible NHCEs. The matching contributions can be under a basic matching formula that provides for QMACs equal to 100% of the first 3% of elective contributions and 50% of the next 2% or an enhanced matching formula that is at least as generous in the aggregate, provided the rate of matching contributions under the enhanced matching formula does not increase as the employee's rate of elective contributions increases. In lieu of QMACs, the plan is permitted to provide QNECs equal to 3% of compensation for all eligible NHCEs. In addition, notice must be provided to each eligible employee, within a reasonable time before the beginning of the year, of the employee's right to defer under the plan.

The proposed regulations did not include any exception to the requirements for safe harbor matching contributions with respect to catch-up contributions. As part of the proposed regulations the IRS and Treasury solicited comments on the specific circumstances under which elective contributions by an NHCE to a safe harbor plan would be less than the amount required to be matched, *e.g.*, less than 5% of safe harbor compensation, but would be treated by the plan as catch-up contributions, and on the extent to which a safe harbor plan should be required to match catch-up contributions under such circumstances. After reviewing the comments and the applicable statutory provisions (including the amendments to section 414(v)(3)(B) made by the Job Creation and Worker Assistance Act of 2002, (JCWAA) (Public Law 107–147)), the IRS and Treasury have determined that no such exception is appropriate.

Section 401(k)(12)(D) contains a requirement that each eligible employee be provided with a written notice of the employee's rights and obligations under the plan. These final regulations provide that the notice can be provided in writing or through another medium that is prescribed by the Commissioner as satisfying the requirement for a written notice. As reflected in the priority guidance plan, the IRS and Treasury are currently developing guidance setting forth the extent to which the notice described in section 401(k)(12)(D), as well as other notices under the various requirements relating to qualified retirement plans, can be provided electronically, taking into account the effect of the Electronic Signatures in Global and National Commerce Act (E–SIGN) (114 Stat. 464), Public Law 106–229. Until that guidance is issued, plan administrators and employers may continue to rely on the interim guidance in Q&A–7 of Notice 2000–3 on the use of electronic media to satisfy the notice requirement in section 401(k)(12)(D).

These final regulations specify that a section 401(k) safe harbor plan must generally be adopted before the beginning of the plan year and be maintained throughout a full 12-month plan year. This requirement is consistent with the notion that the statute specifies a certain contribution level for NHCEs in order to be deemed to pass the nondiscrimination requirements. If the contribution level is not maintained for a full 12-month year, the employer contributions made on behalf of NHCEs should not support what could be a full year's contribution by the HCEs.

The final regulations adopt the exceptions to this 12-month rule that were set forth in the proposed regulations. Thus, a section 401(k) safe harbor plan could have a short plan year in the year the plan terminates, provided the plan termination is in connection with a merger or acquisition involving the employer, or the employer incurs a substantial business hardship comparable to a substantial business hardship described in section 412(d). A section 401(k) safe harbor plan could also have a short plan year in the year the plan terminates (without regard to the reason for the termination or the financial condition of the employer) if the employer makes the safe harbor contributions for the short year, employees are provided notice of the change, and the plan passes the ADP test. In either case, the employer must make the safe harbor contributions through the date of plan termination.

In addition, a safe harbor plan could have a short plan year if it is preceded and followed by plan years as a section 401(k) safe harbor plan. Under these final regulations, the following plan year is permitted to be shorter than 12 months if the short plan year is as a result of a plan termination (whether or not the plan termination is in connection with a merger or acquisition involving the employer). These final regulations clarify that this treatment is

unavailable if in the following plan year safe harbor matching contributions are reduced or suspended. In the event that the short plan year is followed by another short plan year, this treatment is available if the plan satisfies the 401(k) safe harbor requirements for the 12 month period immediately following the first short plan year.

5. SIMPLE 401(k) Plans

Pursuant to section 401(k)(11), a SIMPLE 401(k) plan is treated as satisfying the requirements of section 401(k)(3)(A)(ii) if the contribution, vesting, notice and exclusive plan requirements of section 401(k)(11) are satisfied. Section 1.401(k)–4 of these regulations reflects the provisions of section 401(k)(11) in a manner that follows the positions reflected in the model amendments set forth in Rev. Proc. 97–9.

6. Matching Contributions and Employee Contributions.

Section 401(m)(2) sets forth a nondiscrimination test, the ACP test, with respect to matching contributions and employee contributions that is parallel to the nondiscrimination test for elective contributions set forth in section 401(k). Section 1.401(m)–1 of the regulations sets forth this test in a manner that is consistent with the nondiscrimination test set forth in § 1.401(k)–1(b). Thus, satisfaction of the ACP test, the ACP safe harbor or the SIMPLE 401(k) provisions is the exclusive means that can be used to satisfy the nondiscrimination in amount of contribution requirements of section 401(a)(4) with respect to employee contributions and matching contributions. An anti-abuse provision comparable to that provided in connection with the regulations under section 401(k) limits the ability of an employer to make repeated changes in plan provisions or testing procedures that have the effect of distorting the ACP so as to increase significantly the permitted ACP for HCEs, or otherwise manipulate the nondiscrimination rules of section 401(m), if a principal purpose of the changes was to achieve such a result.

The final regulations also include provisions regarding plan aggregation and disaggregation that are similar to those that apply for CODAs under section 401(k). For example, matching contributions made under the portion of a plan that is an ESOP and the portion of the same plan that is not an ESOP are not disaggregated under these final regulations.

The definitions of matching contribution and employee contribution under § 1.401(m)–1 of the regulations generally follow the definitions in the pre-SBJPA regulations. Thus, whether an employer contribution is on account of an elective deferral or employee contribution—and thus is a matching contribution—is determined based on all the relevant facts and circumstances.

The final regulations generally follow the proposed regulations in providing that a contribution is not treated as a matching contribution on account of an elective deferral if it is contributed before the employee's performance of services with respect to which the elective deferral is made (or when the cash that is subject to the cash or deferred election would be currently available, if earlier) and an employer contribution is not a matching contribution made on account of an employee contribution if it is contributed before the employee contribution. Thus, under these regulations, an employer would not be able to prefund matching contributions to accelerate the deduction for those contributions; and, as noted above with respect to the timing of elective contributions, employer contributions made under the facts in Notice 2002–48 would not be taken into account under the ACP test and would not satisfy any plan requirement to provide matching contributions.

However, in response to comments, the final regulations make an exception to this prefunding restriction for forfeitures and for contributions that result in a matching allocation of employer securities released from encumbrance under a securities acquisition loan in a leveraged ESOP, provided that the contributions are for a required payment that is due under the loan terms and are not made early with a principal purpose of accelerating deductions.

7. ACP Test for Matching Contributions and Employee Contributions

Section 1.401(m)–2 of the final regulations provides rules for the ACP test that generally parallel the rules applicable to the ADP test in § 1.401(k)–2. Thus, for example, the ACP test may be run by comparing the ACP for eligible HCEs for the current year with the ACP for eligible NHCEs for either the current plan year or the prior plan year. The determination of the actual contribution ratio (ACR) for an eligible employee, and the contributions that are taken into account in determining that ACR, under the final regulations are comparable to the rules under the section 401(k) regulations. Thus, for example, the ACR for an HCE who has matching contributions or employee contributions under two or more plans is determined by adding together matching contributions and employee contributions under all plans of the employer during the plan year of the plan being tested, in a manner comparable to that for determining the ADR of an HCE who participates in two or more CODAs.

The final regulations allow QNECs to be taken into account for ACP testing, but would provide essentially the same restrictions on targeting QNECs to a small number of NHCEs as is provided in § 1.401(k)–2. The only difference in the rules is that the contribution percentages used to determine the lowest contribution percentage is based on the sum of the QNECs and those matching contributions taken into account in the ACP test, rather than the sum of the QNECs and the QMACs taken into account under the ADP test. Because QNECs that do not exceed 5% are not subject to the limits on targeted QNECs under either the ADP test or the ACP test, an employer is permitted to take into account up to 10% in QNECs for an eligible NHCE, 5% in ADP testing and 5% in ACP testing, without regard to how many NHCEs receive QNECs (with each of those numbers doubled for QNECs that are made in connection with an employer's obligation to provide a prevailing wage under the Davis-Bacon Act (46 Stat. 1494), Public Law 71–798, Service Contract Act of 1965 (79 Stat. 1965), Public Law 89–286, or similar legislation).

In addition, to prevent an employer from using targeted matching contributions to circumvent the limitation on targeted QNECs, the proposed regulations provided a parallel rule to limit targeted matching contributions for NHCEs from being taken into account in the ACP test to the extent the matching rate for the contribution exceeds the greater of 100% and 2 times the representative matching rate. These final regulations retain this basic rule with modifications to make it more consistent with the rule for QNECs. First, similar to the rule for QNECs, under these final regulations, a contribution that matches an elective contribution may be taken into account to the extent it does not exceed the greater of 5% of compensation. Only then does the rate of matching contribution rate become relevant. Further, in determining the representative matching rate these final regulations provide a new rule if the matching rate is not the same for all levels of elective contributions for an employee. In that case, the employee's matching rate is determined assuming that an employee's elective deferrals are

equal to 6 percent of compensation. There is also a parallel rule for matching contributions for employee contributions.

8. Changes to Other Regulations

These regulations include a number of cross-reference changes to other regulations to reflect the structure of these final regulations. However, no changes were made to the regulations under section 401(a)(26) and the rule relating to treating matching contributions as employer contributions for purposes of section 416 (see § 1.416–1, Q&A M–19) because these regulations have not been updated to reflect recent statutory changes.

Effective Date

These final regulations apply for plan years beginning on or after January 1, 2006. However, plan sponsors are permitted to apply these final regulations to any plan year that ends after December 29, 2004, provided the plan applies all the rules of these final regulations, to the extent applicable, for that plan year and all subsequent plan years. Taxpayers are cautioned, however, that a decision to apply these regulations in the middle of a plan year could only be successfully implemented if the plan has been operated in accordance with these regulations for that year.

For plan years beginning before the effective date of these regulations with respect to a plan, the plan must apply the rules of the prior regulations (as they appeared in the April 1, 2004 edition of 26 CFR part 1), the statutory provisions of section 401(k) and (m), and applicable IRS notices.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the conclusion that few plans containing qualified cash or deferred arrangements will correct excess contributions through the recharacterization of these amounts as employee contributions under § 1.401(k)–2(b)(3) of these regulations. The collection of information contained in § 1.401(k)–3(d), (f), and § 1.401(m)–3(e) are required by statutory provisions. However, the IRS has considered alternatives that would lessen the impact of these statutory requirements on small entities. Thus, the collection of information in these regulations will only have a minimal economic impact on most small entities. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are R. Lisa Mojiri-Azad and John T. Ricotta of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 601 are amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

Section 1.401(k)–1 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(k)–2 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(k)–3 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(k)–4 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(k)–5 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(k)–6 also issued under 26 U.S.C. 401(m)(9).

* * * * *

Section 1.401(m)–1 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(m)–2 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(m)–3 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(m)–4 also issued under 26 U.S.C. 401(m)(9).

Section 1.401(m)–5 also issued under 26 U.S.C. 401(m)(9).

* * * * *

■ **Par. 2.** For each section set forth below, remove the text that appears in the column labeled ''Remove'' and replace with the text that appears in the column labeled ''Insert'':

Regulation cite	Remove	Insert
§ 1.72(p)–1, Q&A–12	''1.401(k)–1(d)(6)(ii)''	''1.401(k)–1(d)(5)(iii)''
§ 1.401(a)(4)–1(b)(2)(ii)(B)	''1.401(k)–1(b)(4)''	''1.401(k)–2(a)(5)(i)''
§ 1.401(a)(4)–1(b)(2)(ii)(B)	''1.401(k)–1(b)(4)(i)''	''1.401(k)–2(a)(4)(i)''
§ 1.401(a)(4)–1(b)(2)(ii)(B)	''1.401(m)–1(b)(4)(ii)(A)''	''1.401(m)–2(a)(4)(iii)''
§ 1.401(a)(4)–1(b)(2)(ii)(B)	''1.401(k)–1(b)(5)''	''1.401(k)–2(a)(6''
§ 1.401(a)(4)–1(b)(2)(ii)(B)	''1.401(m)–1(b)(5)''	''1.401(m)–2(a)(6)''
§ 1.401(a)(4)–4(e)(3)(iii)(D)	''1.401(k)–1(g)(3)''	''1.401(k)–6''
§ 1.401(a)(4)–4(e)(3)(iii)(F)	''1.401(m)–1(f)(6)''	''1.401(m)–1(a)(3)''
§ 1.401(a)(4)–4(e)(3)(iii)(G)	''1.401(m)–1(f)(12)''	''1.401(m)–1(a)(2)''
§ 1.401(a)(4)–4(e)(3)(iii)(G)	''1.401(k)–1(f)(1)(i)''	''1.401(k)–2(b)(1)(i)''
§ 1.401(a)(4)–4(e)(3)(iii)(G)	''1.401(m)–1(e)(1)(i), and 1.401(m)–2(c)''	''1.401(m)–2(b)(1)(i)''
§ 1.401(a)(4)–9(c)(3)(ii)	''1.401(k)–1(b)(3)(ii) and 1.401(m)–1(b)(3)(ii)''	''1.401(k)–1(b)(4)(iv)(B) and 1.401(m)–1(b)(4)(iv)(B)''
§ 1.401(a)(4)–11(g)(3)(vii)(A)	''1.401(k)–1(g)(13)(ii)''	''1.401(k)–6''
§ 1.401(a)(4)–11(g)(3)(vii)(A)	''1.401(k)–1(g)(4)''	''1.401(k)–6''
§ 1.401(a)(4)–11(g)(3)(vii)(A)	''1.401(m)–1(f)(4)''	''1.401(m)–5''
§ 1.401(a)(4)–11(g)(6), Example 7	''1.401(k)–1(f)''	''1.401(k)–2(b)''
§ 1.401(a)(17)–1(b)(3)(iii)(B)	''1.401(k)–1(g)(3)''	''1.401(k)–6''
§ 1.401(a)(17)–1(b)(3)(iii)(B)	''1.401(m)–1(f)(12)''	''1.401(m)–5''
§ 1.401(a)(17)–1(b)(3)(iii)(B)	''1.401(m)–1(f)(6)''	''1.401(m)–5''

Regulation cite	Remove	Insert
§ 1.401(a)(17)–1(d)(5)(ii)	"1.401(m)–(f)(6)"	"1.401(m)–1(a)(3)"
§ 1.401(l)–1(a)(4)(iii)	"1.401(k)–1(g)(3)"	"1.401(k)–6"
§ 1.401(l)–1(a)(4)(iii)	"1.401(m)–1(f)(6) or (f)(12)"	"1.401(m)–1(a)(3) or (a)(2)"
§ 1.402(a)–1(d)(1)	"1.401(k)–1(a)(3)(iii) and (2)(i)"	"1.401(k)–1(a)(3)(iv) and (2)(iv)"
§ 1.402(a)–1(d)(2)(i)	"1.401(k)–1(g)(3)"	"1.401(k)–6"
§ 1.402(a)–1(d)(2)(i)	"1.401(k)–1(a)(4)(i)"	"1.401(k)–1(a)(4)(i)"
§ 1.402(a)–1(d)(2)(i)	"1.401(k)–1(a)(7)"	"1.401(k)–1(a)(5)(iv)(B)"
§ 1.402(a)–1(d)(2)(ii)	"1.401(m)–1(f)(12)"	"1.401(m)–1(a)(2)"
§ 1.402(a)–1(d)(2)(iii)	"1.401(k)–1(a)(4)(iv)"	"1.401(k)–1(a)(3)(v)"
§ 1.402(a)–1(d)(2)(iii)	"1.401(k)–1(a)(6)(ii)(C)"	"1.401(k)–1(a)(3)(v)(B)"
§ 1.402(a)–1(d)(3)(ii)(A)	"1.401(k)–(g)(12)"	"1.401(k)–6"
§ 1.402(a)–1(d)(3)(iv)	"1.401(k)–1(a)(7)"	"1.401–1(a)(5)(iv)(B)"
§ 1.402(c)–2, Q&A–4(c)	"1.401(k)–1(f)"	"1.401(k)–2(b)(2)"
§ 1.402(c)–2, Q&A–4(c)	"1.401(m)–1(e)(3)"	"1.401(m)–2(b)(2)"
§ 1.402(g)–1(c)(2)	"1.401(k)–1(a)(3)(iv)"	"1.401(k)–1(a)(3)(v)"
§ 1.402(g)–1(e)(6)	"1.401(k)–1(f)(5)(i)"	"1.401(k)–2(b)(4)(i)"
§ 1.410(b)–3(a)(3), Example 2	"1.401(k)–1(g)(4)"	"1.401(k)–6"
§ 1.410(b)–3(a)(3), Example 3	"1.401(m)–1(f)(4)"	"1.401(m)–5"
§ 1.410(b)–7(c)(1)	"1.401(k)–1(b)(4)(iv)"	"1.401(k)–2(a)(5)"
§ 1.410(b)–9	"1.401(k)–1(g)(3)"	"1.401(k)–6"
§ 1.410(b)–9	"1.401(k)–1(a)(4)(i)"	"1.401(k)–1(a)(4)(i)"
§ 1.410(b)–9	"1.401(k)–1(b)(5)"	"1.401(k)–1(a)(6)"
§ 1.410(b)–9	"1.401(m)–1(f)(12)"	"1.401(m)–1(a)(2)"
§ 1.410(b)–9	"1.401(m)–1(e)(1)"	"1.401(m)–2(b)(1)"
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§ 1.410(b)–9	"1.401(m)–1(f)(8)"	"1.401(m)–5"
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§ 1.411(a)–4(b)(7)	"1.401(k)–1(f)(2) and (g)(7)"	"1.401(k)–2(b)(2)(ii) and 1.401(k)–6"
§ 1.411(a)–4(b)(7)	"1.401(m)–1(f)(8)"	"1.401(m)–5"
§ 1.411(d)–4(d), Q&A–2(b)(2)(x)	"1.401(k)–1(d)(2)"	"1.401(k)–1(d)(3)"
§ 1.411(d)–4(d), Q&A–2(b)(2)(x)	"1.401(k)–1(d)(2)"	"1.401(k)–1(d)(3)"
§ 1.414(r)–5(g)(2)(iv)(A)	"1.401(m)–1(f)(12)"	"1.401(m)–1(a)(2)"
§ 1.414(r)–5(g)(2)(iv)(A)	"1.401(k)–1(g)(3)"	"1.401(k)–6"
§ 1.414(r)–5(g)(2)(iv)(B)	"1.401(m)–1(f)(12)"	"1.401(m)–1(a)(2)"
§ 1.414(r)–5(g)(3)(iv)	"1.401(k)–1(g)(3)"	"1.401(k)–6"
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§ 54.4979–1(c)(1)	"1.401(m)–1(b)(5)"	"1.401(m)–2(a)(6)"
§ 54.4979–1(c)(1)	"1.401(k)–1(f)(1)(i) and (6)(i)"	"1.401(m)–2(b)(1)(i) and (5)(i)"
§ 54.4979–1(c)(1)	"1.401(m)–1(e)(1)(i)"	"1.401(m)–2(b)(1)(i)"
§ 54.4979–1(c)(2)	"1.401(k)–1(f)(1)(i) and (6)(i)"	"1.401(k)–2(b)(1)(i) and (6)(i)"
§ 54.4979–1(c)(2)	"1.401(k)–1(f)(3)(ii) and (4)(v)"	"1.401(k)–2(b)(3)(ii) and (2)(vi)"
§ 54.4979–1(c)(2)	"1.401(m)–1(e)(3)(v)"	"1.401(m)–2(b)(2)(vi)"
§ 54.4979–1(c)(3)	"1.401(k)–1(f)(4)(ii)"	"1.401(k)–2(b)(2)(iv)"
§ 54.4979–1(c)(3)	"1.401(m)–1(e)(3)(ii)"	"1.401(m)–2(b)(2)(iv)"

■ **Par. 3.** In § 1.410(b)–3, paragraph (a)(2)(i) is revised to read a follows:

§ 1.410(b)–3 Employees and former employees who benefit under a plan.

(a) * * *

(2) *Exceptions to allocation or accrual requirement*—(i) *Section 401(k) and 401(m) plans.* Notwithstanding paragraph (a)(1) of this section, an employee is treated as benefiting under a section 401(k) plan for a plan year if and only if the employee is an eligible employee as defined in § 1.401(k)–6 under the plan. Similarly, an employee is treated as benefiting under a section 401(m) plan for a plan year if and only if the employee is an eligible employee as defined in § 1.401(m)–5 under the plan for the plan year.

* * * * *

■ **Par. 4.** Sections 1.401(k)–0 and 1.401(k)–1 are revised and §§ 1.401(k)–2 through 1.401(k)–6 are added to read as follows:

§ 1.401(k)–0 Table of contents.

This section contains first a list of section headings and then a list of the paragraphs in each section in §§ 1.401(k)–1 through 1.401(k)–6.

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§ 1.401(k)–6 Definitions.

§ 1.401(k)–1 Certain cash or deferred arrangements.

(a) *General rules*—(1) *Certain plans permitted to include cash or deferred arrangements.* A plan, other than a profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan, does not satisfy the requirements of section 401(a) if the plan includes a cash or deferred arrangement. A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a cash or deferred arrangement. A cash or deferred arrangement is part of a plan for purposes of this section if any contributions to the plan, or accruals or other benefits under the plan, are made or provided pursuant to the cash or deferred arrangement.

(2) *Rules applicable to cash or deferred arrangements generally*—(i) *Definition of cash or deferred arrangement.* Except as provided in paragraphs (a)(2)(ii) and (iii) of this section, a cash or deferred arrangement is an arrangement under which an eligible employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to satisfy the requirements of section 401(a) (including a contract that is intended to satisfy the requirements of section 403(a)).

(ii) *Treatment of after-tax employee contributions.* A cash or deferred arrangement does not include an arrangement under which amounts contributed under a plan at an employee's election are designated or treated at the time of contribution as after-tax employee contributions (*e.g.,* by treating the contributions as taxable income subject to applicable withholding requirements). *See also* section 414(h)(1). A designated Roth contribution, however, is not treated as an after-tax contribution for purposes of this section, § 1.401(k)–2 through § 1.401(k)–6 and § 1.401(m)–1 through § 1.401(m)–5. A contribution can be an after-tax employee contribution under the rule of this paragraph (a)(2)(ii) even if the employee's election to make after-

tax employee contributions is made before the amounts subject to the election are currently available to the employee.

(iii) *Treatment of ESOP dividend election.* A cash or deferred arrangement does not include an arrangement under an ESOP under which dividends are either distributed or invested pursuant to an election made by participants or their beneficiaries in accordance with section 404(k)(2)(A)(iii).

(iv) *Treatment of elective contributions as plan assets.* The extent to which elective contributions constitute plan assets for purposes of the prohibited transaction provisions of section 4975 and Title I of the Employee Retirement Income Security Act of 1974 (88 Stat. 829), Public Law 93–406, is determined in accordance with regulations and rulings issued by the Department of Labor. *See* 29 CFR 2510.3–102.

(3) *Rules applicable to cash or deferred elections generally*—(i) *Definition of cash or deferred election.* A cash or deferred election is any direct or indirect election (or modification of an earlier election) by an employee to have the employer either—

(A) Provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available; or

(B) Contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation.

(ii) *Automatic enrollment.* For purposes of determining whether an election is a cash or deferred election, it is irrelevant whether the default that applies in the absence of an affirmative election is described in paragraph (a)(3)(i)(A) of this section (*i.e.*, the employee receives an amount in cash or some other taxable benefit) or in paragraph (a)(3)(i)(B) of this section (*i.e.*, the employer contributes an amount to a trust or provides an accrual or other benefit under a plan deferring the receipt of compensation).

(iii) *Rules related to timing*—(A) *Requirement that amounts not be currently available.* A cash or deferred election can only be made with respect to an amount that is not currently available to the employee on the date of the election. Further, a cash or deferred election can only be made with respect to amounts that would (but for the cash or deferred election) become currently available after the later of the date on which the employer adopts the cash or deferred arrangement or the date on which the arrangement first becomes effective.

(B) *Contribution may not precede election.* A contribution is made pursuant to a cash or deferred election only if the contribution is made after the election is made.

(C) *Contribution may not precede services*—(*1*) *General rule.* Contributions are made pursuant to a cash or deferred election only if the contributions are made after the employee's performance of service with respect to which the contributions are made (or when the cash or other taxable benefit would be currently available, if earlier).

(*2*) *Exception for bona fide administrative considerations.* The timing of contributions will not be treated as failing to satisfy the requirements of this paragraph (a)(3)(iii)(C) merely because contributions for a pay period are occasionally made before the services with respect to that pay period are performed, provided the contributions are made early in order to accommodate bona fide administrative considerations (for example, the temporary absence of the bookkeeper with responsibility to transmit contributions to the plan) and are not paid early with a principal purpose of accelerating deductions.

(iv) *Current availability defined.* Cash or another taxable benefit is currently available to the employee if it has been paid to the employee or if the employee is able currently to receive the cash or other taxable benefit at the employee's discretion. An amount is not currently available to an employee if there is a significant limitation or restriction on the employee's right to receive the amount currently. Similarly, an amount is not currently available as of a date if the employee may under no circumstances receive the amount before a particular time in the future. The determination of whether an amount is currently available to an employee does not depend on whether it has been constructively received by the employee for purposes of section 451.

(v) *Certain one-time elections not treated as cash or deferred elections.* A cash or deferred election does not include a one-time irrevocable election made no later than the employee's first becoming eligible under the plan or any other plan or arrangement of the employer that is described in section 219(g)(5)(A) (whether or not such other plan or arrangement has terminated), to have contributions equal to a specified amount or percentage of the employee's compensation (including no amount of compensation) made by the employer on the employee's behalf to the plan and a specified amount or percentage of the employee's compensation (including no amount of compensation) divided among all other plans or arrangements of the employer (including plans or arrangements not yet established) for the duration of the employee's employment with the employer, or in the case of a defined benefit plan to receive accruals or other benefits (including no benefits) under such plans. Thus, for example, employer contributions made pursuant to a one-time irrevocable election described in this paragraph are not treated as having been made pursuant to a cash or deferred election and are not includible in an employee's gross income by reason of § 1.402(a)–1(d). In the case of an irrevocable election made on or before December 23, 1994—

(A) The election does not fail to be treated as a one-time irrevocable election under this paragraph (a)(3)(v) merely because an employee was previously eligible under another plan of the employer (whether or not such other plan has terminated); and

(B) In the case of a plan in which partners may participate, the election does not fail to be treated as a one-time irrevocable election under this paragraph (a)(3)(v) merely because the election was made after commencement of employment or after the employee's first becoming eligible under any plan of the employer, provided that the election was made before the first day of the first plan year beginning after December 31, 1988, or, if later, March 31,1989.

(vi) *Tax treatment of employees.* An amount generally is includible in an employee's gross income for the taxable year in which the employee actually or constructively receives the amount. But for section 402(e)(3), an employee is treated as having received an amount that is contributed to an exempt trust or plan described in section 401(a) or 403(a) pursuant to the employee's cash or deferred election. This is the case even if the election to defer is made before the year in which the amount is earned, or before the amount is currently available. *See* § 1.402(a)–1(d).

(vii) *Examples.* The following examples illustrate the application of this paragraph (a)(3):

Example 1. (i) An employer maintains a profit-sharing plan under which each eligible employee has an election to defer an annual bonus payable on January 30 each year. The bonus equals 10% of compensation during the previous calendar year. Deferred amounts are not treated as after-tax employee contributions. The bonus is currently available on January 30.

(ii) An election made prior to January 30 to defer all or part of the bonus is a cash or deferred election, and the bonus deferral arrangement is a cash or deferred arrangement.

Example 2. (i) An employer maintains a profit-sharing plan which provides for discretionary profit sharing contributions and under which each eligible employee may elect to reduce his compensation by up to 10% and to have the employer contribute such amount to the plan. The employer pays each employee every two weeks for services during the immediately preceding two weeks. The employee's election to defer compensation for a payroll period must be made prior to the date the amount would otherwise be paid. The employer contributes to the plan the amount of compensation that each employee elected to defer, at the time it would otherwise be paid to the employee, and does not treat the contribution as an after-tax employee contribution.

(ii) The election is a cash or deferred election and the contributions are elective contributions.

Example 3. (i) The facts are the same as in *Example 2,* except that the employer makes a $10,000 contribution on January 31 of the plan year that is in addition to the contributions that satisfy the employer's obligation to make contributions with respect to cash or deferred elections for prior payroll periods. Employee A makes an election on February 15 to defer $2,000 from compensation that is not currently available and the employer reduces the employee's compensation to reflect the election.

(ii) None of the additional $10,000 contributed January 31 is a contribution made pursuant to Employee A's cash or deferred election, because the contribution was made before the election was made. Accordingly, the employer must make an additional contribution of $2,000 in order to satisfy its obligation to contribute an amount to the plan pursuant to Employee A's election. The $10,000 contribution may be allocated under the plan terms providing for discretionary profit sharing contributions.

Example 4. (i) The facts are the same as in *Example 3,* except that Employee A had an outstanding election to defer $500 from each payroll period's compensation. The $10,000 additional payment that is contributed early is not made early in order to accommodate bona fide administrative considerations.

(ii) None of the additional $10,000 contributed January 31 is a contribution made pursuant to Employee A's cash or deferred election for future payroll periods, because the contribution was made before the earlier of Employee A's performance of services to which the contribution is attributable or when the compensation would be currently available. Furthermore, the exception for early contributions in paragraph (a)(3)(iii)(C)(*2*) of this section does not apply. Accordingly, the employer must make an additional contribution of $500 per payroll period in order to satisfy its obligation to contribute an amount to the plan pursuant to Employee A's election. The $10,000 contribution may be allocated under the plan terms providing for discretionary profit sharing contributions.

Example 5. (i) Employer B establishes a money purchase pension plan in 1986. This is the first qualified plan established by Employer B. All salaried employees are eligible to participate under the plan. Hourly-paid employees are not eligible to participate under the plan. In 2000, Employer B establishes a profit-sharing plan under which all employees (both salaried and hourly) are eligible. Employer B permits all employees on the effective date of the profit-sharing plan to make a one-time irrevocable election to have Employer B contribute 5% of compensation on their behalf to the plan and make no other contribution to any other plan of Employer B (including plans not yet established) for the duration of the employee's employment with Employer B, and have their salaries reduced by 5%.

(ii) The election provided under the profit-sharing plan is not a one-time irrevocable election within the meaning of paragraph (a)(3)(v) of this section with respect to the salaried employees of Employer B who, before becoming eligible to participate under the profit-sharing plan, became eligible to participate under the money purchase pension plan. The election under the profit-sharing plan is a one-time irrevocable election within the meaning of paragraph (a)(3)(v) of this section with respect to the hourly employees, because they were not previously eligible to participate under another plan of the employer.

(4) *Rules applicable to qualified cash or deferred arrangements*—(i) *Definition of qualified cash or deferred arrangement.* A qualified cash or deferred arrangement is a cash or deferred arrangement that satisfies the requirements of paragraphs (b), (c), (d), and (e) of this section.

(ii) *Treatment of elective contributions as employer contributions.* Except as otherwise provided in § 1.401(k)–2(b)(3), elective contributions under a qualified cash or deferred arrangement (including designated Roth contributions) are treated as employer contributions. Thus, for example, elective contributions under such an arrangement are treated as employer contributions for purposes of sections 401(a), 401(k), 402, 404, 409, 411, 412, 415, 416, and 417.

(iii) *Tax treatment of employees.* Except as provided in section 402(g), 402A (effective for taxable years beginning after December 31, 2005), or § 1.401(k)–2(b)(3), elective contributions under a qualified cash or deferred arrangement are neither includible in an employee's gross income at the time the cash would have been includible in the employee's gross income (but for the cash or deferred election), nor at the time the elective contributions are contributed to the plan. *See* § 1.402(a)–1(d)(2)(i).

(iv) *Application of nondiscrimination requirements to plan that includes a qualified cash or deferred arrangement*—(A) *Exclusive means of amounts testing.* Elective contributions (including elective contributions that are designated Roth contributions) under a qualified cash or deferred arrangement satisfy the requirements of section 401(a)(4) with respect to amounts if and only if the amount of elective contributions satisfies the nondiscrimination test of section 401(k) under paragraph (b)(1) of this section. *See* § 1.401(a)(4)–1(b)(2)(ii)(B).

(B) *Testing benefits, rights and features.* A plan that includes a qualified cash or deferred arrangement must satisfy the requirements of section 401(a)(4) with respect to benefits, rights and features in addition to the requirements regarding amounts described in paragraph (a)(4)(iv)(A) of this section. For example, the right to make each level of elective contributions under a cash or deferred arrangement and the right to make designated Roth contributions are rights or features subject to the requirements of section 401(a)(4). *See* § 1.401(a)(4)–4(e)(3)(i) and (iii)(D). Thus, for example, if all employees are eligible to make a stated level of elective contributions under a cash or deferred arrangement, but that level of contributions can only be made from compensation in excess of a stated amount, such as the Social Security taxable wage base, the arrangement will generally favor HCEs with respect to the availability of elective contributions and thus will generally not satisfy the requirements of section 401(a)(4).

(C) *Minimum coverage requirement.* A qualified cash or deferred arrangement is treated as a separate plan that must satisfy the requirements of section 410(b). *See* § 1.410(b)–7(c)(1) for special rules. The determination of whether a cash or deferred arrangement satisfies the requirements of section 410(b) must be made without regard to the modifications to the disaggregation rules set forth in paragraph (b)(4)(v) of this section. *See also* § 1.401(a)(4)–11(g)(3)(vii)(A), relating to corrective amendments that may be made to satisfy the minimum coverage requirements of section 410(b).

(5) *Rules applicable to nonqualified cash or deferred arrangements*—(i) *Definition of nonqualified cash or deferred arrangement.* A nonqualified cash or deferred arrangement is a cash or deferred arrangement that fails to satisfy one or more of the requirements in paragraph (b), (c), (d) or (e) of this section.

(ii) *Treatment of elective contributions as nonelective contributions.* Except as specifically provided otherwise, elective contributions under a nonqualified cash or deferred arrangement are treated as nonelective employer contributions. Thus, for example, the elective

contributions under such an arrangement are treated as nonelective employer contributions for purposes of sections 401(a) (including section 401(a)(4)) and 401(k), 404, 409, 411, 412, 415, 416, and 417 and are not subject to the requirements of section 401(m).

(iii) *Tax treatment of employees.* Elective contributions under a nonqualified cash or deferred arrangement are includible in an employee's gross income at the time the cash or other taxable amount that the employee would have received (but for the cash or deferred election) would have been includible in the employee's gross income. *See* § 1.402(a)–1(d)(1).

(iv) *Qualification of plan that includes a nonqualified cash or deferred arrangement*— (A) *In general.* A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a nonqualified cash or deferred arrangement. In determining whether the plan satisfies the requirements of section 401(a)(4), the nondiscrimination tests of sections 401(k), paragraph (b)(1) of this section, section 401(m)(2) and § 1.401(m)–1(b) may not be used. *See* §§ 1.401(a)(4)–1(b)(2)(ii)(B) and 1.410(b)–9 (definition of section 401(k) plan).

(B) *Application of section 401(a)(4) to certain plans.* The amount of employer contributions under a nonqualified cash or deferred arrangement is treated as satisfying section 401(a)(4) if the arrangement is part of a collectively bargained plan that automatically satisfies the requirements of section 410(b). *See* §§ 1.401(a)(4)–(c)(5) and 1.410(b)–2(b)(7). Additionally, the requirements of sections 401(a)(4) and 410(b) do not apply to a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof). *See* sections 401(a)(5) and 410(c)(1)(A).

(v) *Example.* The following example illustrates the application of this paragraph (a)(5):

Example. (i) For the 2006 plan year, Employer A maintains a collectively bargained plan that includes a cash or deferred arrangement. Employer contributions under the cash or deferred arrangement do not satisfy the nondiscrimination test of section 401(k) and paragraph (b) of this section.

(ii) The arrangement is a nonqualified cash or deferred arrangement. The employer contributions under the cash or deferred arrangement are considered to be nondiscriminatory under section 401(a)(4), and the elective contributions are generally treated as employer contributions under paragraph (a)(5)(ii) of this section. Under paragraph (a)(5)(iii) of this section and under § 1.402(a)–1(d)(1), however, the elective contributions are includible in each employee's gross income.

(6) *Rules applicable to cash or deferred arrangements of self-employed individuals*—(i) *Application of general rules.* Generally, a partnership or sole proprietorship is permitted to maintain a cash or deferred arrangement, and individual partners or owners are permitted to make cash or deferred elections with respect to compensation attributable to services rendered to the entity, under the same rules that apply to other cash or deferred arrangements. For example, any contributions made on behalf of an individual partner or owner pursuant to a cash or deferred arrangement of a partnership or sole proprietorship are elective contributions unless they are designated or treated as after-tax employee contributions. In the case of a partnership, a cash or deferred arrangement includes any arrangement that directly or indirectly permits individual partners to vary the amount of contributions made on their behalf. Consistent with § 1.402(a)–1(d), the elective contributions under such an arrangement are includible in income and are not deductible under section 404(a) unless the arrangement is a qualified cash or deferred arrangement (*i.e.*, the requirements of section 401(k) and this section are satisfied). Also, even if the arrangement is a qualified cash or deferred arrangement, the elective contributions are includible in gross income and are not deductible under section 404(a) to the extent they exceed the applicable limit under section 402(g). *See also* § 1.401(a)–30.

(ii) *Treatment of matching contributions made on behalf of self-employed individuals.* Under section 402(g)(8), matching contributions made on behalf of a self-employed individual are not treated as elective contributions made pursuant to a cash or deferred election, without regard to whether such matching contributions indirectly permit individual partners to vary the amount of contributions made on their behalf.

(iii) *Timing of self-employed individual's cash or deferred election.* For purposes of paragraph (a)(3)(iv) of this section, a partner's compensation is deemed currently available on the last day of the partnership taxable year and a sole proprietor's compensation is deemed currently available on the last day of the individual's taxable year. Accordingly, a self-employed individual may not make a cash or deferred election with respect to compensation for a partnership or sole proprietorship taxable year after the last day of that year. See § 1.401(k)–2(a)(4)(ii) for the rules regarding when these contributions are treated as allocated.

(iv) *Special rule for certain payments to self-employed individuals.* For purposes of sections 401(k) and 401(m), the earned income of a self-employed individual for a taxable year constitutes payment for services during that year. Thus, for example, if a partnership provides for cash advance payments during the taxable year to be made to a partner based on the value of the partner's services prior to the date of payment (and which do not exceed a reasonable estimate of the partner's earned income for the taxable year), a contribution of a portion of these payments to a profit sharing plan in accordance with an election to defer the portion of the advance payments does not fail to be made pursuant to a cash or deferred election within the meaning of paragraph (a)(3)(iii) of this section merely because the contribution is made before the amount of the partner's earned income is finally determined and reported. However, see § 1.401(k)–2(a)(4)(ii) for rules on when earned income is treated as received.

(b) *Coverage and nondiscrimination requirements*—(1) *In general.* A cash or deferred arrangement satisfies this paragraph (b) for a plan year only if—

(i) The group of eligible employees under the cash or deferred arrangement (including any employees taken into account for purposes of section 410(b) pursuant to § 1.401(a)(4)–11(g)(3)(vii)(A)) satisfies the requirements of section 410(b) (including the average benefit percentage test, if applicable); and

(ii) The cash or deferred arrangement satisfies—

(A) The ADP test of section 401(k)(3) described in § 1.401(k)–2;

(B) The ADP safe harbor provisions of section 401(k)(12) described in § 1.401(k)–3; or

(C) The SIMPLE 401(k) provisions of section 401(k)(11) described in § 1.401(k)–4.

(2) *Automatic satisfaction by certain plans.* Notwithstanding paragraph (b)(1) of this section, a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof) shall be treated as meeting the requirements of this paragraph (b).

(3) *Anti-abuse provisions.* This section and §§ 1.401(k)–2 through 1.401(k)–6 are designed to provide simple, practical rules that

accommodate legitimate plan changes. At the same time, the rules are intended to be applied by employers in a manner that does not make use of changes in plan testing procedures or other plan provisions to inflate inappropriately the ADP for NHCEs (which is used as a benchmark for testing the ADP for HCEs) or to otherwise manipulate the nondiscrimination testing requirements of this paragraph (b). Further, this paragraph (b) is part of the overall requirement that benefits or contributions not discriminate in favor of HCEs. Therefore, a plan will not be treated as satisfying the requirements of this paragraph (b) if there are repeated changes to plan testing procedures or plan provisions that have the effect of distorting the ADP so as to increase significantly the permitted ADP for HCEs, or otherwise manipulate the nondiscrimination rules of this paragraph, if a principal purpose of the changes was to achieve such a result.

(4) *Aggregation and restructuring*—(i) *In general.* This paragraph (b)(4) contains the exclusive rules for aggregating and disaggregating plans and cash or deferred arrangements for purposes of this section, and §§ 1.401(k)–2 through 1.401(k)–6.

(ii) *Aggregation of cash or deferred arrangements within a plan.* Except as otherwise specifically provided in this paragraph (b)(4), all cash or deferred arrangements included in a plan are treated as a single cash or deferred arrangement and a plan must apply a single test under paragraph (b)(1)(ii) of this section with respect to all such arrangements within the plan. Thus, for example, if two groups of employees are eligible for separate cash or deferred arrangements under the same plan, all contributions under both cash or deferred arrangements must be treated as made under a single cash or deferred arrangement subject to a single test, even if they have significantly different features, such as different limits on elective contributions.

(iii) *Aggregation of plans*—(A) *In general.* For purposes of this section and §§ 1.401(k)–2 through 1.401(k)–6, the term *plan* means a plan within the meaning of § 1.410(b)–7(a) and (b), after application of the mandatory disaggregation rules of § 1.410(b)–7(c), and the permissive aggregation rules of § 1.410(b)–7(d), as modified by paragraph (b)(4)(v) of this section. Thus, for example, two plans (within the meaning of § 1.410(b)–7(b)) that are treated as a single plan pursuant to the permissive aggregation rules of § 1.410(b)–7(d) are treated as a single plan for purposes of sections 401(k) and (m).

(B) *Plans with inconsistent ADP testing methods.* Pursuant to paragraph (b)(4)(ii) of this section, a single testing method must apply with respect to all cash or deferred arrangements under a plan. Thus, in applying the permissive aggregation rules of § 1.410(b)–7(d), an employer may not aggregate plans (within the meaning of § 1.410(b)–7(b)) that apply inconsistent testing methods. For example, a plan (within the meaning of § 1.410(b)–7(b)) that applies the current year testing method may not be aggregated with another plan that applies the prior year testing method. Similarly, an employer may not aggregate a plan (within the meaning of § 1.410(b)–7(b)) using the ADP safe harbor provisions of section 401(k)(12) and another plan that is using the ADP test of section 401(k)(3).

(iv) *Disaggregation of plans and separate testing*—(A) *In general.* If a cash or deferred arrangement is included in a plan (within the meaning of § 1.410(b)–7(b)) that is mandatorily disaggregated under the rules of section 410(b) (as modified by this paragraph (b)(4)), the cash or deferred arrangement must be disaggregated in a consistent manner. For example, in the case of an employer that is treated as operating qualified separate lines of business under section 414(r), if the eligible employees under a cash or deferred arrangement are in more than one qualified separate line of business, only those employees within each qualified separate line of business may be taken into account in determining whether each disaggregated portion of the plan complies with the requirements of section 401(k), unless the employer is applying the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the plan. Similarly, if a cash or deferred arrangement under which employees are permitted to participate before they have completed the minimum age and service requirements of section 410(a)(1) applies section 410(b)(4)(B) for determining whether the plan complies with section 410(b)(1), then the arrangement must be treated as two separate arrangements, one comprising all eligible employees who have met the age and service requirements of section 410(a)(1) and one comprising all eligible employees who have not met the age and service requirements under section 410(a)(1), unless the plan is using the rule in § 1.401(k)–2(a)(1)(iii)(A).

(B) *Restructuring prohibited.* Restructuring under § 1.401(a)(4)–9(c) may not be used to demonstrate compliance with the requirements of section 401(k). *See* § 1.401(a)(4)–9(c)(3)(ii).

(v) *Modifications to section 410(b) rules*—(A) *Certain disaggregation rules not applicable.* The mandatory disaggregation rules relating to section 401(k) plans and section 401(m) plans set forth in § 1.410(b)–7(c)(1) and ESOP and non-ESOP portions of a plan set forth in § 1.410(b)–7(c)(2) shall not apply for purposes of this section and §§ 1.401(k)–2 through 1.401(k)–6. Accordingly, notwithstanding § 1.410(b)–7(d)(2), an ESOP and a non-ESOP which are different plans (within the meaning of section 414(l), as described in § 1.410(b)–7(b)) are permitted to be aggregated for these purposes.

(B) *Permissive aggregation of collective bargaining units.* Notwithstanding the general rule under section 410(b) and § 1.410(b)–7(c) that a plan that benefits employees who are included in a unit of employees covered by a collective bargaining agreement and employees who are not included in the collective bargaining unit is treated as comprising separate plans, an employer can treat two or more separate collective bargaining units as a single collective bargaining unit for purposes of this section and §§ 1.401(k)–2 through 1.401(k)–6, provided that the combinations of units are determined on a basis that is reasonable and reasonably consistent from year to year. Thus, for example, if a plan benefits employees in three categories (*e.g.*, employees included in collective bargaining unit A, employees included in collective bargaining unit B, and employees who are not included in any collective bargaining unit), the plan can be treated as comprising three separate plans, each of which benefits only one category of employees. However, if collective bargaining units A and B are treated as a single collective bargaining unit, the plan will be treated as comprising only two separate plans, one benefiting all employees who are included in a collective bargaining unit and another benefiting all other employees. Similarly, if a plan benefits only employees who are included in collective bargaining unit A and employees who are included in collective bargaining unit B, the plan can be treated as comprising two separate plans. However, if collective bargaining units A and B are treated as a single collective bargaining unit, the plan will be treated as a single plan. An employee is treated as included in a unit of employees covered by a collective bargaining agreement if and only if the employee is a collectively bargained employee within the meaning of § 1.410(b)–6(d)(2).

(C) *Multiemployer plans.* Notwithstanding § 1.410(b)–7(c)(4)(ii)(C), the portion of the plan that is maintained pursuant to a collective bargaining agreement (within the meaning of § 1.413–1(a)(2)) is treated as a single plan maintained by a single employer that employs all the employees benefiting under the same benefit computation formula and covered pursuant to that collective bargaining agreement. The rules of paragraph (b)(4)(v)(B) of this section (including the permissive aggregation of collective bargaining units) apply to the resulting deemed single plan in the same manner as they would to a single employer plan, except that the plan administrator is substituted for the employer where appropriate and that appropriate fiduciary obligations are taken into account. The noncollectively bargained portion of the plan is treated as maintained by one or more employers, depending on whether the noncollectively bargaining unit employees who benefit under the plan are employed by one or more employers.

(vi) *Examples.* The following examples illustrate the application of this paragraph (b)(4):

Example 1. (i) Employer A maintains Plan V, a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer A are eligible to participate. For purposes of applying section 410(b), Employer A is treated as operating qualified separate lines of business under section 414(r) in accordance with § 1.414(r)–1(b). However, Employer A applies the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) to the portion of its profit-sharing plan that consists of elective contributions under the cash or deferred arrangement (and to no other plans or portions of plans).

(ii) Under these facts, the requirements of this section and §§ 1.401(k)–2 through 1.401(k)–6 must be applied on an employer-wide rather than a qualified separate line of business basis.

Example 2. (i) Employer B maintains Plan W, a profit-sharing plan that includes a cash or deferred arrangement in which all of the employees of Employer B are eligible to participate. For purposes of applying section 410(b), the plan treats the cash or deferred arrangement as two separate plans, one for the employees who have completed the minimum age and service eligibility conditions under section 410(a)(1) and the other for employees who have not completed the conditions. The plan provides that it will satisfy the section 401(k) safe harbor requirement of § 1.401(k)–3 with respect to the employees who have met the minimum age and service conditions and that it will meet the ADP test requirements of § 1.401(k)–2 with respect to the employees who have not met the minimum age and service conditions.

(ii) Under these facts, the cash or deferred arrangement must be disaggregated on a consistent basis with the disaggregation of Plan W. Thus, the requirements of § 1.401(k)–2 must be applied by comparing the ADP for eligible HCEs who have not completed the minimum age and service conditions with the ADP for eligible NHCEs for the applicable year who have not completed the minimum age and service conditions.

Example 3. (i) Employer C maintains Plan X, a stock-bonus plan including an ESOP. The plan also includes a cash or deferred arrangement for participants in the ESOP and non-ESOP portions of the plan.

(ii) Pursuant to paragraph (b)(4)(v)(A) of this section the ESOP and non-ESOP portions of the stock-bonus plan are a single cash or deferred arrangement for purposes of this section and §§ 1.401(k)–2 through 1.401(k)–6. However, as provided in paragraph (a)(4)(iv)(C) of this section, the ESOP and non-ESOP portions of the plan are still treated as separate plans for purposes of satisfying the requirements of section 410(b).

(c) *Nonforfeitability requirements*—(1) *General rule.* A cash or deferred arrangement satisfies this paragraph (c) only if the amount attributable to an employee's elective contributions are immediately nonforfeitable, within the meaning of paragraph (c)(2) of this section, are disregarded for purposes of applying section 411(a)(2) to other contributions or benefits, and the contributions remain nonforfeitable even if the employee makes no additional elective contributions under a cash or deferred arrangement.

(2) *Definition of immediately nonforfeitable.* An amount is immediately nonforfeitable if it is immediately nonforfeitable within the meaning of section 411, and would be nonforfeitable under the plan regardless of the age and service of the employee or whether the employee is employed on a specific date. An amount that is subject to forfeitures or suspensions permitted by section 411(a)(3) does not satisfy the requirements of this paragraph (c).

(3) *Example.* The following example illustrates the application of this paragraph (c):

Example. (i) Employees B and C are covered by Employer Y's stock bonus plan, which includes a cash or deferred arrangement. All employees participating in the plan have a nonforfeitable right to a percentage of their account balance derived from all contributions (including elective contributions) as shown in the following table:

Years of service	Nonforfeitable percentage
Less than 1	0
1	20
2	40
3	60
4	80
5 or more	100

(ii) The cash or deferred arrangement does not satisfy paragraph (c) of this section because elective contributions are not immediately nonforfeitable. Thus, the cash or deferred arrangement is a nonqualified cash or deferred arrangement.

(d) *Distribution limitation*—(1) *General rule.* A cash or deferred arrangement satisfies this paragraph (d) only if amounts attributable to elective contributions may not be distributed before one of the following events, and any distributions so permitted also satisfy the additional requirements of paragraphs (d)(2) through (5) of this section (to the extent applicable)—

(i) The employee's death, disability, or severance from employment;

(ii) In the case of a profit-sharing, stock bonus or rural cooperative plan, the employee's attainment of age 59½, or the employee's hardship; or

(iii) The termination of the plan.

(2) *Rules applicable to distributions upon severance from employment.* An employee has a severance from employment when the employee ceases to be an employee of the employer maintaining the plan. An employee does not have a severance from employment if, in connection with a change of employment, the employee's new employer maintains such plan with respect to the employee. For example, a new employer maintains a plan with respect to an employee by continuing or assuming sponsorship of the plan or by accepting a transfer of plan assets and liabilities (within the meaning of section 414(l)) with respect to the employee.

(3) *Rules applicable to hardship distributions*—(i) *Distribution must be on account of hardship.* A distribution is treated as made after an employee's hardship for purposes of paragraph (d)(1)(ii) of this section if and only if it is made on account of the hardship. For purposes of this rule, a distribution is made on account of hardship only if the distribution both is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need. The determination of the existence of an immediate and heavy financial need and of the amount necessary to meet the need must be made in accordance with nondiscriminatory and objective standards set forth in the plan.

(ii) *Limit on maximum distributable amount*—(A) *General rule.* A distribution on account of hardship must be limited to the maximum

distributable amount. The maximum distributable amount is equal to the employee's total elective contributions as of the date of distribution, reduced by the amount of previous distributions of elective contributions. Thus, the maximum distributable amount does not include earnings, QNECs or QMACs, unless grandfathered under paragraph (d)(3)(ii)(B) of this section.

(B) *Grandfathered amounts.* If the plan so provides, the maximum distributable amount may be increased for amounts credited to the employee's account as of a date specified in the plan that is no later than December 31, 1988, or if later, the end of the last plan year ending before July 1, 1989 (or in the case of a collectively bargained plan, the earlier of—

(*1*) The later of January 1, 1989, or the date on which the last of the collective bargaining agreements in effect on March 1, 1986 terminates (determined without regard to any extension thereof after February 28, 1986); or

(*2*) January 1, 1991 and consisting of—

(*i*) Income allocable to elective contributions;

(*ii*) Qualified nonelective contributions and allocable income; and

(*iii*) Qualified matching contributions and allocable income.

(iii) *Immediate and heavy financial need*—(A) *In general.* Whether an employee has an immediate and heavy financial need is to be determined based on all the relevant facts and circumstances. Generally, for example, the need to pay the funeral expenses of a family member would constitute an immediate and heavy financial need. A distribution made to an employee for the purchase of a boat or television would generally not constitute a distribution made on account of an immediate and heavy financial need. A financial need may be immediate and heavy even if it was reasonably foreseeable or voluntarily incurred by the employee.

(B) *Deemed immediate and heavy financial need.* A distribution is deemed to be on account of an immediate and heavy financial need of the employee if the distribution is for—

(*1*) Expenses for (or necessary to obtain) medical care that would be deductible under section 213(d) (determined without regard to whether the expenses exceed 7.5% of adjusted gross income);

(*2*) Costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments);

(*3*) Payment of tuition, related educational fees, and room and board expenses, for up to the next 12 months of post-secondary education for the employee, or the employee's spouse, children, or dependents (as defined in section 152, and, for taxable years beginning on or after January 1, 2005, without regard to section 152(b)(1), (b)(2) and (d)(1)(B));

(*4*) Payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure on the mortgage on that residence;

(*5*) Payments for burial or funeral expenses for the employee's deceased parent, spouse, children or dependents (as defined in section 152, and, for taxable years beginning on or after January 1, 2005, without regard to section 152(d)(1)(B)); or

(*6*) Expenses for the repair of damage to the employee's principal residence that would qualify for the casualty deduction under section 165 (determined without regard to whether the loss exceeds 10% of adjusted gross income).

(iv) *Distribution necessary to satisfy financial need*—(A) *Distribution may not exceed amount of need.* A distribution is treated as necessary to satisfy an immediate and heavy financial need of an employee only to the extent the amount of the distribution is not in excess of the amount required to satisfy the financial need. For this purpose, the amount required to satisfy the financial need may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

(B) *No alternative means available.* A distribution is not treated as necessary to satisfy an immediate and heavy financial need of an employee to the extent the need may be relieved from other resources that are reasonably available to the employee. This determination generally is to be made on the basis of all the relevant facts and circumstances. For purposes of this paragraph (d)(3)(iv), the employee's resources are deemed to include those assets of the employee's spouse and minor children that are reasonably available to the employee. Thus, for example, a vacation home owned by the employee and the employee's spouse, whether as community property, joint tenants, tenants by the entirety, or tenants in common, generally will be deemed a resource of the employee. However, property held for the employee's child under an irrevocable trust or under the Uniform Gifts to Minors Act (or comparable State law) is not treated as a resource of the employee.

(C) *Employer reliance on employee representation.* For purposes of paragraph (d)(3)(iv)(B) of this section, an immediate and heavy financial need generally may be treated as not capable of being relieved from other resources that are reasonably available to the employee, if the employer relies upon the employee's representation (made in writing or such other form as may be prescribed by the Commissioner), unless the employer has actual knowledge to the contrary, that the need cannot reasonably be relieved—

(*1*) Through reimbursement or compensation by insurance or otherwise;

(*2*) By liquidation of the employee's assets;

(*3*) By cessation of elective contributions or employee contributions under the plan;

(*4*) By other currently available distributions (including distribution of ESOP dividends under section 404(k)) and nontaxable (at the time of the loan) loans, under plans maintained by the employer or by any other employer; or

(*5*) By borrowing from commercial sources on reasonable commercial terms in an amount sufficient to satisfy the need.

(D) *Employee need not take counterproductive actions.* For purposes of this paragraph (d)(3)(iv), a need cannot reasonably be relieved by one of the actions described in paragraph (d)(3)(iv)(C) of this section if the effect would be to increase the amount of the need. For example, the need for funds to purchase a principal residence cannot reasonably be relieved by a plan loan if the loan would disqualify the employee from obtaining other necessary financing.

(E) *Distribution deemed necessary to satisfy immediate and heavy financial need.* A distribution is deemed necessary to satisfy an immediate and heavy financial need of an employee if each of the following requirements are satisfied—

(*1*) The employee has obtained all other currently available distributions (including distribution of ESOP dividends under section 404(k), but not hardship distributions) and nontaxable (at the time of the loan) loans, under the plan and all other plans maintained by the employer; and

(*2*) The employee is prohibited, under the terms of the plan or an otherwise legally enforceable agreement, from making elective contributions and employee contributions to the plan and all other plans maintained by the employer for at least 6 months after receipt of the hardship distribution.

(F) *Definition of other plans.* For purposes of paragraph (d)(3)(iv)(C)(*4*) and (E)(*1*) of this section, the phrase *plans maintained by the employer* means all qualified and nonqualified plans of deferred compensation maintained by the employer, including a cash or deferred arrangement that is part of a cafeteria plan within the meaning of section 125. However, it does not include the mandatory employee contribution portion of a defined benefit plan or a health or welfare benefit plan (including one that is part of a cafeteria plan). In addition, for purposes of paragraph (d)(3)(iv)(E)(*2*) of this section, the phrase *plans maintained by the employer* also includes a stock option, stock purchase, or similar plan maintained by the employer. See § 1.401(k)–6 for the continued treatment of suspended employees as eligible employees.

(v) *Commissioner may expand standards.* The Commissioner may prescribe additional guidance of general applicability, published in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter), expanding the list of deemed immediate and heavy financial needs and prescribing additional methods for distributions to be deemed necessary to satisfy an immediate and heavy financial need.

(4) *Rules applicable to distributions upon plan termination*—(i) *No alternative defined contribution plan.* A distribution may not be made under paragraph (d)(1)(iii) of this section if the employer establishes or maintains an alternative defined contribution plan. For purposes of the preceding sentence, the definition of the term ''employer'' contained in § 1.401(k)–6 is applied as of the date of plan termination, and a plan is an alternative defined contribution plan only if it is a defined contribution plan that exists at any time during the period beginning on the date of plan termination and ending 12 months after distribution of all assets from the terminated plan. However, if at all times during the 24-month period beginning 12 months before the date of plan termination, fewer than 2% of the employees who were eligible under the defined contribution plan that includes the cash or deferred arrangement as of the date of plan termination are eligible under the other defined contribution plan, the other plan is not an alternative defined contribution plan. In addition, a defined contribution plan is not treated as an alternative defined contribution plan if it is an employee stock ownership plan as defined in section 4975(e)(7) or 409(a), a simplified employee pension as defined in section 408(k), a SIMPLE IRA plan as defined in section 408(p), a plan or contract that satisfies the requirements of section 403(b), or a plan that is described in section 457(b) or (f).

(ii) *Lump sum requirement for certain distributions.* A distribution may be made under paragraph (d)(1)(iii) of this section only if it is a lump sum distribution. The term lump sum distribution has the meaning provided in section 402(e)(4)(D) (without regard to section 402(e)(4)(D)(i)(I), (II), (III) and (IV)). In addition, a lump sum distribution includes a distribution of an annuity contract from a trust that is part of a plan described in section 401(a) and which is exempt from tax under section 501(a) or an annuity plan described in 403(a).

(5) *Rules applicable to all distributions*—(i) *Exclusive distribution rules.* Amounts attributable to elective contributions may not be distributed on account of any event not described in this paragraph (d), such as completion of a stated period of plan participation or the lapse of a fixed number of years. For example, if excess deferrals (and income) for an employee's taxable year are not distributed within the time prescribed in § 1.402(g)–1(e)(2) or (3), the amounts may be distributed only on account of an event described in this paragraph (d). Pursuant to section 401(k)(8), the prohibition on distributions set forth in this section does not apply to a distribution of excess contributions under § 1.401(k)–2(b).

(ii) *Deemed distributions.* The cost of life insurance (determined under section 72) is not treated as a distribution for purposes of section 401(k)(2) and this paragraph (d). The making of a loan is not treated as a distribution, even if the loan is secured by the employee's accrued benefit attributable to elective contributions or is includible in the employee's income under section 72(p). However, the reduction, by reason of default on a loan, of an employee's accrued benefit derived from elective contributions is treated as a distribution.

(iii) *ESOP dividend distributions.* A plan does not fail to satisfy the requirements of this paragraph (d) merely by reason of a dividend distribution described in section 404(k)(2).

(iv) *Limitations apply after transfer.* The limitations of this paragraph (d) generally continue to apply to amounts attributable to elective contributions (including QNECs and qualified matching contributions taken into account for the ADP test under § 1.401(k)–2(a)(6)) that are transferred to another qualified plan of the same or another employer. Thus, the transferee plan will generally fail to satisfy the requirements of section 401(a) and this section if transferred amounts may be distributed before the times specified in this paragraph (d). In addition, a cash or deferred arrangement fails to satisfy the limitations of this paragraph (d) if it transfers amounts to a plan that does not provide that the transferred amounts may not be distributed before the times specified in this paragraph (d). The transferor plan does not fail to comply with the preceding sentence if it reasonably concludes that the transferee plan provides that the transferred amounts may not be distributed before the times specified in this paragraph (d). What constitutes a basis for a reasonable conclusion is determined under standards comparable to those under the rules related to acceptance of rollover distributions. See § 1.401(a)(31)–1, A–14. The limitations of this paragraph (d) cease to apply after the transfer, however, if the amounts could have been distributed at the time of the transfer (other than on account of hardship), and the transfer is an elective transfer described in § 1.411(d)–4, Q&A–3(b)(1). The limitations of this paragraph (d) also do not apply to amounts that have been paid in a direct rollover to the plan after being distributed by another plan.

(6) *Examples.* The following examples illustrate the application of this paragraph (d):

Example 1. Employer M maintains Plan V, a profit-sharing plan that includes a cash or deferred arrangement. Elective contributions under the arrangement may be withdrawn for any reason after two years following the end of the plan year in which the contributions were made. Because the plan permits distributions of elective contributions before the occurrence of one of the events specified in section 401(k)(2)(B) and this paragraph (d), the cash or deferred arrangement is a nonqualified cash or deferred arrangement and the elective contributions are currently includible in income under section 402.

Example 2. (i) Employer N maintains Plan W, a profit-sharing plan that includes a cash or deferred arrangement. Plan W provides for distributions upon a participant's severance from employment, death or disability. All employees of Employer N and its wholly owned subsidiary, Employer O, are eligible to participate in Plan W. Employer N agrees to sell all issued and outstanding shares of Employer O to an unrelated entity, Employer T, effective on December 31, 2006. Following the transaction, Employer O will be a wholly owned subsidiary of Employer T. Additionally, individuals who are employed by Employer O on the effective date of the sale continue to be employed by Employer O following the sale. Following the transaction, all employees of Employer O will cease to participate in Plan W and will become eligible to participate in the cash or deferred

arrangement maintained by Employer T, Plan X. No assets will be transferred from Plan W to Plan X, except in the case of a direct rollover within the meaning of section 401(a)(31).

(ii) Employer O ceases to be a member of Employer N's controlled group as a result of the sale. Therefore, employees of Employer O who participated in Plan W will have a severance from employment and are eligible to receive a distribution from Plan W.

Example 3. (i) Employer Q maintains Plan Y, a profit-sharing plan that includes a cash or deferred arrangement. Plan Y, the only plan maintained by Employer Q, does not provide for loans. However, Plan Y provides that elective contributions under the arrangement may be distributed to an eligible employee on account of hardship using the deemed immediate and heavy financial need provisions of paragraph (d)(3)(iii)(B) of this section and provisions regarding distributions necessary to satisfy financial need of paragraphs (d)(3)(iv)(A) through (D) of this section. Employee A is an eligible employee in Plan Y with an account balance of $50,000 attributable to elective contributions made by Employee A. The total amount of elective contributions made by Employee A, who has not previously received a distribution from Plan Y, is $20,000. Employee A requests a $15,000 hardship distribution of his elective contributions to pay 6 months of college tuition and room and board expenses for his dependent. At the time of the distribution request, the sole asset of Employee A (that is reasonably available to Employee A within the meaning of paragraph (d)(3)(iv)(B) of this section) is a savings account with an available balance of $10,000.

(ii) A distribution is made on account of hardship only if the distribution both is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need. Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee A's dependent is deemed to be on account of an immediate and heavy financial need of Employee A.

(iii) A distribution is treated as necessary to satisfy Employee A's immediate and heavy financial need to the extent the need may not be relieved from other resources reasonably available to Employee A. Under paragraph (d)(3)(iv)(B) of this section, Employee A's $10,000 savings account is a resource that is reasonably available to the employee and must be taken into account in determining the amount necessary to satisfy Employee A's immediate and heavy financial need. Thus, Employee A may receive a distribution of only $5,000 of his elective contributions on account of this hardship, plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 4. (i) The facts are the same as in *Example 3.* Employee B, another employee of Employer Q has an account balance of $25,000, attributable to Employee B's elective contributions. The total amount of elective contributions made by Employee B, who has not previously received a distribution from Plan Y, is $15,000. Employee B requests a $10,000 distribution of his elective contributions to pay 6 months of college tuition and room and board expenses for his child. Employee B makes a written representation (with respect to which Employer Q has no actual knowledge to the contrary) that the need cannot reasonably be relieved:

(A) Through reimbursement or compensation by insurance or otherwise;

(B) By liquidation of the employee's assets;

(C) By cessation of elective contributions or employee contributions under the plan;

(D) By other distributions or nontaxable (at the time of the loan) loans from plans maintained by the employer or by any other employer; or

(E) By borrowing from commercial sources on reasonable commercial terms in an amount sufficient to satisfy the need.

(ii) Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee B's child is deemed to be on account of an Employee B's immediate and heavy financial need. In addition, because Employer Q can rely on Employee B's written representation, the distribution is considered necessary to satisfy Employee B's immediate and heavy financial need. Therefore, Employee B may receive a $10,000 distribution of his elective contributions on account of hardship plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 5. (i) The facts are the same as in *Example 3*, except Plan Y provides for hardship distributions using the safe harbor rule of paragraph (d)(3)(iv)(E) of this section. Accordingly, Plan Y provides for a 6 month suspension of an eligible employee's elective contributions and employee contributions to the plan after the receipt of a hardship distribution by such eligible employee.

(ii) Under paragraph (d)(3)(iii)(B) of this section, a distribution for payment of up to the next 12 months of post-secondary education and room and board expenses for Employee A's dependent is deemed to be on account of an Employee A's immediate and heavy financial need. In addition, because Employee A is not eligible for any other distribution or loan from Plan Y and Plan Y suspends Employee A's elective contributions and employee contributions following receipt of the hardship distribution, the distribution will be deemed necessary to satisfy Employee A's immediate and heavy financial need (and Employee A is not required to first liquidate his savings account). Therefore, Employee A may receive a $15,000 distribution of his elective contributions on account of hardship plus an amount necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

Example 6. Employer R maintains a pre-ERISA money purchase pension plan that includes a cash or deferred arrangement that is not a rural cooperative plan. Elective contributions under the arrangement may be distributed to an employee on account of hardship. Under paragraph (d)(1) of this section, hardship is a permissible distribution event only in a profit-sharing, stock bonus or rural cooperative plan. Since elective contributions under the arrangement may be distributed before a permissible distribution event occurs, the cash or deferred arrangement does not satisfy this paragraph (d), and is not a qualified cash or deferred arrangement. Moreover, the plan is not a qualified plan because a money purchase pension plan may not provide for payment of benefits upon hardship. *See* § 1.401–1(b)(1)(i).

(e) *Additional requirements for qualified cash or deferred arrangements*—(1) *Qualified plan requirement.* A cash or deferred arrangement satisfies this paragraph (e) only if the plan of which it is a part is a profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan that otherwise satisfies the requirements of section 401(a) (taking into account the cash or deferred arrangement). A plan that includes a cash or deferred arrangement may provide for other contributions, including employer contributions (other than elective contributions), employee contributions, or both. However, except as expressly permitted under section 401(m), 410(b)(2)(A)(ii) or 416(c)(2)(A), elective contributions and matching contributions taken into account under § 1.401(k)–2(a) may not be taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the contributions are made) satisfy the requirements of section 401(a).

(2) *Election requirements*—(i) *Cash must be available.* A cash or deferred arrangement satisfies this paragraph (e) only if the arrangement provides that the amount that each eligible employee may defer as an elective contribution is available to the employee in cash. Thus, for example, if an eligible employee is provided the option to receive a taxable benefit (other than cash) or to have the employer contribute on the employee's behalf to a profit-sharing plan an amount equal to the value of the taxable benefit, the arrangement is not a qualified cash or deferred arrangement. Similarly, if an employee has the option to receive a specified amount in cash or to have the employer contribute an amount in excess of the specified cash amount to a profit-sharing plan on the employee's behalf, any contribution made by the employer on the employee's behalf in excess of the specified cash amount is not treated as made pursuant to a qualified cash or deferred arrangement, but would be treated as a matching contribution. This cash availability requirement applies even if the cash or deferred arrangement

is part of a cafeteria plan within the meaning of section 125.

(ii) *Frequency of elections.* A cash or deferred arrangement satisfies this paragraph (e) only if the arrangement provides an employee with an effective opportunity to make (or change) a cash or deferred election at least once during each plan year. Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including the adequacy of notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections.

(3) *Separate accounting requirement*—(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (e) only if the portion of an employee's benefit subject to the requirements of paragraphs (c) and (d) of this section is determined by an acceptable separate accounting between that portion and any other benefits. Separate accounting is not acceptable unless contributions and withdrawals are attributed to the separate accounts and gains, losses, and other credits or charges are separately allocated on a reasonable and consistent basis to the accounts subject to the requirements of paragraphs (c) and (d) of this section and to other accounts. Subject to section 401(a)(4), forfeitures are not required to be allocated to the accounts in which benefits are subject to paragraphs (c) and (d) of this section. The separate accounting requirement of this paragraph (e)(3)(i) applies at the time the elective contribution is contributed to the plan and continues to apply until the contribution is distributed under the plan.

(ii) *Satisfaction of separate accounting requirement.* The requirements of paragraph (e)(3)(i) of this section are treated as satisfied if all amounts held under a plan that includes a qualified cash or deferred arrangement (and, if applicable, under another plan to which QNECs and QMACs are made) are subject to the requirements of paragraphs (c) and (d) of this section.

(4) *Limitations on cash or deferred arrangements of state and local governments*—(i) *General rule.* A cash or deferred arrangement does not satisfy the requirements of this paragraph (e) if the arrangement is adopted after May 6, 1986, by a State or local government or political subdivision thereof, or any agency or instrumentality thereof (a governmental unit). For purposes of this paragraph (e)(4), an employer that has made a legally binding commitment to adopt a cash or deferred arrangement is treated as having adopted the arrangement on that date.

(ii) *Rural cooperative plans and Indian tribal governments.* This paragraph (e)(4) does not apply to a rural cooperative plan or to a plan of an employer which is an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State or tribal law which is owned in whole or in part by any of the entities in this paragraph (e)(4)(ii).

(iii) *Adoption after May 6, 1986.* A cash or deferred arrangement is treated as adopted after May 6, 1986, with respect to all employees of any employer that adopts the arrangement after such date.

(iv) *Adoption before May 7, 1986.* If a governmental unit adopted a cash or deferred arrangement before May 7, 1986, then any cash or deferred arrangement adopted by the unit at any time is treated as adopted before that date. If an employer adopted an arrangement prior to such date, all employees of the employer may participate in the arrangement.

(5) *One-year eligibility requirement.* A cash or deferred arrangement satisfies this paragraph (e) only if no employee is required to complete a period of service with the employer maintaining the plan extending beyond the period permitted under section 410(a)(1) (determined without regard to section 410(a)(1)(B)(i)) to be eligible to make a cash or deferred election under the arrangement.

(6) *Other benefits not contingent upon elective contributions*—(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (e) only if no other benefit is conditioned (directly or indirectly) upon the employee's electing to make or not to make elective contributions under the arrangement. The preceding sentence does not apply to—

(A) Any matching contribution (as defined in § 1.401(m)–1(a)(2)) made by reason of such an election;

(B) Any benefit, right or feature (such as a plan loan) that requires, or results in, an amount to be withheld from an employee's pay (*e.g.* to pay for the benefit or to repay the loan), to the extent the cash or deferred arrangement restricts elective contributions to amounts available after such withholding from the employee's pay (after deduction of all applicable income and employment taxes);

(C) Any reduction in the employer's top-heavy contributions under section 416(c)(2) because of matching contributions that resulted from the elective contributions; or

(D) Any benefit that is provided at the employee's election under a plan described in section 125(d) in lieu of an elective contribution under a qualified cash or deferred arrangement.

(ii) *Definition of other benefits.* For purposes of this paragraph (e)(6), other benefits include, but are not limited to, benefits under a defined benefit plan; nonelective contributions under a defined contribution plan; the availability, cost, or amount of health benefits; vacations or vacation pay; life insurance; dental plans; legal services plans; loans (including plan loans); financial planning services; subsidized retirement benefits; stock options; property subject to section 83; and dependent care assistance. Also, increases in salary, bonuses or other cash remuneration (other than the amount that would be contributed under the cash or deferred election) are benefits for purposes of this paragraph (e)(6). The ability to make after-tax employee contributions is a benefit, but that benefit is not contingent upon an employee's electing to make or not make elective contributions under the arrangement merely because the amount of elective contributions reduces dollar-for-dollar the amount of after-tax employee contributions that may be made. Additionally, benefits under any other plan or arrangement (whether or not qualified) are not contingent upon an employee's electing to make or not to make elective contributions under a cash or deferred arrangement merely because the elective contributions are or are not taken into account as compensation under the other plan or arrangement for purposes of determining benefits.

(iii) *Effect of certain statutory limits.* Any benefit under an excess benefit plan described in section 3(36) of the Employee Retirement Income Security Act of 1974 (88 Stat. 829), Public Law 93–406, that is dependent on the employee's electing to make or not to make elective contributions is not treated as contingent. Deferred compensation under a nonqualified plan of deferred compensation that is dependent on an employee's having made the maximum elective deferrals under section 402(g) or the maximum elective contributions permitted under the terms of the plan also is not treated as contingent.

(iv) *Nonqualified deferred compensation.* Except as otherwise provided in paragraph (e)(6)(iii) of this section, participation in a nonqualified deferred compensation plan is treated as contingent for purposes of this

paragraph (e)(6) to the extent that an employee may receive additional deferred compensation under the nonqualified plan to the extent the employee makes or does not make elective contributions.

(v) *Plan loans and distributions.* A loan or distribution of elective contributions is not a benefit conditioned on an employee's electing to make or not make elective contributions under the arrangement merely because the amount of the loan or distribution is based on the amount of the employee's account balance.

(vi) *Examples.* The following examples illustrate the application of this paragraph (e)(6):

Example 1. Employer T maintains a cash or deferred arrangement for all of its employees. Employer T also maintains a nonqualified deferred compensation plan for two highly paid executives, Employees R and C. Under the terms of the nonqualified deferred compensation plan, R and C are eligible to participate only if they do not make elective contributions under the cash or deferred arrangement. Participation in the nonqualified plan is a contingent benefit for purposes of this paragraph (e)(6), because R's and C's participation is conditioned on their electing not to make elective contributions under the cash or deferred arrangement.

Example 2. Employer T maintains a cash or deferred arrangement for all its employees. Employer T also maintains a nonqualified deferred compensation plan for two highly paid executives, Employees R and C. Under the terms of the arrangements, Employees R and C may defer a maximum of 10% of their compensation, and may allocate their deferral between the cash or deferred arrangement and the nonqualified deferred compensation plan in any way they choose (subject to the overall 10% maximum). Because the maximum deferral available under the nonqualified deferred compensation plan depends on the elective deferrals made under the cash or deferred arrangement, the right to participate in the nonqualified plan is a contingent benefit for purposes of this paragraph (e)(6).

(7) *Plan provision requirement.* A plan that includes a cash or deferred arrangement satisfies this paragraph (e) only if it provides that the nondiscrimination requirements of section 401(k) will be met. Thus, the plan must provide for satisfaction of one of the specific alternatives described in paragraph (b)(1)(ii) of this section and, if with respect to that alternative there are optional choices, which of the optional choices will apply. For example, a plan that uses the ADP test of section 401(k)(3), as described in paragraph (b)(1)(ii)(A) of this section, must specify whether it is using the current year testing method or prior year testing method. Additionally, a plan that uses the prior year testing method must specify whether the ADP for eligible NHCEs for the first plan year is 3% or the ADP for the eligible NHCEs for the first plan year. Similarly, a plan that uses the safe harbor method of section 401(k)(12), as described in paragraph (b)(1)(ii)(B) of this section, must specify whether the safe harbor contribution will be the nonelective safe harbor contribution or the matching safe harbor contribution and is not permitted to provide that ADP testing will be used if the requirements for the safe harbor are not satisfied. For purposes of this paragraph (e)(7), a plan may incorporate by reference the provisions of section 401(k)(3) and § 1.401(k)–2 if that is the nondiscrimination test being applied. The Commissioner may, in guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter), specify the options that will apply under the plan if the nondiscrimination test is incorporated by reference in accordance with the preceding sentence.

(f) *Special rules for designated Roth contributions.* [Reserved].

(g) *Effective dates*—(1) *General rule.* Except as otherwise provided in this paragraph (g), this section and §§ 1.401(k)–2 through 1.401(k)–6 apply to plan years that begin on or after January 1, 2006.

(2) *Early implementation permitted.* A plan is permitted to apply the rules of this section and §§ 1.401(k)–2 through 1.401(k)–6 to any plan year that ends after December 29, 2004, provided the plan applies all the rules of this section and §§ 1.401(k)–2 through 1.401(k)–6 and all the rules of §§ 1.401(m)–1 through 1.401(m)–5, to the extent applicable, for that plan year and all subsequent plan years.

(3) *Collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers in effect on the date described in paragraph (g)(1) of this section, the provisions of this section and §§ 1.401(k)–2 through 1.401(k)–6 apply to the later of the first plan year beginning after the termination of the last such agreement or the first plan year described in paragraph (g)(1) of this section.

(4) *Applicability of prior regulations.* For any plan year before a plan applies this section and §§ 1.401(k)–2 through 1.401(k)–6 (either the first plan year beginning on or after January 1, 2006, or such earlier year, as provided in paragraph (g)(2) of this section), § 1.401(k)–1 (as it appeared in the April 1, 2004 edition of 26 CFR part 1) applies to the plan to the extent that section, as it so appears, reflects the statutory provisions of section 401(k) as in effect for the relevant year.

§ 1.401(k)–2 ADP test.

(a) *Actual deferral percentage (ADP) test*—(1) *In general*—(i) *ADP test formula.* A cash or deferred arrangement satisfies the ADP test for a plan year only if—

(A) The ADP for the eligible HCEs for the plan year is not more than the ADP for the eligible NHCEs for the applicable year multiplied by 1.25; or

(B) The excess of the ADP for the eligible HCEs for the plan year over the ADP for the eligible NHCEs for the applicable year is not more than 2 percentage points, and the ADP for the eligible HCEs for the plan year is not more than the ADP for the eligible NHCEs for the applicable year multiplied by 2.

(ii) *HCEs as sole eligible employees.* If, for the applicable year for determining the ADP of the NHCEs for a plan year, there are no eligible NHCEs (*i.e.*, all of the eligible employees under the cash or deferred arrangement for the applicable year are HCEs), the arrangement is deemed to satisfy the ADP test for the plan year.

(iii) *Special rule for early participation.* If a cash or deferred arrangement provides that employees are eligible to participate before they have completed the minimum age and service requirements of section 410(a)(1)(A), and if the plan applies section 410(b)(4)(B) in determining whether the cash or deferred arrangement meets the requirements of section 410(b)(1), then in determining whether the arrangement meets the requirements under paragraph (a)(1) of this section, either—

(A) Pursuant to section 401(k)(3)(F), the ADP test is performed under the plan (determined without regard to disaggregation under § 1.410(b)–7(c)(3)), using the ADP for all eligible HCEs for the plan year and the ADP of eligible NHCEs for the applicable year, disregarding all NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A); or

(B) Pursuant to § 1.401(k)–1(b)(4), the plan is disaggregated into separate plans and the ADP test is performed separately for all eligible employees who have completed the minimum age and service requirements of section 410(a)(1)(A) and for all eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A).

(2) *Determination of ADP*—(i) *General rule.* The ADP for a group of eligible employees (either eligible HCEs or

eligible NHCEs) for a plan year or applicable year is the average of the ADRs of the eligible employees in that group for that year. The ADP for a group of eligible employees is calculated to the nearest hundredth of a percentage point.

(ii) *Determination of applicable year under current year and prior year testing method.* The ADP test is applied using the prior year testing method or the current year testing method. Under the prior year testing method, the applicable year for determining the ADP for the eligible NHCEs is the plan year immediately preceding the plan year for which the ADP test is being performed. Under the prior year testing method, the ADP for the eligible NHCEs is determined using the ADRs for the eligible employees who were NHCEs in that preceding plan year, regardless of whether those NHCEs are eligible employees or NHCEs in the plan year for which the ADP test is being calculated. Under the current year testing method, the applicable year for determining the ADP for the eligible NHCEs is the same plan year as the plan year for which the ADP test is being performed. Under either method, the ADP for eligible HCEs is the average of the ADRs of the eligible HCEs for the plan year for which the ADP test is being performed. See paragraph (c) of this section for additional rules for the prior year testing method.

(3) *Determination of ADR*—(i) *General rule.* The ADR of an eligible employee for a plan year or applicable year is the sum of the employee's elective contributions taken into account with respect to such employee for the year, determined under the rules of paragraphs (a)(4) and (5) of this section, and the qualified nonelective contributions and qualified matching contributions taken into account with respect to such employee under paragraph (a)(6) of this section for the year, divided by the employee's compensation taken into account for the year. The ADR is calculated to the nearest hundredth of a percentage point. If no elective contributions, qualified nonelective contributions, or qualified matching contributions are taken into account under this section with respect to an eligible employee for the year, the ADR of the employee is zero.

(ii) *ADR of HCEs eligible under more than one arrangement*—(A) *General rule.* Pursuant to section 401(k)(3)(A), the ADR of an HCE who is an eligible employee in more than one cash or deferred arrangement of the same employer is calculated by treating all contributions with respect to such HCE under any such arrangement as being made under the cash or deferred arrangement being tested. Thus, the ADR for such an HCE is calculated by accumulating all contributions under any cash or deferred arrangement (other than a cash or deferred arrangement described in paragraph (a)(3)(ii)(B) of this section) that would be taken into account under this section for the plan year, if the cash or deferred arrangement under which the contribution was made applied this section and had the same plan year. For example, in the case of a plan with a 12-month plan year, the ADR for the plan year of that plan for an HCE who participates in multiple cash or deferred arrangements of the same employer is the sum of all contributions during such 12-month period that would be taken into account with respect to the HCE under all such arrangements in which the HCE is an eligible employee, divided by the HCE's compensation for that 12-month period (determined using the compensation definition for the plan being tested), without regard to the plan year of the other plans and whether those plans are satisfying this section or § 1.401(k)–3.

(B) *Plans not permitted to be aggregated.* Cash or deferred arrangements under plans that are not permitted to be aggregated under § 1.401(k)–1(b)(4) (determined without regard to the prohibition on aggregating plans with inconsistent testing methods set forth in § 1.401(k)–1(b)(4)(iii)(B) and the prohibition on aggregating plans with different plan years set forth in § 1.410(b)–7(d)(5)) are not aggregated under this paragraph (a)(3)(ii).

(iii) *Examples.* The following examples illustrate the application of this paragraph (a)(3):

Example 1. (i) Employee A, an HCE with compensation of $120,000, is eligible to make elective contributions under Plan S and Plan T, two profit-sharing plans maintained by Employer H with calendar year plan years, each of which includes a cash or deferred arrangement. During the current plan year, Employee A makes elective contributions of $6,000 to Plan S and $4,000 to Plan T.

(ii) Under each plan, the ADR for Employee A is determined by dividing Employee A's total elective contributions under both arrangements by Employee A's compensation taken into account under the plan for the year. Therefore, Employee A's ADR under each plan is 8.33% ($10,000/$120,000).

Example 2. (i) The facts are the same as in *Example 1*, except that Plan T defines compensation (for deferral and testing purposes) to exclude all bonuses paid to an employee. Plan S defines compensation (for deferral and testing purposes) to include bonuses paid to an employee. During the current year, Employee A's compensation included a $10,000 bonus. Therefore, Employee A's compensation under Plan T is $110,000 and Employee A's compensation under Plan S is $120,000.

(ii) Employee A's ADR under Plan T is 9.09% ($10,000/$110,000) and under Plan S, Employee A's ADR is 8.33% ($10,000/$120,000).

Example 3. (i) Employer J sponsors two profit-sharing plans, Plan U and Plan V, each of which includes a cash or deferred arrangement. Plan U's plan year begins on July 1 and ends on June 30. Plan V has a calendar year plan year. Compensation under both plans is limited to the participant's compensation during the period of participation. Employee B is an HCE who participates in both plans. Employee B's monthly compensation and elective contributions to each plan for the 2005 and 2006 calendar years are as follows:

Calendar year	Monthly compensation	Monthly elective contribution to Plan U	Monthly elective contribution to Plan V
2005	$10,000	$500	$400
2006	11,500	700	550

(ii) Under Plan U, Employee B's ADR for the plan year ended June 30, 2006, is equal to Employee B's total elective contributions under Plan U and Plan V for the plan year ending June 30, 2006, divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan U for the plan year ending June 30, 2006, is (($900 × 6) + ($1,250 × 6)) / (($10,000 × 6) + ($11,500 × 6)), or 10%.

(iii) Under Plan V, Employee B's ADR for the plan year ended December 31, 2005, is equal to total elective contributions under Plan U and V for the plan year ending December 31, 2005, divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan V for the plan year ending December 31, 2005, is ($10,800/$120,000), or 9%.

Example 4. (i) The facts are the same as *Example 3*, except that Employee B first becomes eligible to participate in Plan U on January 1, 2006.

(ii) Under Plan U, Employee B's ADR for the plan year ended June 30, 2006, is equal to Employee B's total elective contributions under Plan U and V for the plan year ending June 30, 2006, divided by Employee B's compensation for that period. Therefore, Employee B's ADR under Plan U for the plan year ending June 30, 2006, is (($400 × 6) + ($1,250 × 6)) / (($10,000 × 6) + ($11,500 × 6)), or 7.67%.

(4) *Elective contributions taken into account under the ADP test*—(i) *General rule.* An elective contribution is taken into account in determining the ADR for an eligible employee for a plan year or applicable year only if each of the following requirements is satisfied—

(A) The elective contribution is allocated to the eligible employee's account under the plan as of a date within that year. For purposes of this rule, an elective contribution is

considered allocated as of a date within a year only if—

(*1*) The allocation is not contingent on the employee's participation in the plan or performance of services on any date subsequent to that date; and

(*2*) The elective contribution is actually paid to the trust no later than the end of the 12-month period immediately following the year to which the contribution relates.

(B) The elective contribution relates to compensation that either—

(*1*) Would have been received by the employee in the year but for the employee's election to defer under the arrangement; or

(*2*) Is attributable to services performed by the employee in the year and, but for the employee's election to defer, would have been received by the employee within 2½ months after the close of the year, but only if the plan provides for elective contributions that relate to compensation that would have been received after the close of a year to be allocated to such prior year rather than the year in which the compensation would have been received.

(ii) *Elective contributions for partners and self-employed individuals.* For purposes of this paragraph (a)(4), a partner's distributive share of partnership income is treated as received on the last day of the partnership taxable year and a sole proprietor's compensation is treated as received on the last day of the individual's taxable year. Thus, an elective contribution made on behalf of a partner or sole proprietor is treated as allocated to the partner's account for the plan year that includes the last day of the partnership taxable year, provided the requirements of paragraph (a)(4)(i) of this section are met.

(iii) *Elective contributions for HCEs.* Elective contributions of an HCE must include any excess deferrals, as described in § 1.402(g)–1(a), even if those excess deferrals are distributed, pursuant to § 1.402(g)–1(e).

(5) *Elective contributions not taken into account under the ADP test*—(i) *General rule.* Elective contributions that do not satisfy the requirements of paragraph (a)(4)(i) of this section may not be taken into account in determining the ADR of an eligible employee for the plan year or applicable year with respect to which the contributions were made, or for any other plan year. Instead, the amount of the elective contributions must satisfy the requirements of section 401(a)(4) (without regard to the ADP test) for the plan year for which they are allocated under the plan as if they were nonelective contributions and were the only nonelective contributions for that year. *See* §§ 1.401(a)(4)–1(b)(2)(ii)(B) and 1.410(b)–7(c)(1).

(ii) *Elective contributions for NHCEs.* Elective contributions of an NHCE shall not include any excess deferrals, as described in § 1.402(g)–1(a), to the extent the excess deferrals are prohibited under section 401(a)(30). However, to the extent that the excess deferrals are not prohibited under section 401(a)(30), they are included in elective contributions even if distributed pursuant to § 1.402(g)–1(e).

(iii) *Elective contributions treated as catch-up contributions.* Elective contributions that are treated as catch-up contributions under section 414(v) because they exceed a statutory limit or employer-provided limit (within the meaning of § 1.414(v)–1(b)(1)) are not taken into account under paragraph (a)(4) of this section for the plan year for which the contributions were made, or for any other plan year.

(iv) *Elective contributions used to satisfy the ACP test.* Except to the extent necessary to demonstrate satisfaction of the requirement of § 1.401(m)–2(a)(6)(ii), elective contributions taken into account for the ACP test under § 1.401(m)–2(a)(6) are not taken into account under paragraph (a)(4) of this section.

(v) *Additional elective contributions pursuant to section 414(u).* Additional elective contributions made pursuant to section 414(u) by reason of an eligible employee's qualified military service are not taken into account under paragraph (a)(4) of this section for the plan year for which the contributions are made, or for any other plan year.

(6) *Qualified nonelective contributions and qualified matching contributions that may be taken into account under the ADP test.* Qualified nonelective contributions and qualified matching contributions may be taken into account in determining the ADR for an eligible employee for a plan year or applicable year but only to the extent the contributions satisfy the following requirements—

(i) *Timing of allocation.* The qualified nonelective contribution or qualified matching contribution is allocated to the employee's account as of a date within that year within the meaning of paragraph (a)(4)(i)(A) of this section. Consequently, under the prior year testing method, in order to be taken into account in calculating the ADP for the eligible NHCEs for the applicable year, a qualified nonelective contribution or qualified matching contribution must be contributed no later than the end of the 12-month period immediately following the applicable year even though the applicable year is different than the plan year being tested.

(ii) *Requirement that amount satisfy section 401(a)(4).* The amount of nonelective contributions, including those qualified nonelective contributions taken into account under this paragraph (a)(6) and those qualified nonelective contributions taken into account for the ACP test of section 401(m)(2) under § 1.401(m)–2(a)(6), satisfies the requirements of section 401(a)(4). *See* § 1.401(a)(4)–1(b)(2). The amount of nonelective contributions, excluding those qualified nonelective contributions taken into account under this paragraph (a)(6) and those qualified nonelective contributions taken into account for the ACP test of section 401(m)(2) under § 1.401(m)–2(a)(6), satisfies the requirements of section 401(a)(4). *See* § 1.401(a)(4)–1(b)(2). In the case of an employer that is applying the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the cash or deferred arrangement, the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(ii) must be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on an employer-wide basis. Conversely, in the case of an employer that is treated as operating qualified separate lines of business, and does not apply the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the cash or deferred arrangement, then the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(ii) is not permitted to be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on that basis.

(iii) *Aggregation must be permitted.* The plan that contains the cash or deferred arrangement and the plan or plans to which the qualified nonelective contributions or qualified matching contributions are made, are plans that would be permitted to be aggregated under § 1.401(k)–1(b)(4). If the plan year of the plan that contains the cash or deferred arrangement is changed to satisfy the requirement under § 1.410(b)–7(d)(5) that aggregated plans have the same plan year, qualified nonelective contributions and qualified matching contributions may be taken into account in the resulting short plan year only if such qualified nonelective contributions and qualified matching

contributions could have been taken into account under an ADP test for a plan with the same short plan year.

(iv) *Disproportionate contributions not taken into account*—(A) *General rule.* Qualified nonelective contributions cannot be taken into account for a plan year for an NHCE to the extent such contributions exceed the product of that NHCE's compensation and the greater of 5% or two times the plan's representative contribution rate. Any qualified nonelective contribution taken into account under an ACP test under § 1.401(m)–2(a)(6) (including the determination of the representative contribution rate for purposes of § 1.401(m)–2(a)(6)(v)(B)), is not permitted to be taken into account for purposes of this paragraph (a)(6) (including the determination of the representative contribution rate under paragraph (a)(6)(iv)(B) of this section).

(B) *Definition of representative contribution rate.* For purposes of this paragraph (a)(6)(iv), the plan's representative contribution rate is the lowest applicable contribution rate of any eligible NHCE among a group of eligible NHCEs that consists of half of all eligible NHCEs for the plan year (or, if greater, the lowest applicable contribution rate of any eligible NHCE in the group of all eligible NHCEs for the plan year and who is employed by the employer on the last day of the plan year).

(C) *Definition of applicable contribution rate.* For purposes of this paragraph (a)(6)(iv), the applicable contribution rate for an eligible NHCE is the sum of the qualified matching contributions taken into account under this paragraph (a)(6) for the eligible NHCE for the plan year and the qualified nonelective contributions made for the eligible NHCE for the plan year, divided by the eligible NHCE's compensation for the same period.

(D) *Special rule for prevailing wage contributions.* Notwithstanding paragraph (a)(6)(iv)(A) of this section, qualified nonelective contributions that are made in connection with an employer's obligation to pay prevailing wages under the Davis-Bacon Act (46 Stat. 1494), Public Law 71–798, Service Contract Act of 1965 (79 Stat. 1965), Public Law 89–286, or similar legislation can be taken into account for a plan year for an NHCE to the extent such contributions do not exceed 10 percent of that NHCE's compensation.

(v) *Qualified matching contributions.* Qualified matching contributions satisfy this paragraph (a)(6) only to the extent that such qualified matching contributions are matching contributions that are not precluded from being taken into account under the ACP test for the plan year under the rules of § 1.401(m)–2(a)(5)(ii).

(vi) *Contributions only used once.* Qualified nonelective contributions and qualified matching contributions cannot be taken into account under this paragraph (a)(6) to the extent such contributions are taken into account for purposes of satisfying any other ADP test, any ACP test, or the requirements of § 1.401(k)–3, 1.401(m)–3 or 1.401(k)–4. Thus, for example, matching contributions that are made pursuant to § 1.401(k)–3(c) cannot be taken into account under the ADP test. Similarly, if a plan switches from the current year testing method to the prior year testing method pursuant to § 1.401(k)–2(c), qualified nonelective contributions that are taken into account under the current year testing method for a year may not be taken into account under the prior year testing method for the next year.

(7) *Examples.* The following examples illustrate the application of this paragraph (a):

Example 1. (i) Employer X has three employees, A, B, and C. Employer X sponsors a profit-sharing plan (Plan Z) that includes a cash or deferred arrangement. Each year, Employer X determines a bonus attributable to the prior year. Under the cash or deferred arrangement, each eligible employee may elect to receive none, all or any part of the bonus in cash. X contributes the remainder to Plan Z. The portion of the bonus paid in cash, if any, is paid 2 months after the end of the plan year and thus is included in compensation for the following plan year. Employee A is an HCE, while Employees B and C are NHCEs. The plan uses the current year testing method and defines compensation to include elective contributions and bonuses paid during each plan year. In February of 2005, Employer X determined that no bonuses will be paid for 2004. In February of 2006, Employer X provided a bonus for each employee equal to 10% of regular compensation for 2005. For the 2005 plan year, A, B, and C have the following compensation and make the following elections:

Employee	Compensation	Elective contribution
A	$100,000	$4,340
B	60,000	2,860
C	45,000	1,250

(ii) For each employee, the ratio of elective contributions to the employee's compensation for the plan year is:

Employee	Ratio of elective contribution to compensation	ADR (percent)
A	$4,340/$100,000	4.34
B	2,860/60,000	4.77
C	1,250/45,000	2.78

(iii) The ADP for the HCEs (Employee A) is 4.34%. The ADP for the NHCEs is 3.78% ((4.77% + 2.78%)/2). Because 4.34% is less than 4.73% (3.78% multiplied by 1.25), the plan satisfies the ADP test under paragraph (a)(1)(i) of this section.

Example 2. (i) The facts are the same as in *Example 1,* except that elective contributions are made pursuant to a salary reduction agreement throughout the plan year, and no bonuses are paid. As provided by section 414(s)(2), Employer X includes elective contributions in compensation. During the year, B and C defer the same amount as in *Example 1,* but A defers $5,770. Thus, the compensation and elective contributions for A, B, and C are:

Employee	Compensation	Elective contributions	ADR (percent)
A	$100,000	$5,770	5.77
B	60,000	2,860	4.77
C	45,000	1,250	2.78

(ii) The ADP for the HCEs (Employee A) is 5.77%. The ADP for the NHCEs is 3.78% ((4.77% + 2.78%)/2). Because 5.77% exceeds 4.73% (3.78% × 1.25), the plan does not satisfy the ADP test under paragraph (a)(1)(i) of this section. However, because the ADP for the HCEs does not exceed the ADP for the NHCEs by more than 2 percentage points and the ADP for the HCEs does not exceed the ADP for the NHCEs multiplied by 2 (3.78% × 2 = 7.56%), the plan satisfies the ADP test under paragraph (a)(1)(ii) of this section.

Example 3. (i) Employees D through L are eligible employees in Plan T, a profit-sharing plan that contains a cash or deferred arrangement. The plan is a calendar year plan that uses the prior year testing method. Plan T provides that elective contributions are included in compensation (as provided under section 414(s)(2)). Each eligible employee may elect to defer up to 6% of compensation under the cash or deferred arrangement. Employees D and E are HCEs. The compensation, elective contributions, and ADRs of Employees D and E for the 2006 plan year are shown below:

Employee	Compensation for 2006 plan year	Elective contributions for 2006 plan year	ADR for 2006 plan year (percent)
D	$100,000	$10,000	10
E	95,000	4,750	5

(ii) During the 2005 plan year, Employees F through L were eligible NHCEs. The compensation, elective contributions and ADRs of Employees F through L for the 2005 plan year are shown in the following table:

Employee	Compensation for 2005 plan year	Elective contributions for 2005 plan year	ADR for 2005 plan year (percent)
F	$60,000	$3,600	6
G	40,000	1,600	4
H	30,000	1,200	4
I	20,000	600	3
J	20,000	600	3
K	10,000	300	3
L	5,000	150	3

(iii) The ADP for 2006 for the HCEs is 7.5%. Because Plan T is using the prior year testing method, the applicable year for determining the NHCE ADP is the prior plan year (*i.e.*, 2005). The NHCE ADP is determined using the ADRs for NHCEs eligible during the prior plan year (without regard to whether they are eligible under the plan during the plan year). The ADP for the NHCEs is 3.71% (the sum of the individual ADRs, 26%, divided by 7 employees). Because 7.5% exceeds 4.64% (3.71% $\times$ 1.25), Plan T does not satisfy the ADP test under paragraph (a)(1)(i) of this section. In addition, because the ADP for the HCEs exceeds the ADP for the NHCEs by more than 2 percentage points, Plan T does not satisfy the ADP test under paragraph (a)(1)(ii) of this section. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

Example 4. (i) Plan U is a calendar year profit-sharing plan that contains a cash or deferred arrangement and uses the current year testing method. Plan U provides that elective contributions are included in compensation (as provided under section 414(s)(2)). The following amounts are contributed under Plan U for the 2006 plan year: QNECs equal to 2% of each employee's compensation; Contributions equal to 6% of each employee's compensation that are not immediately vested under the terms of the plan; 3% of each employee's compensation that the employee may elect to receive as cash or to defer under the plan. Both types of nonelective contributions are made for the HCEs (employees M and N) and the NHCEs (employees O through S) for the plan year and are contributed after the end of the plan year and before the end of the following plan year. In addition, neither type of nonelective contributions is used for any other ADP or ACP test.

(ii) For the 2006 plan year, the compensation, elective contributions, and actual deferral ratios of employees M through S are shown in the following table:

Employee	Compensation	Elective contributions	Actual deferral ratio (percent)
M	$100,000	$3,000	3
N	100,000	2,000	2
O	60,000	1,800	3
P	40,000	0	0
Q	30,000	0	0
R	5,000	0	0
S	20,000	0	0

(iii) The elective contributions alone do not satisfy the ADP test of section 401(k)(3) and paragraph (a)(1) of this section because the ADP for the HCEs, consisting of employees M and N, is 2.5% and the ADP for the NHCEs is 0.6%.

(iv) The 2% QNECs satisfies the timing requirement of paragraph (a)(6)(i) of this section because it is paid within 12-month after the plan year for which allocated. All nonelective contributions also satisfy the requirements relating to section 401(a)(4) set forth in paragraph (a)(6)(ii) of this section (because all employees receive an 8% nonelective contribution and the nonelective contributions excluding the QNECs is 6% for all employees). In addition, the QNECs are not disproportionate under paragraph (a)(6)(iv) of this section because no QNEC for an NHCE exceeds the product of the plan's applicable contribution rate (2%) and that NHCE's compensation.

(v) Because the rules of paragraph (a)(6) of this section are satisfied, the 2% QNECs may be taken into account in applying the ADP test of section 401(k)(3) and paragraph (a)(1) of this section. The 6% nonelective contributions, however, may not be taken into account because they are not QNECs.

(vi) If the 2% QNECs are taken into account, the ADP for the HCEs is 4.5%, and the actual deferral percentage for the NHCEs is 2.6%. Because 4.5% is not more than two percentage points greater than 2.6 percent, and not more than two times 2.6, the cash or deferred arrangement satisfies the ADP test of section 401(k)(3) under paragraph (a)(1)(ii) of this section.

Example 5. (i) The facts are the same as *Example 4,* except the plan uses the prior year testing method. In addition, the NHCE ADP for the 2005 plan year (the prior plan year) is 0.8% and no QNECs are contributed for the 2005 plan year during 2005 or 2006.

(ii) In 2007, it is determined that the elective contributions alone do not satisfy the ADP test of section 401(k)(3) and paragraph (a)(1) of this section for 2006 because the 2006 ADP for the eligible HCEs, consisting of employees M and N, is 2.5% and the 2005 ADP for the eligible NHCEs is 0.8%. An additional QNEC of 2% of compensation is made for each eligible NHCE in 2007 and allocated for 2005.

(iii) The 2% QNECs that are made in 2007 and allocated for the 2005 plan year do not satisfy the timing requirement of paragraph

(a)(6)(i) of this section for the applicable year for the 2005 plan year because they were not contributed before the last day of the 2006 plan year. Accordingly, the 2% QNECs do not satisfy the rules of paragraph (a)(6) of this section and may not be taken into account in applying the ADP test of section 401(k)(3) and paragraph (a)(1) of this section for the 2006 plan year. The cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

Example 6. (i) The facts are the same as *Example 4,* except that the ADP for the HCEs is 4.6% and there is no 6% nonelective contribution under the plan. The employer would like to take into account the 2% QNEC in determining the ADP for the NHCEs but not in determining the ADP for the HCEs.

(ii) The elective contributions alone fail the requirements of section 401(k) and paragraph (a)(1) of this section because the HCE ADP for the plan year (4.6%) exceeds 0.75% (0.6% × 1.25) and 1.2% (0.6% × 2).

(iii) The 2% QNECs may not be taken into account in determining the ADP of the NHCEs because they fail to satisfy the requirements relating to section 401(a)(4) set forth in paragraph (a)(6)(ii) of this section. This is because the amount of nonelective contributions, excluding those QNECs that would be taken into account under the ADP test, would be 2% of compensation for the HCEs and 0% for the NHCEs. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

Example 7. (i) The facts are the same as Example 6, except that Employee R receives a QNEC in an amount of $500 and no QNECs are made on behalf of the other employees.

(ii) If the QNEC could be taken into account under paragraph (a)(6) of this section, the ADP for the NHCEs would be 2.6% and the plan would satisfy the ADP test. The QNEC is disproportionate under paragraph (a)(6)(iv) of this section, and cannot be taken into account under paragraph (a)(6) of this section, to the extent it exceeds the greater of 5% and two times the plan's representative contribution rate (0%), multiplied by Employee R's compensation. The plan's representative contribution rate is 0% because it is the lowest applicable contribution rate among a group of NHCEs that is at least half of all NHCEs, or all the NHCEs who are employed on the last day of the plan year. Therefore, the QNEC may be taken into account under the ADP test only to the extent it does not exceed 5% times Employee R's compensation (or $250) and the cash or deferred arrangement fails to satisfy the ADP test and must correct under paragraph (b) of this section.

Example 8. (i) The facts are the same as in *Example 4* except that the plan changes from the current year testing method to the prior year testing method for the following plan year (2007 plan year). The ADP for the HCEs for the 2007 plan year is 3.5%.

(ii) The 2% QNECs may not be taken into account in determining the ADP for the NHCEs for the applicable year (2006 plan year) in satisfying the ADP test for the 2007 plan year because they were taken into account in satisfying the ADP test for the 2006 plan year. Accordingly, the NHCE ADP for the applicable year is 0.6%. The elective contributions for the plan year fail the requirements of section 401(k) and paragraph (a)(1) of this section because the HCE ADP for the plan year (3.5%) exceeds the ADP limit of 1.2% (the greater of 0.75% (0.6% × 1.25) and 1.2% (0.6% × 2)), determined using the applicable year ADP for the NHCEs. Therefore, the cash or deferred arrangement fails to be a qualified cash or deferred arrangement unless the ADP failure is corrected under paragraph (b) of this section.

Example 9. (i)(A) Employer N maintains Plan X, a profit sharing plan that contains a cash or deferred arrangement and that uses the current year testing method. Plan X provides for employee contributions, elective contributions, and matching contributions. Matching contributions on behalf of NHCEs are qualified matching contributions (QMACs) and are contributed during the 2005 plan year. Matching contributions on behalf of HCEs are not QMACs, because they fail to satisfy the nonforfeitability requirement of § 1.401(k)–1(c). The elective contributions and matching contributions with respect to HCEs for the 2005 plan year are shown in the following table:

	Elective contributions	Total matching contributions	Matching contributions that are not QMACs	QMACs
Highly compensated employees	15%	5%	5%	0%

(B) The elective contributions and matching contributions with respect to the NHCEs for the 2005 plan year are shown in the following table:

	Elective contributions	Total matching contributions	Matching contributions that are not QMACs	QMACs
Nonhighly compensated employees	11%	4%	0%	4%

(ii) The plan fails to satisfy the ADP test of section 401(k)(3)(A) and paragraph (a)(1) of this section because the ADP for HCEs (15%) is more than 125% of the ADP for NHCEs (11%), and more than 2 percentage points greater than 11%. However, the plan provides that QMACs may be used to meet the requirements of section 401(k)(3)(A)(ii) provided that they are not used for any other ADP or ACP test. QMACs equal to 1% of compensation are taken into account for each NHCE in applying the ADP test. After this adjustment, the applicable ADP and ACP (taking into account the provisions of § 1.401(m)-2(a)(5)(ii)) for the plan year are as follows:

	Actual deferral percentage	Actual contribution percentage
HCEs	15	5
Nonhighly compensated employees	12	3

(iii) The elective contributions and QMACs taken into account for purposes of the ADP test of section 401(k)(3) satisfy the requirements of section 401(k)(3)(A)(ii) under paragraph (a)(1)(ii) of this section because the ADP for HCEs (15%) is not more than the ADP for NHCEs multiplied by 1.25 (12% × 1.25 = 15%).

(b) *Correction of excess contributions*—(1) *Permissible correction methods*—(i) *In general.* A cash or deferred arrangement does not fail to satisfy the requirements of section 401(k)(3) and paragraph (a)(1) of this section if the employer, in accordance with the terms of the plan that includes the cash or deferred arrangement, uses any of the following correction methods—

(A) *Qualified nonelective contributions or qualified matching contributions.* The employer makes qualified nonelective contributions or qualified matching contributions that are taken into account under this

section and, in combination with other amounts taken into account under paragraph (a) of this section, allow the cash or deferred arrangement to satisfy the requirements of paragraph (a)(1) of this section.

(B) *Excess contributions distributed.* Excess contributions are distributed in accordance with paragraph (b)(2) of this section.

(C) *Excess contributions recharacterized.* Excess contributions are recharacterized in accordance with paragraph (b)(3) of this section.

(ii) *Combination of correction methods.* A plan may provide for the use of any of the correction methods described in paragraph (b)(1)(i) of this section, may limit elective contributions in a manner designed to prevent excess contributions from being made, or may use a combination of these methods, to avoid or correct excess contributions. A plan may permit an HCE to elect whether any excess contributions are to be recharacterized or distributed. If the plan uses a combination of correction methods, any contribution made under paragraph (b)(1)(i)(A) of this section must be taken into account before application of the correction methods in paragraph (b)(1)(i)(B) or (C) of this section.

(iii) *Exclusive means of correction.* A failure to satisfy the requirements of paragraph (a)(1) of this section may not be corrected using any method other than the ones described in paragraphs (b)(1)(i) and (ii) of this section. Thus, excess contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year. In addition, excess contributions may not be corrected using the retroactive correction rules of § 1.401(a)(4)–11(g). See § 1.401(a)(4)–11(g)(3)(vii) and (5).

(2) *Corrections through distribution*—(i) *General rule.* This paragraph (b)(2) contains the rules for correction of excess contributions through a distribution from the plan. Correction through a distribution generally involves a 4-step process. First, the plan must determine, in accordance with paragraph (b)(2)(ii) of this section, the total amount of excess contributions that must be distributed under the plan. Second, the plan must apportion the total amount of excess contributions among HCEs in accordance with paragraph (b)(2)(iii) of this section. Third, the plan must determine the income allocable to excess contributions in accordance with paragraph (b)(2)(iv) of this section. Finally, the plan must distribute the apportioned excess contributions and allocable income in accordance with paragraph (b)(2)(v) of this section. Paragraph (b)(2)(vi) of this section provides rules relating to the tax treatment of these distributions. Paragraph (b)(2)(vii) provides other rules relating to these distributions.

(ii) *Calculation of total amount to be distributed.* The following procedures must be used to determine the total amount of the excess contributions to be distributed—

(A) *Calculate the dollar amount of excess contributions for each HCE.* The amount of excess contributions attributable to a given HCE for a plan year is the amount (if any) by which the HCE's contributions taken into account under this section must be reduced for the HCE's ADR to equal the highest permitted ADR under the plan. To calculate the highest permitted ADR under a plan, the ADR of the HCE with the highest ADR is reduced by the amount required to cause that HCE's ADR to equal the ADR of the HCE with the next highest ADR. If a lesser reduction would enable the arrangement to satisfy the requirements of paragraph (b)(2)(ii)(C) of this section, only this lesser reduction is used in determining the highest permitted ADR.

(B) *Determination of the total amount of excess contributions.* The process described in paragraph (b)(2)(ii)(A) of this section must be repeated until the arrangement would satisfy the requirements of paragraph (b)(2)(ii)(C) of this section. The sum of all reductions for all HCEs determined under paragraph (b)(2)(ii)(A) of this section is the total amount of excess contributions for the plan year.

(C) *Satisfaction of ADP.* A cash or deferred arrangement satisfies this paragraph (b)(2)(ii)(C) if the arrangement would satisfy the requirements of paragraph (a)(1)(ii) of this section if the ADR for each HCE were determined after the reductions described in paragraph (b)(2)(ii)(A) of this section.

(iii) *Apportionment of total amount of excess contributions among the HCEs.* The following procedures must be used in apportioning the total amount of excess contributions determined under paragraph (b)(2)(ii) of this section among the HCEs:

(A) *Calculate the dollar amount of excess contributions for each HCE.* The contributions of the HCE with the highest dollar amount of contributions taken into account under this section are reduced by the amount required to cause that HCE's contributions to equal the dollar amount of the contributions taken into account under this section for the HCE with the next highest dollar amount of contributions taken into account under this section. If a lesser apportionment to the HCE would enable the plan to apportion the total amount of excess contributions, only the lesser apportionment would apply.

(B) *Limit on amount apportioned to any individual.* For purposes of this paragraph (b)(2)(iii), the amount of contributions taken into account under this section with respect to an HCE who is an eligible employee in more than one plan of an employer is determined by taking into account all contributions otherwise taken into account with respect to such HCE under any plan of the employer during the plan year of the plan being tested as being made under the plan being tested. However, the amount of excess contributions apportioned for a plan year with respect to any HCE must not exceed the amount of contributions actually contributed to the plan for the HCE for the plan year. Thus, in the case of an HCE who is an eligible employee in more than one plan of the same employer to which elective contributions are made and whose ADR is calculated in accordance with paragraph (a)(3)(ii) of this section, the amount required to be distributed under this paragraph (b)(2)(iii) shall not exceed the contributions actually contributed to the plan and taken into account under this section for the plan year.

(C) *Apportionment to additional HCEs.* The procedure in paragraph (b)(2)(iii)(A) of this section must be repeated until the total amount of excess contributions determined under paragraph (b)(2)(ii) of this section has been apportioned.

(iv) *Income allocable to excess contributions*—(A) *General rule.* The income allocable to excess contributions is equal to the sum of the allocable gain or loss for the plan year and, to the extent the excess contributions are or will be credited with gain or loss for the gap period (*i.e.*, the period after the close of the plan year and prior to the distribution) if the total account were to be distributed, the allocable gain or loss during that period.

(B) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess contributions, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income to participant's accounts. See § 1.401(a)(4)–1(c)(8). A plan will not fail to use a reasonable method for computing the income allocable to excess contributions merely because the income allocable to excess contributions is determined on a date

that is no more than 7 days before the distribution.

(C) *Alternative method of allocating plan year income.* A plan may allocate income to excess contributions for the plan year by multiplying the income for the plan year allocable to the elective contributions and other amounts taken into account under this section (including contributions made for the plan year), by a fraction, the numerator of which is the excess contributions for the employee for the plan year, and the denominator of which is the sum of the—

(*1*) Account balance attributable to elective contributions and other contributions taken into account under this section as of the beginning of the plan year, and

(2) Any additional amount of such contributions made for the plan year.

(D) *Safe harbor method of allocating gap period income.* A plan may use the safe harbor method in this paragraph (b)(2)(iv)(D) to determine income on excess contributions for the gap period. Under this safe harbor method, income on excess contributions for the gap period is equal to 10% of the income allocable to excess contributions for the plan year that would be determined under paragraph (b)(2)(iv)(C) of this section, multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of calculating the number of calendar months that have elapsed under the safe harbor method, a corrective distribution that is made on or before the fifteenth day of a month is treated as made on the last day of the preceding month and a distribution made after the fifteenth day of a month is treated as made on the last day of the month.

(E) *Alternative method for allocating plan year and gap period income.* A plan may determine the allocable gain or loss for the aggregate of the plan year and the gap period by applying the alternative method provided by paragraph (b)(2)(iv)(C) of this section to this aggregate period. This is accomplished by substituting the income for the plan year and the gap period for the income for the plan year and by substituting the contributions taken into account under this section for the plan year and the gap period for the contributions taken into account under this section for the plan year in determining the fraction that is multiplied by that income.

(v) *Distribution.* Within 12 months after the close of the plan year in which the excess contribution arose, the plan must distribute to each HCE the excess contributions apportioned to such HCE under paragraph (b)(2)(iii) of this section and the allocable income. Except as otherwise provided in this paragraph (b)(2)(v) and paragraph (b)(4)(i) of this section, a distribution of excess contributions must be in addition to any other distributions made during the year and must be designated as a corrective distribution by the employer. In the event of a complete termination of the plan during the plan year in which an excess contribution arose, the corrective distribution must be made as soon as administratively feasible after the date of termination of the plan, but in no event later than 12 months after the date of termination. If the entire account balance of an HCE is distributed prior to when the plan makes a distribution of excess contributions in accordance with this paragraph (b)(2), the distribution is deemed to have been a corrective distribution of excess contributions (and income) to the extent that a corrective distribution would otherwise have been required.

(vi) *Tax treatment of corrective distributions*—(A) *General rule.* Except as provided in this paragraph (b)(2)(vi), a corrective distribution of excess contributions (and income) that is made within 2½ months after the end of the plan year for which the excess contributions were made is includible in the employee's gross income on the dates the elective contributions would have been received by the employee had the employee originally elected to receive the amounts in cash, treating the excess contributions that are being distributed as the first elective contributions for the plan year. A corrective distribution of excess contributions (and income) that is made more than 2½ months after the end of the plan year for which the contributions were made is includible in the employee's gross income in the employee's taxable year in which distributed. Regardless of when the corrective distribution is made, it is not subject to the early distribution tax of section 72(t). See also paragraph (b)(4) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months after the end of the plan year. See also § 1.402(c)–2, A–4 for restrictions on rolling over distributions that are excess contributions.

(B) *Rule for de minimis distributions.* If the total amount of excess contributions, determined under this paragraph (b)(2), and excess aggregate contributions determined under § 1.401(m)–2(b)(2) distributed to a recipient under a plan for any plan year is less than $100 (excluding income), a corrective distribution of excess contributions (and income) is includible in the gross income of the recipient in the taxable year of the recipient in which the corrective distribution is made.

(vii) *Other rules*—(A) *No employee or spousal consent required.* A corrective distribution of excess contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(B) *Treatment of corrective distributions as elective contributions.* Excess contributions are treated as employer contributions for purposes of sections 404 and 415 even if distributed from the plan.

(C) *No reduction of required minimum distribution.* A distribution of excess contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9). *See* § 1.401(a)(9)–5, A–9(b).

(D) *Partial distributions.* Any distribution of less than the entire amount of excess contributions (and allocable income) with respect to any HCE is treated as a pro rata distribution of excess contributions and allocable income.

(viii) *Examples.* The following examples illustrate the application of this paragraph (b)(2). For purposes of these examples, none of the plans provide for catch-up contributions under section 414(v). The examples are as follows:

Example 1. (i) Plan P, a calendar year profit-sharing plan that includes a cash or deferred arrangement, provides for distribution of excess contributions to HCEs to the extent necessary to satisfy the ADP test. For the 2006 plan year, Employee A, an HCE, has elective contributions of $12,000 and $200,000 in compensation, for an ADR of 6%, and Employee B, a second HCE, has elective contributions of $8,960 and compensation of $128,000, for an ADR of 7%. The ADP for the NHCEs is 3% for the 2006 plan year. Under the ADP test, the ADP of the two HCEs under the plan may not exceed 5% (*i.e.*, 2 percentage points more than the ADP of the NHCEs under the plan). The ADP for the 2 HCEs under the plan is 6.5%. Therefore, there must be a correction of excess contributions for the 2006 plan year.

(ii) The total amount of excess contributions for the HCEs is determined under paragraph (b)(2)(ii) of this section as follows: the elective contributions of Employee B (the HCE with the highest ADR) are reduced by $1,280 in order to reduce his ADR to 6% ($7,680/$128,000), which is the ADR of Employee A.

(iii) Because the ADP of the HCEs determined after the $1,280 reduction to Employee B still exceeds 5%, further reductions in elective contributions are necessary in order to reduce the ADP of the

HCEs to 5%. The elective contributions of Employee A and Employee B are each reduced by 1% of compensation ($2,000 and $1,280 respectively). Because the ADP of the HCEs determined after the reductions equals 5%, the plan would satisfy the requirements of (a)(1)(ii) of this section.

(iv) The total amount of excess contributions ($4,560 = $1,280+$2,000+$1,280) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of elective contributions. Therefore, Employee A is apportioned $3,040 (the amount required to cause Employee A's elective contributions to equal the next highest dollar amount of elective contributions).

(v) Because the total amount of excess contributions has not been apportioned, further apportionment is necessary. The balance ($1,520) of the total amount of excess contributions is apportioned equally among Employee A and Employee B ($760 to each).

(vi) Therefore, the cash or deferred arrangement will satisfy the requirements of paragraph (a)(1) of this section if, by the end of the 12 month period following the end of the 2006 plan year, Employee A receives a corrective distribution of excess contributions equal to $3,800 ($3,040 + $760) and allocable income and Employee B receives a corrective distribution of $760 and allocable income.

Example 2. (i) The facts are the same as in *Example 1,* except Employee A's ADR is based on $3,000 of elective contributions to this plan and $9,000 of elective contributions to another plan of the employer.

(ii) The total amount of excess contributions ($4,560 = $1,280+$2,000+$1,280) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of elective contributions. The amount of elective contributions for Employee A is $12,000. Therefore, Employee A is apportioned $3,040 (the amount required to cause Employee A's elective contributions to equal the next highest dollar amount of elective contributions). However, pursuant to paragraph (b)(2)(iii)(B) of this section, no more than the amount actually contributed to the plan may be apportioned to an HCE. Accordingly, no more than $3,000 may be apportioned to Employee A. Therefore, the remaining $1,560 must be apportioned to Employee B.

(iii) The cash or deferred arrangement will satisfy the requirements of paragraph (a)(1) of this section if, by the end of the 12 month period following the end of the 2006 plan year, Employee A receives a corrective distribution of excess contributions equal to $3,000 (total amount of elective contributions actually contributed to the plan for Employee A) and allocable income and Employee B receives a corrective distribution of $1,560 and allocable income.

Example 3. (i) The facts are the same as in *Example 1.* The plan allocates income on a daily basis. The corrective distributions are made in February 2007. The excess contribution that must be distributed to Employee A as a corrective distribution is $3,800. This amount must be increased (or decreased) to reflect gains (or losses) allocable to that amount during the 2006 plan year. The plan uses a reasonable method that satisfies paragraph (b)(2)(iv)(B) of this section to determine the gain during the 2006 plan year allocable to the $3,800 as $145. Therefore, as of the end of the 2006 plan year, the amount of corrective distribution that is required would be $3,945.

(ii) Because the plan allocates income on a daily basis, excess contributions are credited with gain or loss during the gap period. Therefore, the corrective distribution must include income allocable to $3,945 through the date of distribution. For the period from January 1 through the date of distribution (or if the plan provides 7 days before the date of distribution), the income allocable to $3,945 is $105. Therefore, the plan will satisfy the requirements of paragraph (a)(1) of this section if Employee A receives a corrective distribution of $4,050.

Example 4. (i) The facts are the same as in *Example 1.* The plan determines plan year income using the alternative method for calculating income provided in paragraph (b)(2)(iv)(C) of this section and using the portion of the participant's account attributable to elective contributions, including elective contributions made for the plan year. The plan uses the safe harbor method provided in paragraph (b)(2)(iv)(D) of this section for allocating gap period income. The corrective distribution is made during the last week of February 2007. At the beginning of the 2006 plan year, $100,000 of Employee A's plan account represents elective contributions plus attributable earnings. During the 2006 plan year, $10,000 in elective contributions were contributed to the plan for Employee A. The income allocable to Employee A's account attributable to elective contributions for the 2006 plan year is $8,000.

(ii) Therefore, the plan year income allocable to the $3,800 corrective distribution for Employee A is $266.65 ($8,000 multiplied by $3,800 divided by $110,000). Therefore, as of the end of the 2006 plan year, the amount of corrective distribution that is required is $4,066.65. This amount must be increased by the gap period income of $53.32 (10% multiplied by $266.65 (2006 plan year income attributable to the excess contribution) multiplied by 2 (number of calendar months since end of 2006 plan year). Therefore, the plan will satisfy the requirements of paragraph (a)(1) of this section if Employee A receives a corrective distribution of $4,119.97.

Example 5. (i) The facts are the same as in *Example 4,* except that the plan provides for quarterly valuations based on the account balance at the end of the quarter.

(ii) Because the plan's method for allocating income does not allocate any income to amounts distributed during the quarter, Employee A will not be credited with an allocation of income with respect to the amount distributed. Accordingly, Plan P need not plan adjust the distribution of excess contribution for income during the gap period and thus satisfies paragraph (a)(1) of this section if Employee A receives a corrective distribution of $4,066.65.

(3) *Recharacterization of excess contributions*—(i) *General rule.* Excess contributions are recharacterized in accordance with this paragraph (b)(3) only if the excess contributions that would have to be distributed under (b)(2) of this section if the plan was correcting through distribution of excess contributions are recharacterized as described in paragraph (b)(3)(ii) of this section, and all of the conditions set forth in paragraph (b)(3)(iii) of this section are satisfied.

(ii) *Treatment of recharacterized excess contributions.* Recharacterized excess contributions are includible in the employee's gross income as if such amounts were distributed under paragraph (b)(2) of this section. The recharacterized excess contributions are treated as employee contributions for purposes of section 72, sections 401(a)(4), 401(m), § 1.401(k)–1(d) and § 1.401(k)–2. This requirement is not treated as satisfied unless the payor or plan administrator reports the recharacterized excess contributions as employee contributions to the Internal Revenue Service and the employee by timely providing such Federal tax forms and accompanying instructions and timely taking such other action as is prescribed by the Commissioner in revenue rulings, notices and other guidance published in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter) as well as the applicable Federal tax forms and accompanying instructions.

(iii) *Additional rules*—(A) *Time of recharacterization.* Excess contributions may not be recharacterized under this paragraph (b)(3) after 2½ months after the close of the plan year to which the recharacterization relates. Recharacterization is deemed to have occurred on the date on which the last of those HCEs with excess contributions to be recharacterized is notified in accordance with paragraph (b)(3)(ii) of this section.

(B) *Employee contributions must be permitted under plan.* The amount of recharacterized excess contributions, in combination with the employee contributions actually made by the HCE, may not exceed the maximum amount of employee contributions (determined without regard to the ACP test of section 401(m)(2)) permitted under the provisions of the plan as in effect on the first day of the plan year.

(C) *Treatment of recharacterized excess contributions.* Recharacterized excess contributions continue to be treated as employer contributions for all purposes under the Internal Revenue Code (other than those specified in paragraph (b)(3)(ii) of this section),

including section 401(a) and sections 404, 409, 411, 412, 415, 416, and 417. Thus, for example, recharacterized excess contributions remain subject to the requirements of § 1.401(k)–1(c); must be deducted under section 404; and are treated as employer contributions described in section 415(c)(2)(A).

(4) *Rules applicable to all corrections*—(i) *Coordination with distribution of excess deferrals*—(A) *Treatment of excess deferrals that reduce excess contributions.* The amount of excess contributions (and allocable income) to be distributed under paragraph (b)(2) of this section or the amount of excess contributions recharacterized under paragraph (b)(3) of this section with respect to an employee for a plan year, is reduced by any amounts previously distributed to the employee from the plan to correct excess deferrals for the employee's taxable year ending with or within the plan year in accordance with section 402(g)(2).

(B) *Treatment of excess contributions that reduce excess deferrals.* Under § 1.402(g)–1(e), the amount required to be distributed to correct an excess deferral to an employee for a taxable year is reduced by any excess contributions (and allocable income) previously distributed or excess contributions recharacterized with respect to the employee for the plan year beginning with or within the taxable year. The amount of excess contributions includible in the gross income of the employee, and the amount of excess contributions reported by the payer or plan administrator as includible in the gross income of the employee, does not include the amount of any reduction under § 1.402(g)–1(e)(6).

(ii) *Forfeiture of match on distributed excess contributions.* A matching contribution is taken into account under section 401(a)(4) even if the match is with respect to an elective contribution that is distributed or recharacterized under this paragraph (b). This requires that, after correction of excess contributions, each level of matching contributions be currently and effectively available to a group of employees that satisfies section 410(b). *See* § 1.401(a)(4)–4(e)(3)(iii)(G). Thus, a plan that provides the same rate of matching contributions to all employees will not meet the requirements of section 401(a)(4) if elective contributions are distributed under this paragraph (b) to HCEs to the extent needed to meet the requirements of section 401(k)(3), while matching contributions attributable to those elective contributions remain allocated to the HCEs' accounts. Under section 411(a)(3)(G) and § 1.411(a)–4(b)(7), a plan may forfeit matching contributions attributable to excess contributions, excess aggregate contributions or excess deferrals to avoid a violation of section 401(a)(4). *See also* § 1.401(a)(4)–11(g)(3)(vii)(B) regarding the use of additional allocations to the accounts of NHCEs for the purpose of correcting a discriminatory rate of matching contributions.

(iii) *Permitted forfeiture of QMAC.* Pursuant to section 401(k)(8)(E), a qualified matching contribution is not treated as forfeitable under § 1.401(k)–1(c) merely because under the plan it is forfeited in accordance with paragraph (b)(4)(ii) of this section.

(iv) *No requirement for recalculation.* If excess contributions are distributed or recharacterized in accordance with paragraphs (b)(2) and (3) of this section, the cash or deferred arrangement is treated as meeting the nondiscrimination test of section 401(k)(3) regardless of whether the ADP for the HCEs, if recalculated after the distributions or recharacterizations, would satisfy section 401(k)(3).

(v) *Treatment of excess contributions that are catch-up contributions.* A cash or deferred arrangement does not fail to meet the requirements of section 401(k)(3) and paragraph (a)(1) of this section merely because excess contributions that are catch-up contributions because they exceed the ADP limit, as described in § 1.414(v)–1(b)(1)(iii), are not corrected in accordance with this paragraph (b).

(5) *Failure to timely correct*—(i) *Failure to correct within 2½ months after end of plan year.* If a plan does not correct excess contributions within 2½ months after the close of the plan year for which the excess contributions are made, the employer will be liable for a 10% excise tax on the amount of the excess contributions. *See* section 4979 and § 54.4979–1 of this chapter. Qualified nonelective contributions and qualified matching contributions properly taken into account under paragraph (a)(6) of this section for a plan year may enable a plan to avoid having excess contributions, even if the contributions are made after the close of the 2½ month period.

(ii) *Failure to correct within 12 months after end of plan year.* If excess contributions are not corrected within 12 months after the close of the plan year for which they were made, the cash or deferred arrangement will fail to satisfy the requirements of section 401(k)(3) for the plan year for which the excess contributions are made and all subsequent plan years during which the excess contributions remain in the trust.

(c) *Additional rules for prior year testing method*—(1) *Rules for change in testing method*—(i) *General rule.* A plan is permitted to change from the prior year testing method to the current year testing method for any plan year. A plan is permitted to change from the current year testing method to the prior year testing method only in situations described in paragraph (c)(1)(ii) of this section. For purposes of this paragraph (c)(1), a plan that uses the safe harbor method described in § 1.401(k)–3 or a SIMPLE 401(k) plan is treated as using the current year testing method for that plan year.

(ii) *Situations permitting a change to the prior year testing method.* The situations described in this paragraph (c)(1)(ii) are:

(A) The plan is not the result of the aggregation of two or more plans, and the current year testing method was used under the plan for each of the 5 plan years preceding the plan year of the change (or if lesser, the number of plan years the plan has been in existence, including years in which the plan was a portion of another plan).

(B) The plan is the result of the aggregation of two or more plans, and for each of the plans that are being aggregated (the aggregating plans), the current year testing method was used for each of the 5 plan years preceding the plan year of the change (or if lesser, the number of plan years since that aggregating plan has been in existence, including years in which the aggregating plan was a portion of another plan).

(C) A transaction described in section 410(b)(6)(C)(i) and § 1.410(b)–2(f) occurs and—

(*1*) As a result of the transaction, the employer maintains both a plan using the prior year testing method and a plan using the current year testing method; and

(*2*) The change from the current year testing method to the prior year testing method occurs within the transition period described in section 410(b)(6)(C)(ii).

(2) *Calculation of ADP under the prior year testing method for the first plan year*—(i) *Plans that are not successor plans.* If, for the first plan year of any plan (other than a successor plan), the plan uses the prior year testing method, the plan is permitted to use either that first plan year as the applicable year for determining the ADP for eligible NHCEs, or use 3% as the ADP for eligible NHCEs, for applying the ADP test for that first plan year. A plan (other than a successor plan) that uses the prior year testing method but has

elected for its first plan year to use that year as the applicable year is not treated as changing its testing method in the second plan year and is not subject to the limitations on double counting on QNECs under paragraph (a)(6)(vi) of this section for the second plan year.

(ii) *First plan year defined.* For purposes of this paragraph (c)(2), the first plan year of any plan is the first year in which the plan provides for elective contributions. Thus, the rules of this paragraph (c)(2) do not apply to a plan (within the meaning of § 1.410(b)–7(b)) for a plan year if for such plan year the plan is aggregated under § 1.401(k)–1(b)(4) with any other plan that provided for elective contributions in the prior year.

(iii) *Successor plans.* A plan is a successor plan if 50% or more of the eligible employees for the first plan year were eligible employees under a qualified cash or deferred arrangement maintained by the employer in the prior year. If a plan that is a successor plan uses the prior year testing method for its first plan year, the ADP for the group of NHCEs for the applicable year must be determined under paragraph (c)(4) of this section.

(3) *Plans using different testing methods for the ADP and ACP test.* Except as otherwise provided in this paragraph (c)(3), a plan may use the current year testing method or prior year testing method for the ADP test for a plan year without regard to whether the current year testing method or prior year testing method is used for the ACP test for that year. For example, a plan may use the prior year testing method for the ADP test and the current year testing method for its ACP test for the plan year. However, plans that use different testing methods under this paragraph (c)(3) cannot use—

(i) The recharacterization method of paragraph (b)(3) of this section to correct excess contributions for a plan year;

(ii) The rules of § 1.401(m)–2(a)(6)(ii) to take elective contributions into account under the ACP test (rather than the ADP test); or

(iii) The rules of paragraph (a)(6)(v) of this section to take qualified matching contributions into account under the ADP test (rather than the ACP test).

(4) *Rules for plan coverage changes*—(i) *In general.* A plan that uses the prior year testing method and experiences a plan coverage change during a plan year satisfies the requirements of this section for that year only if the plan provides that the ADP for the NHCEs for the plan year is the weighted average of the ADPs for the prior year subgroups.

(ii) *Optional rule for minor plan coverage changes.* If a plan coverage change occurs and 90% or more of the total number of the NHCEs from all prior year subgroups are from a single prior year subgroup, then, in lieu of using the weighted averages described in paragraph (c)(4)(i) of this section, the plan may provide that the ADP for the group of eligible NHCEs for the prior year under the plan is the ADP of the NHCEs for the prior year of the plan under which that single prior year subgroup was eligible.

(iii) *Definitions.* The following definitions apply for purposes of this paragraph (c)(4):

(A) *Plan coverage change.* The term *plan coverage change* means a change in the group or groups of eligible employees under a plan on account of—

(*1*) The establishment or amendment of a plan;

(*2*) A plan merger or spinoff under section 414(l);

(*3*) A change in the way plans (within the meaning of § 1.410(b)–7(b)) are combined or separated for purposes of § 1.401(k)–1(b)(4) (*e.g.*, permissively aggregating plans not previously aggregated under § 1.410(b)–7(d), or ceasing to permissively aggregate plans under § 1.410(b)–7(d));

(*4*) A reclassification of a substantial group of employees that has the same effect as amending the plan (*e.g.*, a transfer of a substantial group of employees from one division to another division); or

(*5*) A combination of any of paragraphs (c)(4)(iii)(A)(*1*) through (*4*) of this section.

(B) *Prior year subgroup.* The term *prior year subgroup* means all NHCEs for the prior plan year who, in the prior year, were eligible employees under a specific plan maintained by the employer that included a qualified cash or deferred arrangement and who would have been eligible employees in the prior year under the plan being tested if the plan coverage change had first been effective as of the first day of the prior plan year instead of first being effective during the plan year. The determination of whether an NHCE is a member of a prior year subgroup is made without regard to whether the NHCE terminated employment during the prior year.

(C) *Weighted average of the ADPs for the prior year subgroups.* The term *weighted average of the ADPs for the prior year subgroups* means the sum, for all prior year subgroups, of the adjusted ADPs for the plan year. The term *adjusted ADP with respect to a prior year subgroup* means the ADP for the prior plan year of the specific plan under which the members of the prior year subgroup were eligible employees on the first day of the prior plan year, multiplied by a fraction, the numerator of which is the number of NHCEs in the prior year subgroup and denominator of which is the total number of NHCEs in all prior year subgroups.

(iv) *Examples.* The following examples illustrate the application of this paragraph (c)(4):

Example 1. (i) Employer B maintains two calendar year plans, Plan O and Plan P, each of which includes a cash or deferred arrangement. The plans were not permissively aggregated under § 1.410(b)–7(d) for the 2005 plan year. Both plans use the prior year testing method. Plan O had 300 eligible employees who were NHCEs for the 2005 plan year, and their ADP for that year was 6%. Sixty of the eligible employees who were NHCEs for the 2005 plan year under Plan O, terminated their employment during that year. Plan P had 100 eligible employees who were NHCEs for 2005, and the ADP for those NHCEs for that plan was 4%. Plan O and Plan P are permissively aggregated under § 1.410(b)–7(d) for the 2006 plan year.

(ii) The permissive aggregation of Plan O and Plan P for the 2006 plan year under § 1.410(b)–7(d) is a plan coverage change that results in treating the plans as one plan (Plan OP) for purposes of § 1.401(k)–1(b)(4). Therefore, the prior year ADP for the NHCEs under Plan OP for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups: the Plan O prior year subgroup and the Plan P prior year subgroup.

(iii) The Plan O prior year subgroup consists of the 300 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and who would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated for that plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P and would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated for that plan year.

(iv) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP for the Plan O prior year subgroup and the adjusted ADP for the Plan P prior year subgroup. The adjusted ADP for the Plan O prior year subgroup is 4.5%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year) × 300/400 (the number of NHCEs in the Plan O prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the Plan P prior year subgroup is 1%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year) × 100/400 (the number of NHCEs in the Plan P prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan OP for the 2006 plan year is 5.5% (the sum of adjusted ADPs for the prior year subgroups, 4.5% plus 1%).

(v) As provided in paragraph (c)(4)(iii)(B) of this section, the determination of whether an NHCE is a member of a prior year subgroup is made without regard to whether that NHCE terminated employment during

the prior year. Thus, the prior ADP for the NHCEs under Plan OP for the 2006 plan year is unaffected by the termination of the 60 NHCEs covered by Plan O during the 2005 plan year.

Example 2. (i) The facts are the same as *Example 1,* except that the 60 employees who terminated employment during the 2005 plan are instead spun-off to another plan.

(ii) The permissive aggregation of Plan O and Plan P for the 2006 plan year under § 1.410(b)–7(d) is a plan coverage change that results in treating the plans as one plan (Plan OP) for purposes of § 1.401(k)–1(b)(4) and the spin-off of the 60 employees is a plan coverage change. Therefore, the prior year ADP for the NHCEs under Plan OP for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups: the Plan O prior year subgroup and the Plan P prior year subgroup.

(iii) For purposes of determining the prior year subgroups, the employees who would have been eligible employees in the prior year under the plan being tested are determined as if both plan coverage changes had first been effective as of the first day of the prior plan year. The Plan O prior year subgroup consists of the 240 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and would have been eligible under Plan OP for the 2005 plan year if the spin-off had occurred at the beginning of the 2005 plan year and Plan O and Plan P had been permissively aggregated under § 1.410(b)–7(d) for that plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P and would have been eligible under Plan OP for the 2005 plan year if Plan O and Plan P had been permissively aggregated under § 1.410(b)–7(d) for that plan year.

(iv) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP with respect to the prior year subgroup consisting of eligible NHCEs from Plan O and the adjusted ADP with respect to the prior year subgroup consisting of eligible NHCEs from Plan P. The adjusted ADP for the prior year subgroup consisting of eligible NHCEs under Plan O is 4.23%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year) × 240/340 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the prior year subgroup consisting of the eligible NHCEs from Plan P is 1.18%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year) × 100/340 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan OP for the 2006 plan year is 5.41% (the sum of adjusted ADPs for the prior year subgroups, 4.23% plus 1.18%).

Example 3. (i) The facts are the same as in *Example 1,* except that instead of Plan O and Plan P being permissively aggregated for the 2006 plan year, 200 of the employees eligible under Plan O were spun-off from Plan O and merged into Plan P.

(ii) The spin-off from Plan O and merger to Plan P for the 2006 plan year are plan coverage changes for Plan P. Therefore, the prior year ADP for the NHCEs under Plan P for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups under Plan P. There are 2 subgroups under Plan P for the 2006 plan year. The Plan O prior year subgroup consists of the 200 employees who, in the 2005 plan year, were eligible NHCEs under Plan O and who would have been eligible under Plan P for the 2005 plan year if the spin-off and merger had occurred on the first day of the 2005 plan year. The Plan P prior year subgroup consists of the 100 employees who, in the 2005 plan year, were eligible NHCEs under Plan P for the 2005 plan year.

(iii) The weighted average of the ADPs for the prior year subgroups is the sum of the adjusted ADP for the Plan O prior year subgroup and the adjusted ADP for the Plan P prior year subgroup. The adjusted ADP for the Plan O prior year subgroup is 4.0%, calculated as follows: 6% (the ADP for the NHCEs under Plan O for the 2005 plan year) × 200/300 (the number of NHCEs in the Plan O prior year subgroup divided by the total number of NHCEs in all prior year subgroups). The adjusted ADP for the Plan P prior year subgroup is 1.33%, calculated as follows: 4% (the ADP for the NHCEs under Plan P for the 2005 plan year) × 100/300 (the number of NHCEs in the Plan P prior year subgroup divided by the total number of NHCEs in all prior year subgroups). Thus, the prior year ADP for NHCEs under Plan P for the 2006 plan year is 5.33% (the sum of adjusted ADPs for the 2 prior year subgroups, 4.0% plus 1.33%).

(iv) The spin-off from Plan O for the 2006 plan year is a plan coverage change for Plan O. Therefore, the prior year ADP for the NHCEs under Plan O for the 2006 plan year is the weighted average of the ADPs for the prior year subgroups under Plan O. In this case, there is only one prior year subgroup under Plan O, the employees who were NHCEs of Employer B for the 2005 plan year and who were eligible for the 2005 plan year under Plan O. Because there is only one prior year subgroup under Plan O, the weighted average of the ADPs for the prior year subgroup under Plan O is equal to the NHCE ADP for the prior year (2005 plan year) under Plan O, or 6%.

Example 4. (i) Employer C maintains a calendar year plan, Plan Q, which includes a cash or deferred arrangement that uses the prior year testing method. Plan Q covers employees of Division A and Division B. In 2005, Plan Q had 500 eligible employees who were NHCEs, and the ADP for those NHCEs for 2005 was 2%. Effective January 1, 2006, Employer C amends the eligibility provisions under Plan Q to exclude employees of Division B effective January 1, 2006. In addition, effective on that same date, Employer C establishes a new calendar year plan, Plan R, which includes a cash or deferred arrangement that uses the prior year testing method. The only eligible employees under Plan R are the 100 employees of Division B who were eligible employees under Plan Q.

(ii) Plan R is a successor plan, within the meaning of paragraph (c)(2)(iii) of this section (because all of the employees were eligible employees under Plan Q in the prior year). Therefore, Plan R cannot use the first plan year rule set forth in paragraph (c)(2)(i) of this section.

(iii) The amendment to the eligibility provisions of Plan Q and the establishment of Plan R are plan coverage changes within the meaning of paragraph (c)(4)(iii)(A) of this section for Plan Q and Plan R. Accordingly, each plan must determine the NHCE ADP for the 2006 plan year under the rules set forth in paragraph (c)(4) of this section.

(iv) The prior year ADP for NHCEs under Plan Q is the weighted average of the ADPs for the prior year subgroups. Plan Q has only one prior year subgroup (because the only NHCEs who would have been eligible employees under Plan Q for the 2005 plan year if the amendment to the Plan Q eligibility provisions had occurred as of the first day of that plan year were eligible employees under Plan Q). Therefore, for purposes of the 2006 plan year under Plan Q, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as if the plan amendment had not occurred.

(v) Similarly, Plan R has only one prior year subgroup (because the only NHCEs who would have been eligible employees under Plan R for the 2005 plan year if the plan were established as of the first day of that plan year were eligible employees under Plan Q). Therefore, for purposes of the 2006 testing year under Plan R, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as that of Plan Q.

Example 5. (i) The facts are the same as in *Example 4,* except that the provisions of Plan R extend eligibility to 50 hourly employees who previously were not eligible employees under any qualified cash or deferred arrangement maintained by Employer C.

(ii) Plan R is a successor plan (because 100 of Plan R's 150 eligible employees were eligible employees under another qualified cash or deferred arrangement maintained by Employer C in the prior year). Therefore, Plan R cannot use the first plan year rule set forth in paragraph (c)(2)(i) of this section.

(iii) The establishment of Plan R is a plan coverage change that affects Plan R. Because the 50 hourly employees were not eligible employees under any qualified cash or deferred arrangement of Employer C for the prior plan year, they do not comprise a prior year subgroup. Accordingly, Plan R still has only one prior year subgroup. Therefore, for purposes of the 2006 testing year under Plan R, the ADP for NHCEs for the prior year is the weighted average of the ADPs for the prior year subgroups, or 2%, the same as that of Plan Q.

§ 1.401(k)–3 Safe harbor requirements.

(a) *ADP test safe harbor.* A cash or deferred arrangement satisfies the ADP safe harbor provision of section 401(k)(12) for a plan year if the arrangement satisfies the safe harbor contribution requirement of paragraph (b) or (c) of this section for the plan year, the notice requirement of paragraph (d) of this section, the plan

year requirements of paragraph (e) of this section, and the additional rules of paragraphs (f), (g) and (h) of this section, as applicable. Pursuant to section 401(k)(12)(E)(ii), the safe harbor contribution requirement of paragraph (b) or (c) of this section must be satisfied without regard to section 401(l). The contributions made under paragraphs (b) and (c) of this section are referred to as safe harbor nonelective contributions and safe harbor matching contributions, respectively.

(b) *Safe harbor nonelective contribution requirement*—(1) *General rule.* The safe harbor nonelective contribution requirement of this paragraph is satisfied if, under the terms of the plan, the employer is required to make a qualified nonelective contribution on behalf of each eligible NHCE equal to at least 3% of the employee's safe harbor compensation.

(2) *Safe harbor compensation defined.* For purposes of this section, safe harbor compensation means compensation as defined in § 1.401(k)–6 (which incorporates the definition of compensation in § 1.414(s)–1); provided, however, that the rule in the last sentence of § 1.414(s)–1(d)(2)(iii) (which generally permits a definition of compensation to exclude all compensation in excess of a specified dollar amount) does not apply in determining the safe harbor compensation of NHCEs. Thus, for example, the plan may limit the period used to determine safe harbor compensation to the eligible employee's period of participation.

(c) *Safe harbor matching contribution requirement*—(1) *In general.* The safe harbor matching contribution requirement of this paragraph (c) is satisfied if, under the plan, qualified matching contributions are made on behalf of each eligible NHCE in an amount determined under the basic matching formula of section 401(k)(12)(B)(i)(I), as described in paragraph (c)(2) of this section, or under an enhanced matching formula of section 401(k)(12)(B)(i)(II), as described in paragraph (c)(3) of this section.

(2) *Basic matching formula.* Under the basic matching formula, each eligible NHCE receives qualified matching contributions in an amount equal to the sum of—

(i) 100% of the amount of the employee's elective contributions that do not exceed 3% of the employee's safe harbor compensation; and

(ii) 50% of the amount of the employee's elective contributions that exceed 3% of the employee's safe harbor compensation but that do not exceed 5% of the employee's safe harbor compensation.

(3) *Enhanced matching formula.* Under an enhanced matching formula, each eligible NHCE receives a matching contribution under a formula that, at any rate of elective contributions by the employee, provides an aggregate amount of qualified matching contributions at least equal to the aggregate amount of qualified matching contributions that would have been provided under the basic matching formula of paragraph (c)(2) of this section. In addition, under an enhanced matching formula, the ratio of matching contributions on behalf of an employee under the plan for a plan year to the employee's elective contributions may not increase as the amount of an employee's elective contributions increases.

(4) *Limitation on HCE matching contributions.* The safe harbor matching contribution requirement of this paragraph (c) is not satisfied if the ratio of matching contributions made on account of an HCE's elective contributions under the cash or deferred arrangement for a plan year to those elective contributions is greater than the ratio of matching contributions to elective contributions that would apply with respect to any eligible NHCE with elective contributions at the same percentage of safe harbor compensation.

(5) *Use of safe harbor match not precluded by certain plan provisions*—(i) *Safe harbor matching contributions on employee contributions.* The safe harbor matching contribution requirement of this paragraph (c) will not fail to be satisfied merely because safe harbor matching contributions are made on both elective contributions and employee contributions if safe harbor matching contributions are made with respect to the sum of elective contributions and employee contributions on the same terms as safe harbor matching contributions are made with respect to elective contributions. Alternatively, the safe harbor matching contribution requirement of this paragraph (c) will not fail to be satisfied merely because safe harbor matching contributions are made on both elective contributions and employee contributions if safe harbor matching contributions on elective contributions are not affected by the amount of employee contributions.

(ii) *Periodic matching contributions.* The safe harbor matching contribution requirement of this paragraph (c) will not fail to be satisfied merely because the plan provides that safe harbor matching contributions will be made separately with respect to each payroll period (or with respect to all payroll periods ending with or within each month or quarter of a plan year) taken into account under the plan for the plan year, provided that safe harbor matching contributions with respect to any elective contributions made during a plan year quarter are contributed to the plan by the last day of the immediately following plan year quarter.

(6) *Permissible restrictions on elective contributions by NHCEs*—(i) *General rule.* The safe harbor matching contribution requirement of this paragraph (c) is not satisfied if elective contributions by NHCEs are restricted, unless the restrictions are permitted by this paragraph (c)(6).

(ii) *Restrictions on election periods.* A plan may limit the frequency and duration of periods in which eligible employees may make or change cash or deferred elections under a plan. However, an employee must have a reasonable opportunity (including a reasonable period after receipt of the notice described in paragraph (d) of this section) to make or change a cash or deferred election for the plan year. For purposes of this paragraph (c)(6)(ii), a 30-day period is deemed to be a reasonable period to make or change a cash or deferred election.

(iii) *Restrictions on amount of elective contributions.* A plan is permitted to limit the amount of elective contributions that may be made by an eligible employee under a plan, provided that each NHCE who is an eligible employee is permitted (unless the employee is restricted under paragraph (c)(6)(v) of this section) to make elective contributions in an amount that is at least sufficient to receive the maximum amount of matching contributions available under the plan for the plan year, and the employee is permitted to elect any lesser amount of elective contributions. However, a plan may require eligible employees to make cash or deferred elections in whole percentages of compensation or whole dollar amounts.

(iv) *Restrictions on types of compensation that may be deferred.* A plan may limit the types of compensation that may be deferred by an eligible employee under a plan, provided that each eligible NHCE is permitted to make elective contributions under a definition of compensation that would be a reasonable definition of compensation within the meaning of § 1.414(s)–1(d)(2). Thus, the definition of compensation from which elective contributions may be made is not required to satisfy the nondiscrimination requirement of § 1.414(s)–1(d)(3).

(v) *Restrictions due to limitations under the Internal Revenue Code.* A plan may limit the amount of elective contributions made by an eligible employee under a plan—

(A) Because of the limitations of section 402(g) or 415; or

(B) Because, on account of a hardship distribution, an employee's ability to make elective contributions has been suspended for 6 months in accordance with § 1.401(k)–1(d)(3)(iv)(E).

(7) *Examples.* The following examples illustrate the safe harbor contribution requirement of this paragraph (c):

Example 1. (i) Beginning January 1, 2006, Employer A maintains Plan L covering employees in Divisions D and E, each of which includes HCEs and NHCEs. Plan L contains a cash or deferred arrangement and provides qualified matching contributions equal to 100% of each eligible employee's elective contributions up to 3% of compensation and 50% of the next 2% of compensation. For purposes of the matching contribution formula, safe harbor compensation is defined as all compensation within the meaning of section 415(c)(3) (a definition that satisfies section 414(s)). Also, each employee is permitted to make elective contributions from all safe harbor compensation within the meaning of section 415(c)(3) and may change a cash or deferred election at any time. Plan L limits the amount of an employee's elective contributions for purposes of section 402(g) and section 415, and, in the case of a hardship distribution, suspends an employee's ability to make elective contributions for 6 months in accordance with § 1.401(k)–1(d)(3)(iv)(E). All contributions under Plan L are nonforfeitable and are subject to the withdrawal restrictions of section 401(k)(2)(B). Plan L provides for no other contributions and Employer A maintains no other plans. Plan L is maintained on a calendar-year basis, and all contributions for a plan year are made within 12 months after the end of the plan year.

(ii) Based on these facts, matching contributions under Plan L are safe harbor matching contributions because they are qualified matching contributions equal to the basic matching formula. Accordingly, Plan L satisfies the safe harbor contribution requirement of this paragraph (c).

Example 2. (i) The facts are the same as in *Example 1,* except that instead of providing a basic matching contribution, Plan L provides a qualified matching contribution equal to 100% of each eligible employee's elective contributions up to 4% of safe harbor compensation.

(ii) Plan L's formula is an enhanced matching formula because each eligible NHCE receives safe harbor matching contributions at a rate that, at any rate of elective contributions, provides an aggregate amount of qualified matching contributions at least equal to the aggregate amount of qualified matching contributions that would have been received under the basic safe harbor matching formula, and the rate of matching contributions does not increase as the rate of an employee's elective contributions increases. Accordingly, Plan L satisfies the safe harbor contribution requirement of this paragraph (c).

Example 3. (i) The facts are the same as in *Example 2,* except that instead of permitting each employee to make elective contributions from all compensation within the meaning of section 415(c)(3), each employee's elective contributions under Plan L are limited to 15% of the employee's basic compensation. *Basic compensation* is defined under Plan L as compensation within the meaning of section 415(c)(3), but excluding overtime pay.

(ii) The definition of basic compensation under Plan L is a reasonable definition of compensation within the meaning of § 1.414(s)–1(d)(2).

(iii) Plan L will not fail to satisfy the safe harbor contribution requirement of this paragraph (c) merely because Plan L limits the amount of elective contributions and the types of compensation that may be deferred by eligible employees, provided that each eligible NHCE may make elective contributions equal to at least 4% of the employee's safe harbor compensation.

Example 4. (i) The facts are the same as in *Example 1,* except that Plan L provides that only employees employed on the last day of the plan year will receive a safe harbor matching contribution.

(ii) Even if the plan that provides for employee contributions and matching contributions satisfies the minimum coverage requirements of section 410(b)(1) taking into account this last-day requirement, Plan L would not satisfy the safe harbor contribution requirement of this paragraph (c) because safe harbor matching contributions are not made on behalf of all eligible NHCEs who make elective contributions.

(iii) The result would be the same if, instead of providing safe harbor matching contributions, Plan L provides for a 3% safe harbor nonelective contribution that is restricted to eligible employees under the cash or deferred arrangement who are employed on the last day of the plan year.

Example 5. (i) The facts are the same as in *Example 1,* except that instead of providing qualified matching contributions under the basic matching formula to employees in both Divisions D and E, employees in Division E are provided qualified matching contributions under the basic matching formula, while safe harbor matching contributions continue to be provided to employees in Division D under the enhanced matching formula described in *Example 2.*

(ii) Even if Plan L satisfies § 1.401(a)(4)–4 with respect to each rate of matching contributions available to employees under the plan, the plan would fail to satisfy the safe harbor contribution requirement of this paragraph (c) because the rate of matching contributions with respect to HCEs in Division D at a rate of elective contributions between 3% and 5% would be greater than that with respect to NHCEs in Division E at the same rate of elective contributions. For example, an HCE in Division D who would have a 4% rate of elective contributions would have a rate of matching contributions of 100% while an NHCE in Division E who would have the same rate of elective contributions would have a lower rate of matching contributions.

(d) *Notice requirement*—(1) *General rule.* The notice requirement of this paragraph (d) is satisfied for a plan year if each eligible employee is given notice of the employee's rights and obligations under the plan and the notice satisfies the content requirement of paragraph (d)(2) of this section and the timing requirement of paragraph (d)(3) of this section. The notice must be in writing or in such other form as may be approved by the Commissioner.

(2) *Content requirement*—(i) *General rule.* The content requirement of this paragraph (d)(2) is satisfied if the notice is—

(A) Sufficiently accurate and comprehensive to inform the employee of the employee's rights and obligations under the plan; and

(B) Written in a manner calculated to be understood by the average employee eligible to participate in the plan.

(ii) *Minimum content requirement.* Subject to the requirements of paragraph (d)(2)(iii) of this section, a notice is not considered sufficiently accurate and comprehensive unless the notice accurately describes—

(A) The safe harbor matching contribution or safe harbor nonelective contribution formula used under the plan (including a description of the levels of safe harbor matching contributions, if any, available under the plan);

(B) Any other contributions under the plan or matching contributions to another plan on account of elective contributions or employee contributions under the plan (including the potential for discretionary matching contributions) and the conditions under which such contributions are made;

(C) The plan to which safe harbor contributions will be made (if different than the plan containing the cash or deferred arrangement);

(D) The type and amount of compensation that may be deferred under the plan;

(E) How to make cash or deferred elections, including any administrative requirements that apply to such elections;

(F) The periods available under the plan for making cash or deferred elections;

(G) Withdrawal and vesting provisions applicable to contributions under the plan; and

(H) Information that makes it easy to obtain additional information about the plan (including an additional copy of the summary plan description) such as telephone numbers, addresses and, if applicable, electronic addresses, of

individuals or offices from whom employees can obtain such plan information.

(iii) *References to SPD.* A plan will not fail to satisfy the content requirements of this paragraph (d)(2) merely because, in the case of information described in paragraph (d)(2)(ii)(B) of this section (relating to any other contributions under the plan), paragraph (d)(2)(ii)(C) of this section (relating to the plan to which safe harbor contributions will be made) or paragraph (d)(2)(ii)(D) of this section (relating to the type and amount of compensation that may be deferred under the plan), the notice cross-references the relevant portions of a summary plan description that provides the same information that would be provided in accordance with such paragraphs and that has been provided (or is concurrently provided) to employees.

(3) *Timing requirement*—(i) *General rule.* The timing requirement of this paragraph (d)(3) is satisfied if the notice is provided within a reasonable period before the beginning of the plan year (or, in the year an employee becomes eligible, within a reasonable period before the employee becomes eligible). The determination of whether a notice satisfies the timing requirement of this paragraph (d)(3) is based on all of the relevant facts and circumstances.

(ii) *Deemed satisfaction of timing requirement.* The timing requirement of this paragraph (d)(3) is deemed to be satisfied if at least 30 days (and no more than 90 days) before the beginning of each plan year, the notice is given to each eligible employee for the plan year. In the case of an employee who does not receive the notice within the period described in the previous sentence because the employee becomes eligible after the 90th day before the beginning of the plan year, the timing requirement is deemed to be satisfied if the notice is provided no more than 90 days before the employee becomes eligible (and no later than the date the employee becomes eligible). Thus, for example, the preceding sentence would apply in the case of any employee eligible for the first plan year under a newly established plan that provides for elective contributions, or would apply in the case of the first plan year in which an employee becomes eligible under an existing plan that provides for elective contributions.

(e) *Plan year requirement*—(1) *General rule.* Except as provided in this paragraph (e) or in paragraph (f) of this section, a plan will fail to satisfy the requirements of section 401(k)(12) and this section unless plan provisions that satisfy the rules of this section are adopted before the first day of the plan year and remain in effect for an entire 12-month plan year. In addition, except as provided in paragraph (g) of this section, a plan which includes provisions that satisfy the rules of this section will not satisfy the requirements of § 1.401(k)–1(b) if it is amended to change such provisions for that plan year. Moreover, if, as described under paragraph (h)(4) of this section, safe harbor matching or nonelective contributions will be made to another plan for a plan year, provisions under that other plan specifying that the safe harbor contributions will be made and providing that the contributions will be QNECs or QMACs must also be adopted before the first day of that plan year.

(2) *Initial plan year.* A newly established plan (other than a successor plan within the meaning of § 1.401(k)–2(c)(2)(iii)) will not be treated as violating the requirements of this paragraph (e) merely because the plan year is less than 12 months, provided that the plan year is at least 3 months long (or, in the case of a newly established employer that establishes the plan as soon as administratively feasible after the employer comes into existence, a shorter period). Similarly, a cash or deferred arrangement will not fail to satisfy the requirement of this paragraph (e) if it is added to an existing profit sharing, stock bonus, or pre-ERISA money purchase pension plan for the first time during that year provided that—

(i) The plan is not a successor plan; and

(ii) The cash or deferred arrangement is made effective no later than 3 months prior to the end of the plan year.

(3) *Change of plan year.* A plan that has a short plan year as a result of changing its plan year will not fail to satisfy the requirements of paragraph (e)(1) of this section merely because the plan year has less than 12 months, provided that—

(i) The plan satisfied the requirements of this section for the immediately preceding plan year; and

(ii) The plan satisfies the requirements of this section (determined without regard to paragraph (g) of this section) for the immediately following plan year (or for the immediately following 12 months if the immediately following plan year is less than 12 months).

(4) *Final plan year.* A plan that terminates during a plan year will not fail to satisfy the requirements of paragraph (e)(1) of this section merely because the final plan year is less than 12 months, provided that the plan satisfies the requirement of this section through the date of termination and either—

(i) The plan would satisfy the requirements of paragraph (g) of this section, treating the termination of the plan as a reduction or suspension of safe harbor matching contributions, other than the requirement that employees have a reasonable opportunity to change their cash or deferred elections and, if applicable, employee contribution elections; or

(ii) The plan termination is in connection with a transaction described in section 410(b)(6)(C) or the employer incurs a substantial business hardship comparable to a substantial business hardship described in section 412(d).

(f) *Plan amendments adopting safe harbor nonelective contributions*—(1) *General rule.* Notwithstanding paragraph (e)(1) of this section, a plan that provides for the use of the current year testing method may be amended after the first day of the plan year and no later than 30 days before the last day of the plan year to adopt the safe harbor method of this section, effective as of the first day of the plan year, using nonelective contributions under paragraph (b) of this section, but only if the plan provides the contingent and follow-up notices described in this section. A plan amendment made pursuant to this paragraph (f)(1) for a plan year may provide for the use of the safe harbor method described in this section solely for that plan year and a plan sponsor is not limited in the number of years for which it is permitted to adopt an amendment providing for the safe harbor method of this section using nonelective contributions under paragraph (b) of this section and this paragraph (f).

(2) *Contingent notice provided.* A plan satisfies the requirement to provide the contingent notice under this paragraph (f)(2) if it provides a notice that would satisfy the requirements of paragraph (d) of this section, except that, in lieu of setting forth the safe harbor contributions used under the plan as set forth in paragraph (d)(2)(ii)(A) of this section, the notice specifies that the plan may be amended during the plan year to include the safe harbor nonelective contribution and that, if the plan is amended, a follow-up notice will be provided.

(3) *Follow-up notice requirement.* A plan satisfies the requirement to provide a follow-up notice under this paragraph (f)(3) if, no later than 30 days before the last day of the plan year, each eligible employee is given a notice that states that the safe harbor nonelective contributions will be made for the plan

year. The notice must be in writing or in such other form as may be prescribed by the Commissioner and is permitted to be combined with a contingent notice provided under paragraph (f)(2) of this section for the next plan year.

(g) *Permissible reduction or suspension of safe harbor matching contributions*—(1) *General rule.* A plan that provides for safe harbor matching contributions will not fail to satisfy the requirements of section 401(k)(3) for a plan year merely because the plan is amended during a plan year to reduce or suspend safe harbor matching contributions on future elective contributions (and, if applicable, employee contributions) provided that—

(i) All eligible employees are provided the supplemental notice in accordance with paragraph (g)(2) of this section;

(ii) The reduction or suspension of safe harbor matching contributions is effective no earlier than the later of 30 days after eligible employees are provided the notice described in paragraph (g)(2) of this section and the date the amendment is adopted;

(iii) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of safe harbor matching contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(iv) The plan is amended to provide that the ADP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in § 1.401(k)–2(a)(2)(ii); and

(v) The plan satisfies the requirements of this section (other than this paragraph (g)) with respect to amounts deferred through the effective date of the amendment.

(2) *Notice of suspension requirement.* The notice of suspension requirement of this paragraph (g)(2) is satisfied if each eligible employee is given a notice (in writing or such other form as prescribed by the Commissioner) that explains—

(i) The consequences of the amendment which reduces or suspends matching contributions on future elective contributions and, if applicable, employee contributions;

(ii) The procedures for changing their cash or deferred election and, if applicable, their employee contribution elections; and

(iii) The effective date of the amendment.

(h) *Additional rules*—(1) *Contributions taken into account.* A contribution is taken into account for purposes of this section for a plan year if and only if the contribution would be taken into account for such plan year under the rules of § 1.401(k)–2(a) or 1.401(m)–2(a). Thus, for example, a safe harbor matching contribution must be made within 12 months of the end of the plan year. Similarly, an elective contribution that would be taken into account for a plan year under § 1.401(k)–2(a)(4)(i)(B)(*2*) must be taken into account for such plan year for purposes of this section, even if the compensation would have been received after the close of the plan year.

(2) *Use of safe harbor nonelective contributions to satisfy other nondiscrimination tests.* A safe harbor nonelective contribution used to satisfy the nonelective contribution requirement under paragraph (b) of this section may also be taken into account for purposes of determining whether a plan satisfies section 401(a)(4). Thus, these contributions are not subject to the limitations on qualified nonelective contributions under § 1.401(k)–2(a)(6)(ii), but are subject to the rules generally applicable to nonelective contributions under section 401(a)(4). See § 1.401(a)(4)–1(b)(2)(ii). However, pursuant to section 401(k)(12)(E)(ii), to the extent they are needed to satisfy the safe harbor contribution requirement of paragraph (b) of this section, safe harbor nonelective contributions may not be taken into account under any plan for purposes of section 401(l) (including the imputation of permitted disparity under § 1.401(a)(4)–7).

(3) *Early participation rules.* Section 401(k)(3)(F) and § 1.401(k)–2(a)(1)(iii)(A), which provide an alternative nondiscrimination rule for certain plans that provide for early participation, do not apply for purposes of section 401(k)(12) and this section. Thus, a plan is not treated as satisfying this section with respect to the eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A) unless the plan satisfies the requirements of this section with respect to such eligible employees. However, a plan is permitted to apply the rules of section 410(b)(4)(B) to treat the plan as two separate plans for purposes of section 410(b) and apply the safe harbor requirements of this section to one plan and apply the requirements of § 1.401(k)–2 to the other plan. See § 1.401(k)–1(b)(4)(vi), *Example 2.*

(4) *Satisfying safe harbor contribution requirement under another defined contribution plan.* Safe harbor matching or nonelective contributions may be made to the plan that contains the cash or deferred arrangement or to another defined contribution plan that satisfies section 401(a) or 403(a). If safe harbor contributions are made to another defined contribution plan, the safe harbor plan must specify the plan to which the safe harbor contributions are made and the contribution requirement of paragraph (b) or (c) of this section must be satisfied in the other defined contribution plan in the same manner as if the contributions were made to the plan that contains the cash or deferred arrangement. Consequently, the plan to which the contributions are made must have the same plan year as the plan containing the cash and deferred arrangement and each employee eligible under the plan containing the cash or deferred arrangement must be eligible under the same conditions under the other defined contribution plan. The plan to which the safe harbor contributions are made need not be a plan that can be aggregated with the plan that contains the cash or deferred arrangement.

(5) *Contributions used only once.* Safe harbor matching or nonelective contributions cannot be used to satisfy the requirements of this section with respect to more than one plan.

§ 1.401(k)–4 SIMPLE 401(k) plan requirements.

(a) *General rule.* A cash or deferred arrangement satisfies the SIMPLE 401(k) plan provision of section 401(k)(11) for a plan year if the arrangement satisfies the requirements of paragraphs (b) through (i) of this section for that year. A plan that contains a cash or deferred arrangement that satisfies this section is referred to as a SIMPLE 401(k) plan. Pursuant to section 401(k)(11), a SIMPLE 401(k) plan is treated as satisfying the ADP test of section 401(k)(3)(A)(ii) for that year.

(b) *Eligible employer*—(1) *General rule.* A SIMPLE 401(k) plan must be established by an eligible employer. Eligible employer for purposes of this section means, with respect to any plan year, an employer that had no more than 100 employees who each received at least $5,000 of SIMPLE compensation, as defined in paragraph (e)(5) of this section, from the employer for the prior calendar year.

(2) *Special rule.* An eligible employer that establishes a SIMPLE 401(k) plan for a plan year and that fails to be an eligible employer for any subsequent plan year, is treated as an eligible employer for the 2 plan years following the last plan year the employer was an eligible employer. If the failure is due to any acquisition, disposition, or similar transaction involving an eligible employer, the preceding sentence

applies only if the provisions of section 410(b)(6)(C)(i) are satisfied.

(c) *Exclusive plan*—(1) *General rule.* The SIMPLE 401(k) plan must be the exclusive plan for each SIMPLE 401(k) plan participant for the plan year. This requirement is satisfied if there are no contributions made, or benefits accrued, for services during the plan year on behalf of any SIMPLE 401(k) plan participant under any other qualified plan maintained by the employer. Other qualified plan for purposes of this section means any plan, contract, pension, or trust described in section 219(g)(5)(A) or (B).

(2) *Special rule.* A SIMPLE 401(k) plan will not be treated as failing the requirements of this paragraph (c) merely because any SIMPLE 401(k) plan participant receives an allocation of forfeitures under another plan of the employer.

(d) *Election and notice*—(1) *General rule.* An eligible employer establishing or maintaining a SIMPLE 401(k) plan must satisfy the election and notice requirements in paragraphs (d)(2) and (3) of this section.

(2) *Employee elections*—(i) *Initial plan year of participation.* For the plan year in which an employee first becomes eligible under the SIMPLE 401(k) plan, the employee must be permitted to make a cash or deferred election under the plan during a 60-day period that includes either the day the employee becomes eligible or the day before.

(ii) *Subsequent plan years.* For each subsequent plan year, each eligible employee must be permitted to make or modify his cash or deferred election during the 60-day period immediately preceding such plan year.

(iii) *Election to terminate.* An eligible employee must be permitted to terminate his cash or deferred election at any time. If an employee does terminate his cash or deferred election, the plan is permitted to provide that such employee cannot have elective contributions made under the plan for the remainder of the plan year.

(3) *Employee notices.* The employer must notify each eligible employee within a reasonable time prior to each 60-day election period, or on the day the election period starts, that he or she can make a cash or deferred election, or modify a prior election, if applicable, during that period. The notice must state whether the eligible employer will make the matching contributions described in paragraph (e)(3) of this section or the nonelective contributions described in paragraph (e)(4) of this section.

(e) *Contributions*—(1) *General rule.* A SIMPLE 401(k) plan satisfies the contribution requirements of this paragraph (e) for a plan year only if no contributions may be made to the SIMPLE 401(k) plan during such year, other than contributions described in this paragraph (e) and rollover contributions described in § 1.402(c)–2, Q&A–1(a).

(2) *Elective contributions.* Subject to the limitations on annual additions under section 415, each eligible employee must be permitted to make an election to have up to $10,000 of elective contributions made on the employee's behalf under the SIMPLE 401(k) plan for a plan year. The $10,000 limit is increased beginning in 2006 in the same manner as the $160,000 amount is adjusted under section 415(d), except that pursuant to section 408(p)(2)(E)(ii) the base period shall be the calendar quarter beginning July 1, 2004 and any increase which is not a multiple of $500 is rounded to the next lower multiple of $500.

(3) *Matching contributions.* Each plan year, the eligible employer must contribute a matching contribution to the account of each eligible employee on whose behalf elective contributions were made for the plan year. The amount of the matching contribution must equal the lesser of the eligible employee's elective contributions for the plan year or 3% of the eligible employee's SIMPLE compensation for the entire plan year.

(4) *Nonelective contributions.* For any plan year, in lieu of contributing matching contributions described in paragraph (e)(3) of this section, an eligible employer may, in accordance with plan terms, contribute a nonelective contribution to the account of each eligible employee in an amount equal to 2% of the eligible employee's SIMPLE compensation for the entire plan year. The eligible employer may limit the nonelective contributions to those eligible employees who received at least $5,000 of SIMPLE compensation from the employer for the entire plan year.

(5) *SIMPLE compensation.* Except as otherwise provided, the term *SIMPLE compensation* for purposes of this section means the sum of wages, tips, and other compensation from the eligible employer subject to federal income tax withholding (as described in section 6051(a)(3)) and the employee's elective contributions made under any other plan, and if applicable, elective deferrals under a section 408(p) SIMPLE IRA plan, a section 408(k)(6) SARSEP, or a plan or contract that satisfies the requirements of section 403(b), and compensation deferred under a section 457 plan, required to be reported by the employer on Form W–2 (as described in section 6051(a)(8)). For self-employed individuals, SIMPLE compensation means net earnings from self-employment determined under section 1402(a) prior to subtracting any contributions made under the SIMPLE 401(k) plan on behalf of the individual.

(f) *Vesting.* All benefits attributable to contributions described in paragraph (e) of this section must be nonforfeitable at all times.

(g) *Plan year.* The plan year of a SIMPLE 401(k) plan must be the whole calendar year. Thus, in general, a SIMPLE 401(k) plan can be established only on January 1 and can be terminated only on December 31. However, in the case of an employer that did not previously maintain a SIMPLE 401(k) plan, the establishment date can be as late as October 1 (or later in the case of an employer that comes into existence after October 1 and establishes the SIMPLE 401(k) plan as soon as administratively feasible after the employer comes into existence).

(h) *Other rules.* A SIMPLE 401(k) plan is not treated as a top-heavy plan under section 416. See section 416(g)(4)(G).

§ 1.401(k)–5 Special rules for mergers, acquisitions and similar events. [Reserved]

§ 1.401(k)–6 Definitions.

Unless otherwise provided, the definitions of this section govern for purposes of section 401(k) and the regulations thereunder.

Actual contribution percentage (ACP) test. Actual contribution percentage test or *ACP test* means the test described in § 1.401(m)–2(a)(1).

Actual deferral percentage (ADP). Actual deferral percentage or *ADP* means the ADP of the group of eligible employees as defined in § 1.401(k)–2(a)(2).

Actual deferral percentage (ADP) test. Actual deferral percentage test or *ADP test* means the test described in § 1.401(k)–2(a)(1).

Actual deferral ratio (ADR). Actual deferral ratio or *ADR* means the ADR of an eligible employee as defined in § 1.401(k)–2(a)(3).

Cash or deferred arrangement. Cash or deferred arrangement is defined in § 1.401(k)–1(a)(2).

Cash or deferred election. Cash or deferred election is defined in § 1.401(k)–1(a)(3).

Compensation. Compensation means compensation as defined in section 414(s) and § 1.414(s)–1. The period used to determine an employee's compensation for a plan year must be

either the plan year or the calendar year ending within the plan year. Whichever period is selected must be applied uniformly to determine the compensation of every eligible employee under the plan for that plan year. A plan may, however, limit the period taken into account under either method to that portion of the plan year or calendar year in which the employee was an eligible employee, provided that this limit is applied uniformly to all eligible employees under the plan for the plan year. In the case of an HCE whose ADR is determined under § 1.401(k)–2(a)(3)(ii), period of participation includes periods under another plan for which elective contributions are aggregated under § 1.401(k)–2(a)(3)(ii). See also section 401(a)(17) and § 1.401(a)(17)–1(c)(1).

Current year testing method. Current year testing method means the testing method described in § 1.401(k)–2(a)(2)(ii) or 1.401(m)–2(a)(2)(ii) under which the applicable year is the current plan year.

Elective contributions. Elective contributions means employer contributions made to a plan pursuant to a cash or deferred election under a cash or deferred arrangement (whether or not the arrangement is a qualified cash or deferred arrangement under § 1.401(k)–1(a)(4)).

Eligible employee—(1) *General rule. Eligible employee* means an employee who is directly or indirectly eligible to make a cash or deferred election under the plan for all or a portion of the plan year. For example, if an employee must perform purely ministerial or mechanical acts (*e.g.*, formal application for participation or consent to payroll withholding) in order to be eligible to make a cash or deferred election for a plan year, the employee is an eligible employee for the plan year without regard to whether the employee performs the acts.

(2) *Conditions on eligibility.* An employee who is unable to make a cash or deferred election because the employee has not contributed to another plan is also an eligible employee. By contrast, if an employee must perform additional service (*e.g.*, satisfy a minimum period of service requirement) in order to be eligible to make a cash or deferred election for a plan year, the employee is not an eligible employee for the plan year unless the service is actually performed. See § 1.401(k)–1(e)(5), however, for certain limits on the use of minimum service requirements. An employee who would be eligible to make elective contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, is treated as an eligible employee for purposes of section 401(k)(3) for a plan year even though the employee may not make a cash or deferred election by reason of the suspension. Finally, an employee does not fail to be treated as an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1).

(3) *Certain one-time elections.* An employee is not an eligible employee merely because the employee, no later than the employee's first becoming eligible to make a cash or deferred election under any plan or arrangement of the employer (described in section 219(g)(5)(A)), is given the one-time opportunity to elect, and the employee does in fact elect, not to be eligible to make a cash or deferred election under the plan or any other plan or arrangement maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer. This rule applies in addition to the rules in § 1.401(k)–1(a)(3)(v) relating to the definition of a cash or deferred election. In no event is an election made after December 23, 1994, treated as a one-time irrevocable election under this paragraph if the election is made by an employee who previously became eligible under another plan or arrangement (whether or not terminated) of the employer.

Eligible HCE. Eligible HCE means an eligible employee who is an HCE.

Eligible NHCE. Eligible NHCE means an eligible employee who is not an HCE.

Employee. Employee means an employee within the meaning of § 1.410(b)–9.

Employee stock ownership plan (ESOP). Employee stock ownership plan or *ESOP* means the portion of a plan that is an ESOP within the meaning of § 1.410(b)–7(c)(2).

Employer. Employer means an employer within the meaning of § 1.410(b)–9.

Excess contributions. Excess contributions means, with respect to a plan year, the amount of total excess contributions apportioned to an HCE under § 1.401(k)–2(b)(2)(iii).

Excess deferrals. Excess deferrals means excess deferrals as defined in § 1.402(g)–1(e)(3).

Highly compensated employee (HCE). Highly compensated employee or *HCE* has the meaning provided in section 414(q).

Matching contributions. Matching contributions means matching contributions as defined in § 1.401(m)–1(a)(2).

Nonelective contributions. Nonelective contributions means employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan.

Non-employee stock ownership plan (non-ESOP). Non-employee stock ownership plan or *non-ESOP* means the portion of a plan that is not an ESOP within the meaning of § 1.410(b)–7(c)(2).

Non-highly compensated employee (NHCE). Non-highly compensated employee or *NHCE* means an employee who is not an HCE.

Plan. Plan is defined in § 1.401(k)–1(b)(4).

Pre-ERISA money purchase pension plan. (1) *Pre-ERISA money purchase pension plan* is a pension plan—

(i) That is a defined contribution plan (as defined in section 414(i));

(ii) That was in existence on June 27, 1974, and as in effect on that date, included a salary reduction agreement; and

(iii) Under which neither the employee contributions nor the employer contributions, including elective contributions, may exceed the levels (as a percentage of compensation) provided for by the contribution formula in effect on June 27, 1974.

(2) A plan was in existence on June 27, 1974, if it was a written plan adopted on or before that date, even if no funds had yet been paid to the trust associated with the plan.

Prior year testing method. Prior year testing method means the testing method under which the applicable year is the prior plan year, as described in § 1.401(k)–2(a)(2)(ii) or 1.401(m)–2(a)(2)(ii).

Qualified matching contributions (QMACs). Qualified matching contributions or *QMACs* means matching contributions that, except as provided otherwise in § 1.401(k)–1(c) and (d), satisfy the requirements of § 1.401(k)–1(c) and (d) as though the contributions were elective contributions, without regard to whether the contributions are actually taken into account under the ADP test under § 1.401(k)–2(a)(6) or the ACP test under § 1.401(m)–2(a)(6). Thus, the matching contributions must satisfy the vesting requirements of § 1.401(k)–1(c) and be subject to the distribution requirements of § 1.401(k)–1(d) when they are contributed to the plan. See also § 1.401(k)–2(b)(4)(iii) for a rule providing that a matching contribution does not fail to qualify as a QMAC solely because it is forfeitable under

section 411(a)(3)(G) as a result of being a matching contribution with respect to an excess deferral, excess contribution, or excess aggregate contribution.

Qualified nonelective contributions (QNECs). Qualified nonelective contributions or *QNECs* means employer contributions, other than elective contributions or matching contributions, that, except as provided otherwise in § 1.401(k)–1(c) and (d), satisfy the requirements of § 1.401(k)–1(c) and (d) as though the contributions were elective contributions, without regard to whether the contributions are actually taken into account under the ADP test under § 1.401(k)–2(a)(6) or the ACP test under § 1.401(m)–2(a)(6). Thus, the nonelective contributions must satisfy the vesting requirements of § 1.401(k)–1(c) and be subject to the distribution requirements of § 1.401(k)–1(d) when they are contributed to the plan.

Rural cooperative plans. Rural cooperative plan means a plan described in section 401(k)(7).

■ **Par. 5.** Sections 1.401(m)–0 through 1.401(m)–2 are revised and sections 1.401(m)–3 through 1.401(m)–5 are added to read as follows:

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This section contains first a list of section headings and then a list of the paragraphs in each section in §§ 1.401(m)–1 through 1.401(m)–5.

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§ 1.401(m)–2 ACP test.
§ 1.401(m)–3 Safe harbor requirements.
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§ 1.401(m)–4 Special rules for mergers, acquisitions and similar events.

[Reserved].

§ 1.401(m)–5 Definitions.

§ 1.401(m)–1 Employee contributions and matching contributions.

(a) *General nondiscrimination rules*—(1) *Nondiscriminatory amount of contributions*—(i) *Exclusive means of amounts testing.* A defined contribution plan does not satisfy section 401(a) for a plan year unless the amount of employee contributions and matching contributions to the plan for the plan year satisfies section 401(a)(4). The amount of employee contributions and matching contributions under a plan satisfies the requirements of section 401(a)(4) with respect to amounts if and only if the amount of employee contributions and matching contributions satisfies the nondiscrimination test of section 401(m) under paragraph (b) of this section and the plan satisfies the additional requirements of paragraph (c) of this section. See § 1.401(a)(4)–1(b)(2)(ii)(B).

(ii) *Testing benefits, rights and features.* A plan that provides for employee contributions or matching contributions must satisfy the requirements of section 401(a)(4) relating to benefits, rights and features in addition to the requirement regarding amounts described in paragraph (a)(1)(i) of this section. For example, the right to make each level of employee contributions and the right to each level of matching contributions under the plan are benefits, rights or features subject to the requirements of section 401(a)(4). See § 1.401(a)(4)–4(e)(3)(i) and (iii)(F) through (G).

(2) *Matching contributions*—(i) *In general.* For purposes of section 401(m), this section and §§ 1.401(m)–2 through 1.401(m)–5, matching contributions are—

(A) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an employee contribution to a plan maintained by the employer;

(B) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an elective deferral; and

(C) Any forfeiture allocated on the basis of employee contributions, matching contributions, or elective deferrals.

(ii) *Employer contributions made on account of an employee contribution or elective deferral.* Whether an employer contribution is made on account of an employee contribution or an elective deferral is determined on the basis of all the relevant facts and circumstances, including the relationship between the employer contribution and employee actions outside the plan. An employer contribution made to a defined contribution plan on account of contributions made by an employee under an employer-sponsored savings arrangement that are not held in a plan that is intended to be a qualified plan or other arrangement described in § 1.402(g)–1(b) is not a matching contribution.

(iii) *Employer contributions not on account of an employee contribution or elective deferral*—(A) *General rule.* Employer contributions are not matching contributions made on account of elective deferrals if they are contributed before the cash or deferred election is made or before the employees' performance of services with respect to which the elective deferrals are made (or when the cash that is subject to the cash or deferred elections would be currently available, if earlier). In addition, an employer contribution is not a matching contribution made on account of an employee contribution if it is contributed before the employee contribution.

(B) *Exceptions for forfeitures and released ESOP shares.* The rule of paragraph (a)(3)(iii)(A) of this section does not apply to a forfeiture that is allocated as a matching contribution. In addition, an allocation of shares from an ESOP loan suspense account described in § 54.4975–11(c) and (d) of this chapter will not fail to be treated as a matching contribution solely because the employer contribution that resulted in the release and allocation of those shares from the suspense account is made before the employees' performance of services with respect to which the elective deferrals are made (or when the cash that is subject to the cash or deferred elections would be currently available, if earlier) provided that—

(*1*) The contribution is for a required payment that is due under the loan terms; and

(*2*) The contribution is not made early with a principal purpose of accelerating deductions.

(C) *Exception for bona fide administrative considerations.* The timing of contributions will not be treated as failing to satisfy the requirements of this paragraph (a)(3)(iii) merely because contributions are occasionally made before the employees' performance of services with respect to which the elective

deferrals are made (or when the cash that is subject to the cash or deferred elections would be currently available, if earlier) in order to accommodate bona fide administrative considerations and are not paid early with a principal purpose of accelerating deductions.

(3) *Employee contributions*—(i) *In general.* For purposes of section 401(m), this section and §§ 1.401(m)–2 through 1.401(m)–5, employee contributions are contributions to a plan that are designated or treated at the time of contribution as after-tax employee contributions (*e.g.*, by treating the contributions as taxable income subject to applicable withholding requirements) and are allocated to an individual account for each eligible employee to which attributable earnings and losses are allocated. See § 1.401(k)–1(a)(2)(ii). The term *employee contributions includes*—

(A) Employee contributions to the defined contribution portion of a plan described in section 414(k);

(B) Employee contributions applied to the purchase of whole life insurance protection or survivor benefit protection under a defined contribution plan;

(C) Amounts attributable to excess contributions within the meaning of section 401(k)(8)(B) that are recharacterized as employee contributions under § 1.401(k)–2(b)(3); and

(D) Employee contributions to a plan or contract that satisfies the requirements of section 403(b).

(ii) *Certain contributions not treated as employee contributions.* The term employee contributions does not include designated Roth contributions, repayment of loans, rollover contributions, repayment of distributions described in section 411(a)(7)(C), or employee contributions that are transferred to the plan from another plan.

(iii) *Qualified cost-of-living arrangements.* Employee contributions to a qualified cost-of-living arrangement described in section 415(k)(2)(B) are treated as employee contributions to a defined contribution plan, without regard to the requirement that the employee contributions be allocated to an individual account to which attributable earnings and losses are allocated.

(b) *Nondiscrimination requirements for amount of contributions*—(1) *Matching contributions and employee contributions.* The matching contributions and employee contributions under a plan satisfy this paragraph (b) for a plan year only if the plan satisfies—

(i)The ACP test of section 401(m)(2) described in § 1.401(m)–2;

(ii) The ACP safe harbor provisions of section 401(m)(11) described in § 1.401(m)–3; or

(iii) The SIMPLE 401(k) provisions of sections 401(k)(11) and 401(m)(10) described in § 1.401(k)–4.

(2) *Automatic satisfaction by certain plans.* Notwithstanding paragraph (b)(1) of this section, the requirements of this section are treated as satisfied with respect to employee contributions and matching contributions under a collectively bargained plan (or the portion of a plan) that automatically satisfies section 410(b). See §§ 1.401(a)(4)–1(c)(5) and 1.410(b)–2(b)(7). Additionally, the requirements of sections 401(a)(4) and 410(b) do not apply to a governmental plan (within the meaning of section 414(d)) maintained by a State or local government or political subdivision thereof (or agency or instrumentality thereof) and, accordingly such plans are not required to comply with this section. See sections 401(a)(5)(G), 403(b)(12)(C) and 410(c)(1)(A).

(3) *Anti-abuse provisions.* Sections 1.401(m)–1 through 1.401(m)–5 are designed to provide simple, practical rules that accommodate legitimate plan changes. At the same time, the rules are intended to be applied by employers in a manner that does not make use of changes in plan testing procedures or other plan provisions to inflate inappropriately the ACP for NHCEs (which is used as a benchmark for testing the ACP for HCEs) or to otherwise manipulate the nondiscrimination testing requirements of this paragraph (b). Further, this paragraph (b) is part of the overall requirement that benefits or contributions not discriminate in favor of HCEs. Therefore, a plan will not be treated as satisfying the requirements of this paragraph (b) if there are repeated changes to plan testing procedures or plan provisions that have the effect of distorting the ACP so as to increase significantly the permitted ACP for HCEs, or otherwise manipulate the nondiscrimination rules of this paragraph, if a principal purpose of the changes was to achieve such a result.

(4) *Aggregation and restructuring*—(i) *In general.* This paragraph (b)(4) contains the exclusive rules for aggregating and disaggregating plans that provide for employee contributions and matching contributions for purposes of this section and §§ 1.401(m)–2 through 1.401(m)–5.

(ii) *Aggregation of employee contributions and matching contributions within a plan.* Except as otherwise specifically provided in this paragraph (b)(4) and § 1.401(m)–3(j)(6), a plan must be subject to a single test under paragraph (b)(1) of this section with respect to all employee contributions and matching contributions and all eligible employees under the plan. Thus, for example, if two groups of employees are eligible for matching contributions under a plan, all employee contributions and matching contributions under the plan must be subject to a single test, even if they have significantly different features, such as different rates of match.

(iii) *Aggregation of plans*—(A) *In general.* The term *plan* means a plan within the meaning of § 1.410(b)–7(a) and (b), after application of the mandatory disaggregation rules of § 1.410(b)–7(c), and the permissive aggregation rules of § 1.410(b)–7(d), as modified by paragraph (b)(4)(v) of this section. Thus, for example, two plans (within the meaning of § 1.410(b)–7(b)) that are treated as a single plan pursuant to the permissive aggregation rules of § 1.410(b)–7(d) are treated as a single plan for purposes of sections 401(k) and 401(m).

(B) *Arrangements with inconsistent ACP testing methods.* Pursuant to paragraph (b)(4)(ii) of this section, a single testing method must apply with respect to all employee contributions and matching contributions and all eligible employees under a plan. Thus, in applying the permissive aggregation rules of § 1.410(b)–7(d), an employer may not aggregate plans (within the meaning of § 1.410(b)–7(b)) that apply inconsistent testing methods. For example, a plan (within the meaning of § 1.410(b)–7) that applies the current year testing method may not be aggregated with another plan that applies the prior year testing method. Similarly, an employer may not aggregate a plan (within the meaning of § 1.410(b)–7) that is using the ACP safe harbor provisions of section 401(m)(11) and another plan that is using the ACP test of section 401(m)(2).

(iv) *Disaggregation of plans and separate testing*—(A) *In general.* If employee contributions or matching contributions are included in a plan (within the meaning of § 1.410(b)–7(b)) that is mandatorily disaggregated under the rules of section 410(b) (as modified by this paragraph (b)(4)), the matching contributions and employee contributions under that plan must be disaggregated in a consistent manner. For example, in the case of an employer that is treated as operating qualified separate lines of business under section 414(r), if the eligible employees under a plan which provides for employee

contributions or matching contributions are in more than one qualified separate line of business, only those employees within each qualified separate line of business may be taken into account in determining whether each disaggregated portion of the plan complies with the requirements of section 401(m), unless the employer is applying the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the plan. Similarly, if a plan that provides for employee contributions or matching contributions under which employees are permitted to participate before they have completed the minimum age and service requirements of section 410(a)(1) applies section 410(b)(4)(B) for determining whether the plan complies with section 410(b)(1), then the plan must be treated as two separate plans, one comprising all eligible employees who have met the minimum age and service requirements of section 410(a)(1) and one comprising all eligible employees who have not met the minimum age and service requirements of section 410(a)(1), unless the plan is using the rule in § 1.401(m)–2(a)(1)(iii)(A).

(B) *Restructuring prohibited.* Restructuring under § 1.401(a)(4)–9(c) may not be used to demonstrate compliance with the requirements of section 401(m). See § 1.401(a)(4)–9(c)(3)(ii).

(v) *Certain disaggregation rules not applicable.* The mandatory disaggregation rules relating to section 401(k) plans and section 401(m) plans set forth in § 1.410(b)–7(c)(1) and to ESOP and non-ESOP portions of a plan set forth in § 1.410(b)–7(c)(2) shall not apply for purposes of this section and §§ 1.401(m)–2 through 1.401(m)–5. Accordingly, notwithstanding § 1.410(b)–7(d)(2), an ESOP and a non-ESOP which are different plans (within the meaning of section 414(l), as described in § 1.410(b)–7(b)) are permitted to be aggregated for these purposes.

(c) *Additional requirements*—(1) *Separate testing for employee contributions and matching contributions.* Under § 1.410(b)–7(c)(1), the group of employees who are eligible to make employee contributions or eligible to receive matching contributions must satisfy the requirements of section 410(b) as if those employees were covered under a separate plan. The determination of whether the separate plan satisfies the requirements of section 410(b) must be made without regard to the modifications to the disaggregation rules set forth in paragraph (b)(4)(v) of this section. In addition, except as expressly permitted under section 401(k), 410(b)(2)(A)(ii), or 416(c)(2)(A), employee contributions, matching contributions and elective contributions taken into account under § 1.401(m)–2(a)(6) may not be taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the employee contributions or matching contributions are made) satisfy the requirements of section 401(a). See also § 1.401(a)(4)–11(g)(3)(vii) for special rules relating to corrections of violations of the minimum coverage requirements or discriminatory rates of matching contributions.

(2) *Plan provision requirement.* A plan that provides for employee contributions or matching contributions satisfies this section only if it provides that the nondiscrimination requirements of section 401(m) will be met. Thus, the plan must provide for satisfaction of one of the specific alternatives described in paragraph (b)(1) of this section and, if with respect to that alternative there are optional choices, which of the optional choices will apply. For example, a plan that uses the ACP test of section 401(m)(2), as described in paragraph (b)(1)(i) of this section, must specify whether it is using the current year testing method or prior year testing method. Additionally, a plan that uses the prior year testing method must specify whether the ACP for eligible NHCEs for the first plan year is 3% or the ACP for the eligible NHCEs for the first plan year. Similarly, a plan that uses the safe harbor method of section 401(m)(11), as described in paragraph (b)(1)(ii) of this section, must specify whether the safe harbor contribution will be the nonelective safe harbor contribution or the matching safe harbor contribution and is not permitted to provide that ACP testing will be used if the requirements for the safe harbor are not satisfied. For purposes of this paragraph (c)(2), a plan may incorporate by reference the provisions of section 401(m)(2) and § 1.401(m)–2 if that is the nondiscrimination test being applied. The Commissioner may, in guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter), specify the options that will apply under the plan if the nondiscrimination test is incorporated by reference in accordance with the preceding sentence.

(d) *Effective date*—(1) *General rule.* Except as otherwise provided in this paragraph (d), this section and §§ 1.401(m)–2 through 1.401(m)–5 apply to plan years that begin on or after January 1, 2006.

(2) *Early implementation permitted.* A plan is permitted to apply the rules of this section and §§ 1.401(m)–2 through 1.401(m)–5 to any plan year that ends after December 29, 2004, provided the plan applies all the rules of this section and §§ 1.401(m)–2 through 1.401(m)–5 and all the rules of §§ 1.401(k)–1 through 1.401(k)–6, to the extent applicable, for that plan year and all subsequent plan years.

(3) *Applicability of prior regulations.* For any plan year, before a plan applies this section and §§ 1.401(m)–2 through 1.401(m)–5 (either the first plan year beginning on or after January 1, 2006 or such earlier year, as provided in paragraph (d)(2) of this section), § 1.401(m)–1 and § 1.401(m)–2 (as they appeared in the April 1, 2004 edition of 26 CFR part 1) apply to the plan to the extent those sections, as they so appear, reflect the statutory provisions of section 401(m) as in effect for the relevant year.

§ 1.401(m)–2 ACP test.

(a) *Actual contribution percentage (ACP) test*—(1) *In general—(i) ACP test formula.* A plan satisfies the ACP test for a plan year only if—

(A) The ACP for the eligible HCEs for the plan year is not more than the ACP for the eligible NHCEs for the applicable year multiplied by 1.25; or

(B) The excess of the ACP for the eligible HCEs for the plan year over the ACP for the eligible NHCEs for the applicable year is not more than 2 percentage points, and the ACP for the eligible HCEs for the plan year is not more than the ACP for the eligible NHCEs for the applicable year multiplied by 2.

(ii) *HCEs as sole eligible employees.* If, for the applicable year there are no eligible NHCEs (*i.e.*, all of the eligible employees under the plan for the applicable year are HCEs), the plan is deemed to satisfy the ACP test.

(iii) *Special rule for early participation.* If a plan providing for employee contributions or matching contributions provides that employees are eligible to participate before they have completed the minimum age and service requirements of section 410(a)(1)(A), and if the plan applies section 410(b)(4)(B) in determining whether the plan meets the requirements of section 410(b)(1), then in determining whether the plan meets the requirements under paragraph (a)(1) of this section either—

(A) Pursuant to section 401(m)(5)(C), the ACP test is performed under the plan (determined without regard to disaggregation under § 1.410(b)–7(c)(3)), using the ACP for all eligible HCEs for

the plan year and the ACP of eligible NHCEs for the applicable year, disregarding all NHCEs who have not met the minimum age and service requirements of section 410(a)(1)(A); or

(B) Pursuant to § 1.401(m)–1(b)(4), the plan is disaggregated into separate plans and the ACP test is performed separately for all eligible employees who have completed the minimum age and service requirements of section 410(a)(1)(A) and for all eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A).

(2) *Determination of ACP*—(i) *General rule.* The ACP for a group of eligible employees (either eligible HCEs or eligible NHCEs) for a plan year or applicable year is the average of the ACRs of eligible employees in the group for that year. The ACP for a group of eligible employees is calculated to the nearest hundredth of a percentage point.

(ii) *Determination of applicable year under current year and prior year testing method.* The ACP test is applied using the prior year testing method or the current year testing method. Under the prior year testing method, the applicable year for determining the ACP for the eligible NHCEs is the plan year immediately preceding the plan year for which the ACP test is being calculated. Under the prior year testing method, the ACP for the eligible NHCEs is determined using the ACRs for the eligible employees who were NHCEs in that preceding plan year, regardless of whether those NHCEs are eligible employees or NHCEs in the plan year for which the ACP test is being performed. Under the current year testing method, the applicable year for determining the ACP for eligible NHCEs is the same plan year as the plan year for which the ACP test is being calculated. Under either method, the ACP for the eligible HCEs is determined using the ACRs of eligible employees who are HCEs for the plan year for which the ACP test is being performed. See paragraph (c) of this section for additional rules for the prior year testing method.

(3) *Determination of ACR*—(i) *General rule.* The ACR of an eligible employee for the plan year or applicable year is the sum of the employee contributions and matching contributions taken into account with respect to such employee (determined under the rules of paragraphs (a)(4) and (5) of this section), and the qualified nonelective and elective contributions taken into account under paragraph (a)(6) of this section for the year, divided by the employee's compensation taken into account for the year. The ACR is calculated to the nearest hundredth of a percentage point. If no employee contributions, matching contributions, elective contributions, or qualified nonelective contributions are taken into account under this section with respect to an eligible employee for the year, the ACR of the employee is zero.

(ii) *ACR of HCEs eligible under more than one plan*—(A) *General rule.* Pursuant to section 401(m)(2)(B), the ACR of an HCE who is an eligible employee in more than one plan of an employer to which matching contributions or employee contributions are made is calculated by treating all contributions with respect to such HCE under any such plan as being made under the plan being tested. Thus, the ACR for such an HCE is calculated by accumulating all matching contributions and employee contributions under any plan (other than a plan described in paragraph (a)(3)(ii)(B) of this section) that would be taken into account under this section for the plan year, if the plan under which the contribution was made applied this section and had the same plan year. For example, in the case of a plan with a 12-month plan year, the ACR for the plan year of that plan for an HCE who participates in multiple plans of the same employer that provide for matching contributions or employee contributions is the sum of all such contributions during such 12-month period that would be taken into account with respect to the HCE under all plans in which the HCE is an eligible employee, divided by the HCE's compensation for that 12-month period (determined using the compensation definition for the plan being tested), without regard to the plan year of the other plans and whether those plans are satisfying this section or § 1.401(m)–3.

(B) *Plans not permitted to be aggregated.* Contributions under plans that are not permitted to be aggregated under § 1.401(m)–1(b)(4) (determined without regard to the prohibition on aggregating plans with inconsistent testing methods set forth in § 1.401(m)–1(b)(4)(iii)(B) and the prohibition on aggregating plans with different plan years set forth in § 1.410(b)–7(d)(5)) are not aggregated under this paragraph (a)(3)(ii).

(iii) *Example.* The following example illustrates the application of paragraph (a)(3)(ii) of this section. See also § 1.401(k)–2(a)(3)(iii) for additional examples of the application of the parallel rule under section 401(k)(3)(A). The example is as follows:

Example. Employee A, an HCE with compensation of $120,000, is eligible to make employee contributions under Plan S and Plan T, two calendar-year profit-sharing plans of Employer H. Plan S and Plan T use the same definition of compensation. Plan S provides a match equal to 50% of each employee's contributions and Plan T has no match. During the current plan year, Employee A elects to contribute $4,000 in employee contributions to Plan T and $4,000 in employee contributions to Plan S. There are no other contributions made on behalf of Employee A. Each plan must calculate Employee A's ACR by dividing the total employee contributions by Employee A and matching contributions under both plans by $120,000. Therefore, Employee A's ACR under each plan is 8.33% ($4,000 + $4,000 + $2,000/$120,000).

(4) *Employee contributions and matching contributions taken into account under the ACP test*—(i) *Employee contributions.* An employee contribution is taken into account in determining the ACR for an eligible employee for the plan year or applicable year in which the contribution is made. For purposes of the preceding sentence, an amount withheld from an employee's pay (or a payment by the employee to an agent of the plan) is treated as contributed at the time of such withholding (or payment) if the funds paid are transmitted to the trust within a reasonable period after the withholding (or payment).

(ii) *Recharacterized elective contributions.* Excess contributions recharacterized in accordance with § 1.401(k)–2(b)(3) are taken into account as employee contributions for the plan year that includes the time at which the excess contribution is includible in the gross income of the employee under § 1.401(k)–2(b)(3)(ii).

(iii) *Matching contributions.* A matching contribution is taken into account in determining the ACR for an eligible employee for a plan year or applicable year only if each of the following requirements is satisfied—

(A) The matching contribution is allocated to the employee's account under the terms of the plan as of a date within that year;

(B) The matching contribution is made on account of (or the matching contribution is allocated on the basis of) the employee's elective deferrals or employee contributions for that year; and

(C) The matching contribution is actually paid to the trust no later than the end of the 12-month period immediately following the year that contains that date.

(5) *Employee contributions and matching contributions not taken into account under the ACP test*—(i) *General rule.* Matching contributions that do not satisfy the requirements of paragraph (a)(4)(iii) of this section may not be taken into account in the ACP test for

the plan year with respect to which the contributions were made, or for any other plan year. Instead, the amount of the matching contributions must satisfy the requirements of section 401(a)(4) (without regard to the ACP test) for the plan year for which they are allocated under the plan as if they were nonelective contributions and were the only nonelective contributions for that year. *See* §§ 1.401(a)(4)–1(b)(2)(ii)(B) and 1.410(b)–7(c)(1).

(ii) *Disproportionate matching contributions*—(A) *Matching contributions in excess of 100%.* A matching contribution with respect to an elective deferral for an NHCE is not taken into account under the ACP test to the extent it exceeds the greatest of:

(*1*) 5% of compensation;

(*2*) the employee's elective deferrals for a year; and

(*3*) the product of 2 times the plan's representative matching rate and the employee's elective deferrals for a year.

(B) *Representative matching rate.* For purposes of this paragraph (a)(5)(ii), the plan's representative matching rate is the lowest matching rate for any eligible NHCE among a group of NHCEs that consists of half of all eligible NHCEs in the plan for the plan year who make elective deferrals for the plan year (or, if greater, the lowest matching rate for all eligible NHCEs in the plan who are employed by the employer on the last day of the plan year and who make elective deferrals for the plan year).

(C) *Definition of matching rate.* For purposes of this paragraph (a)(5)(ii), the matching rate for an employee generally is the matching contributions made for such employee divided by the employee's elective deferrals for the year. If the matching rate is not the same for all levels of elective deferrals for an employee, the employee's matching rate is determined assuming that an employee's elective deferrals are equal to 6 percent of compensation.

(D) *Application to matching contributions that match employee contributions.* If a plan provides a match with respect to the sum of the employee's employee contributions and elective deferrals, that sum is substituted for the amount of the employee's elective deferrals in paragraphs (a)(5)(ii) (A) and (C) of this section and employees who make either employee contributions or elective deferrals are taken into account under paragraph (a)(5)(ii)(B) of this section. Similarly, if a plan provides a match with respect to the employee's employee contributions, but not elective deferrals, the employee's employee contributions are substituted for the amount of the employee's elective deferrals in paragraphs (a)(5)(ii) (A) and (C) of this section and employees who make employee contributions are taken into account under paragraph (a)(5)(ii)(B) of this section.

(iii) *Qualified matching contributions used to satisfy the ADP test.* Qualified matching contributions that are taken into account for the ADP test of section 401(k)(3) under § 1.401(k)–2(a)(6) are not taken into account in determining an eligible employee's ACR.

(iv) *Matching contributions taken into account under safe harbor provisions.* A plan that satisfies the ACP safe harbor requirements of section 401(m)(11) for a plan year but nonetheless must satisfy the requirements of this section because it provides for employee contributions for such plan year is permitted to apply this section disregarding all matching contributions with respect to all eligible employees. In addition, a plan that satisfies the ADP safe harbor requirements of § 1.401(k)–3 for a plan year using qualified matching contributions but does not satisfy the ACP safe harbor requirements of section 401(m)(11) for such plan year is permitted to apply this section by excluding matching contributions with respect to all eligible employees that do not exceed 4% of each employee's compensation. If a plan disregards matching contributions pursuant to this paragraph (a)(5)(iv), the disregard must apply with respect to all eligible employees.

(v) *Treatment of forfeited matching contributions.* A matching contribution that is forfeited because the contribution to which it relates is treated as an excess contribution, excess deferral, or excess aggregate contribution is not taken into account for purposes of this section.

(vi) *Additional employee contributions or matching contributions pursuant to section 414(u).* Additional employee contributions and matching contributions made by reason of an eligible employee's qualified military service under section 414(u) are not taken into account under paragraph (a)(4) of this section for the plan year for which the contributions are made, or for any other plan year.

(6) *Qualified nonelective contributions and elective contributions that may be taken into account under the ACP test.* Qualified nonelective contributions and elective contributions may be taken into account in determining the ACR for an eligible employee for a plan year or applicable year, but only to the extent the contributions satisfy the following requirements—

(i) *Timing of allocation.* The qualified nonelective contribution is allocated to the employee's account as of a date within that year (within the meaning of § 1.401(k)–2(a)(4)(i)(A)) and the elective contribution satisfies § 1.401(k)–2(a)(4)(i). Consequently, under the prior year testing method, in order to be taken into account in calculating the ACP for the group of eligible NHCEs for the applicable year, a qualified nonelective contribution must be contributed no later than the end of the 12-month period following the applicable year even though the applicable year is different than the plan year being tested.

(ii) *Elective contributions taken into account under the ACP test.* Elective contributions may be taken into account for the ACP test only if the cash or deferred arrangement under which the elective contributions are made is required to satisfy the ADP test in § 1.401(k)–2(a)(1) and, then only to the extent that the cash or deferred arrangement would satisfy that test, including such elective contributions in the ADP for the plan year or applicable year. Thus, for example, elective deferrals made pursuant to a salary reduction agreement under an annuity described in section 403(b) are not permitted to be taken into account in an ACP test. Similarly, elective contributions under a cash or deferred arrangement that is using the section 401(k) safe harbor described in § 1.401(k)–3 cannot be taken into account in an ACP test.

(iii) *Requirement that amount satisfy section 401(a)(4).* The amount of nonelective contributions, including those qualified nonelective contributions taken into account under this paragraph (a)(6) and those qualified nonelective contributions taken into account for the ADP test under paragraph § 1.401(k)–2(a)(6), and the amount of nonelective contributions, excluding those qualified nonelective contributions taken into account under this paragraph (a)(6) for the ACP test and those qualified nonelective contributions taken into account for the ADP test under paragraph § 1.401(k)–2(a)(6), satisfies the requirements of section 401(a)(4). See § 1.401(a)(4)–1(b)(2). In the case of an employer that is applying the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the plan, the determination of whether the qualified nonelective contributions satisfy the requirements of this paragraph (a)(6)(iii) must be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on an employer-wide basis. Conversely, in the case of an employer that is treated as

operating qualified separate lines of business, and does not apply the special rule for employer-wide plans in § 1.414(r)–1(c)(2)(ii) with respect to the plan, then the determination of whether the qualifiednonelective contributions satisfy the requirements of this paragraph (a)(6)(iii) is not permitted to be made on an employer-wide basis regardless of whether the plans to which the qualified nonelective contributions are made are satisfying the requirements of section 410(b) on that basis.

(iv) *Aggregation must be permitted.* The plan that provides for employee or matching contributions and the plan or plans to which the qualified nonelective contributions or elective contributions are made are plans that would be permitted to be aggregated under § 1.401(m)–1(b)(4). If the plan year of the plan that provides for employee or matching contributions is changed to satisfy the requirement under § 1.410(b)–7(d)(5) that aggregated plans have the same plan year, qualified nonelective contributions and elective contributions may be taken into account in the resulting short plan year only if such qualified nonelective and elective contributions could have been taken into account under an ADP test for a plan with that same short plan year.

(v) *Disproportionate contributions not taken into account*—(A) *General rule.* Qualified nonelective contributions cannot be taken into account for an applicable year for an NHCE to the extent such contributions exceed the product of that NHCE's compensation and the greater of 5% and 2 times the plan's representative contribution rate. Any qualified nonelective contribution taken into account in an ADP test under § 1.401(k)–2(a)(6) (including the determination of the representative contribution rate for purposes of § 1.401(k)–2(a)(6)(iv)(B)) is not permitted to be taken into account for purposes of this paragraph (a)(6) (including the determination of the representative contribution rate for purposes of paragraph (a)(6)(v)(B) of this section).

(B) *Definition of representative contribution rate.* For purposes of this paragraph (a)(6)(v), the plan's representative contribution rate is the lowest applicable contribution rate of any eligible NHCE among a group of eligible NHCEs that consists of half of all eligible NHCEs for the plan year (or, if greater, the lowest applicable contribution rate of any eligible NHCE in the group of all eligible NHCEs for the applicable year and who is employed by the employer on the last day of the applicable year).

(C) *Definition of applicable contribution rate.* For purposes of this paragraph (a)(6)(v), the applicable contribution rate for an eligible NHCE is the sum of the matching contributions taken into account under this section for the employee for the plan year and the qualified nonelective contributions made for that employee for the plan year, divided by that employee's compensation for the same period.

(D) *Special rule for prevailing wage contributions.* Notwithstanding paragraph (a)(6)(v)(A) of this section, qualified nonelective contributions that are made in connection with an employer's obligation to pay prevailing wages under the Davis-Bacon Act (46 Stat. 1494), Pub. L. 71–798, Service Contract Act of 1965 (79 Stat. 1965), Pub. L. 89–286, or similar legislation can be taken into account for a plan year for an NHCE to the extent such contributions do not exceed 10 percent of that NHCE's compensation.

(vi) *Contribution only used once.* Qualified nonelective contributions cannot be taken into account under this paragraph (a)(6) to the extent such contributions are taken into account for purposes of satisfying any other ACP test, any ADP test, or the requirements of § 1.401(k)–3, 1.401(m)–3 or 1.401(k)–4. Thus, for example, qualified nonelective contributions that are made pursuant to § 1.401(k)–3(b) cannot be taken into account under the ACP test. Similarly, if a plan switches from the current year testing method to the prior year testing method pursuant to § 1.401(m)–2(c)(1), qualified nonelective contributions that are taken into account under the current year testing method for a plan year may not be taken into account under the prior year testing method for the next plan year.

(7) *Examples.* The following examples illustrate the application of this paragraph (a). See § 1.401(k)–2(a)(6) for additional examples of the parallel rules under section 401(k)(3)(A). The examples are as follows:

Example 1. (i) Employer L maintains Plan U, a profit-sharing plan under which $.50 matching contributions are made for each dollar of employee contributions. Plan U uses the current year testing method. The chart below shows the average employee contributions (as a percentage of compensation) and matching contributions (as a percentage of compensation) for Plan U's HCEs and NHCEs for the 2006 plan year:

	Employee contributions (percentage)	Matching contributions (percentage)	Actual contribution (percentage)
Highly compensated employees	4	2	6
Nonhighly compensated employees	3	1.5	4.5

(ii) The matching rate for all NHCEs is 50% and thus the matching contributions are not disproportionate under paragraph (a)(5)(ii) of this section. Accordingly, they are taken into account in determining the ACR of eligible employees.

(iii) Because the ACP for the HCEs (6.0%) exceeds 5.63% (4.5% x 1.25), Plan U does not satisfy the ACP test under paragraph (a)(1)(i)(A) of this section. However, because the ACP for the HCEs does not exceed the ACP for the NHCEs by more than 2 percentage points and the ACP for the HCEs does not exceed the ACP for the NHCEs multiplied by 2 (4.5% x 2 = 9%), the plan satisfies the ACP test under paragraph (a)(1)(i)(B) of this section.

Example 2. (i) Employees A through F are eligible employees in Plan V, a profit-sharing plan of Employer M that includes a cash or deferred arrangement and permits employee contributions. Under Plan V, a $.50 matching contribution is made for each dollar of elective contributions and employee contributions. Plan V uses the current year testing method and does not provide for elective contributions to be taken into account in determining an eligible employee's ACR. For the 2006 plan year, Employees A and B are HCEs and the remaining employees are NHCEs. The compensation, elective contributions, employee contributions, and matching contributions for the 2006 plan year are shown in the following table:

Employee	Compensation	Elective contributions	Employee contributions	Matching contributions
A	$190,000	$15,000	$3,500	$9,250
B	100,000	5,000	10,000	7,500

Employee	Compensation	Elective contributions	Employee contributions	Matching contributions
C	85,000	12,000	0	6,000
D	70,000	9,500	0	4,750
E	40,000	10,000	0	5,000
F	10,000	0	0	0

(ii) The matching rate for all NHCEs is 50% and thus the matching contributions are not disproportionate under paragraph (a)(5)(ii) of this section. Accordingly, they are taken into account in determining the ACR of eligible employees, as shown in the following table:

Employee	Compensation	Employee contributions	Matching contributions	ACR (percent)
A	$190,000	$3,500	$9,250	6.71
B	100,000	10,000	7,500	17.50
C	85,000	0	6,000	7.06
D	70,000	0	4,750	6.79
E	40,000	0	5,000	12.50
F	10,000	0	0	0

(iii) The ACP for the HCEs is 12.11% ((6.71% + 17.50%)/2). The ACP for the NHCEs is 6.59% ((7.06% + 6.79% + 12.50% + 0.%)/4). Plan V fails to satisfy the ACP test under paragraph (a)(1)(i)(A) of this section because the ACP of HCEs is more than 125% of the ACP of the NHCEs (6.59% x 1.25 = 8.24%). In addition, Plan V fails to satisfy the ACP test under paragraph (a)(1)(i)(B) of this section because the ACP for the HCEs exceeds the ACP of the other employees by more than 2 percentage points (6.59% + 2% = 8.59%). Therefore, the plan fails to satisfy the requirements of section 401(m)(2) and paragraph (a)(1) of this section unless the ACP failure is corrected under paragraph (b) of this section.

Example 3. (i) The facts are the same as *Example 2,* except that the plan provides that the NHCEs' elective contributions may be used to meet the requirements of section 401(m) to the extent needed under that section.

(ii) Pursuant to paragraph (a)(6)(ii) of this section, the $10,000 of elective contributions for Employee E may be taken into account in determining the ACP rather than the ADP to the extent that the plan satisfies the requirements of § 1.401(k)–2(a)(1) excluding from the ADP this $10,000. In this case, if the $10,000 were excluded from the ADP for the NHCEs, the ADP for the HCEs is 6.45% (7.89% + 5.00%) /2 and the ADP for the NHCEs would be 6.92% (14.12% + 13.57% + 0% +0%)/4) and the plan would satisfy the requirements of § 1.401(k)–2(a)(1) excluding from the ADP the elective contributions for NHCEs that are taken into account under section 401(m).

(iii) After taking into account the $10,000 of elective contributions for Employee E in the ACP test, the ACP for the NHCEs is 12.84% (7.06% + 6.79% + 37.50 % + 0%) /4. Therefore the plan satisfies the ACP test because the ACP for the HCEs (12.11%) is less than 1.25 times the ACP for the NHCEs.

Example 4. (i) The facts are the same as *Example 2,* except that Plan V provides for a higher than 50% match rate on the elective contributions and employee contributions for all NHCEs. The match rate is defined as the rate, rounded up to the next whole percent, necessary to allow the plan to satisfy the ACP test, but not in excess of 100%. In this case, an increase in the match rate from 50% to 74% will be sufficient to allow the plan to satisfy the ACP test. Thus, for the 2006 plan year, the compensation, elective contributions, employee contributions, matching contributions at a 74% match rate of the eligible NHCEs (employees C through F) are shown in the following table:

Employee	Compensation	Elective contributions	Employee contributions	Matching contributions
C	$85,000	$12,000	$0	$8,880
D	70,000	9,500	0	7,030
E	40,000	10,000	0	7,400
F	10,000	0	0	0

(ii) The matching rate for all NHCEs is 74% and thus the matching contributions are not disproportionate under paragraph (a)(5)(ii) of this section. Therefore, the matching contributions may be taken into account in determining the ACP for the NHCEs.

(iii) The ACP for the NHCEs is 9.75% (10.45% + 10.04% + 18.50% + 0%)/4. Because the ACP for the HCEs (12.11%) is less than 1.25 times the ACP for the NHCEs, the plan satisfies the requirements of section 401(m).

Example 5. (i) The facts are the same as *Example 4,* except that: Employee E's elective contributions are $2,000 (rather than $10,000) and pursuant to paragraph (a)(6)(ii) of this section, the $2,000 of elective contributions for Employee E are taken into account in determining the ACP rather than the ADP. In addition, Plan V provides that the higher match rate is not limited to 100% and applies only for a specified group of NHCEs. The only member of that group is Employee E. Under the plan provision, the higher match rate is a 400% match. Thus, for the 2006 plan year, the compensation, elective contributions, employee contributions, matching contributions of the eligible NHCEs (employees C through F) are shown in the following table:

Employee	Compensation	Elective contributions	Employee contributions	Matching contributions
C	$85,000	$12,000	$0	$6,000
D	70,000	9,500	0	4,750
E	40,000	2,000	0	8,000
F	10,000	0	0	0

(ii) If the entire matching contribution made on behalf of Employee E were taken into account under the ACP test, Plan V would satisfy the test, because the ACP for the NHCEs would be 9.71% (7.06% + 6.79% + 25.00% + 0%)/4. Because the ACP for the HCEs (12.11%) is less than 1.25 times what the ACP for the NHCEs would be, the plan would satisfy the requirements of section 401(m).

(iii) Pursuant to paragraph (a)(5)(ii) of this section, however, matching contributions for an eligible NHCE that exceed the greatest of 5% of compensation, the employee's elective deferrals and 2 times the product of the plan's representative matching rate and the employee's elective deferrals cannot be taken into account in applying the ACP test. The plan's representative matching rate is the lowest matching rate for any eligible employee in a group of NHCEs that is at least half of all eligible employees who are NHCEs in the plan for the plan year who make elective contributions for the plan year. For Plan V, the group of NHCEs who make such contributions consists of Employees C, D and E. The matching rates for these three employees are 50%, 50% and 400% respectively. The lowest matching rate for a group of NHCEs that is at least half of all the NHCEs who make elective contributions (or 2 NHCEs) is 50%. Because 400% is more than twice the plan's representative matching rate and the matching contributions exceed 5% of compensation, the full amount of matching contributions is not taken into account. Only $2,000 of the matching contributions made on behalf of Employee E (matching contributions that do not exceed the greatest of 5% of compensation, the employee's elective deferrals, or the product of 100% (2 times the representative matching rate) and the employee's elective deferrals) satisfy the requirements of paragraph (a)(5)(ii) of this section and may be taken into account under the ACP test. Accordingly, the ACP for the NHCEs is 5.96% (7.06% + 6.79% + 10% + 0%)/4 and the plan fails to satisfy the requirements of section 401(m)(2) and paragraph (a)(1) of this section unless the ACP failure is corrected under paragraph (b) of this section.

Example 6. (i) The facts are the same as *Example 2,* except that Plan V provides a QNEC equal to 13% of pay for Employee F that will be taken into account under the ACP test to the extent the contributions satisfy the requirements of paragraph (a)(6) of this section.

(ii) Pursuant to paragraph (a)(6)(v) of this section, a QNEC cannot be taken into account in determining an NHCE's ACR to the extent it exceeds the greater of 5% and the product of the employee's compensation and the plan's representative contribution rate. The plan's representative contribution rate is two times the lowest applicable contribution rate for any eligible employee in a group of NHCEs that is at least half of all eligible employees who are NHCEs in the plan for the plan year. For Plan V, the applicable contribution rates for Employees C, D, E and F are 7.06%, 6.79%, 12.5% and 13% respectively. The lowest applicable contribution rate for a group of NHCEs that is at least half of all the NHCEs is 12.50% (the lowest applicable contribution rate for the group of NHCEs that consists of Employees E and F).

(iii) Under paragraph (a)(6)(v)(B) of this section, the plan's representative contribution rate is 2 times 12.50% or 25.00%. Accordingly, the QNECs for Employee F can be taken into account under the ACP test only to the extent they do not exceed 25.00% of compensation. In this case, all of the QNECs for Employee F may be taken into account under the ACP test.

(iv) After taking into account the QNECs for Employee F, the ACP for the NHCEs is 9.84% (7.06% + 6.79% + 12.50% + 13%)/4. Because the ACP for the HCEs (12.11%) is less than 1.25 times the ACP for the NHCEs, the plan satisfies the requirements of section 401(m)(2) and paragraph (a)(1) of this section.

(b) *Correction of excess aggregate contributions*—(1) *Permissible correction methods*—(i) *In general.* A plan that provides for employee contributions or matching contributions does not fail to satisfy the requirements of section 401(m)(2) and paragraph (a)(1) of this section if the employer, in accordance with the terms of the plan, uses either of the following correction methods—

(A) *Additional contributions.* The employer makes additional contributions that are taken into account for the ACP test under this section that, in combination with the other contributions taken into account under this section, allow the plan to satisfy the requirements of paragraph (a)(1) of this section.

(B) *Excess aggregate contributions distributed or forfeited.* Excess aggregate contributions are distributed or forfeited in accordance with paragraph (b)(2) of this section.

(ii) *Combination of correction methods.* A plan may provide for the use of either of the correction methods described in paragraph (b)(1)(i) of this section, may limit employee contributions or matching contributions in a manner that prevents excess aggregate contributions from being made, or may use a combination of these methods, to avoid or correct excess aggregate contributions. If a plan uses a combination of correction methods, any contributions made under paragraph (b)(1)(i)(A) of this section must be taken into account before application of the correction method in paragraph (b)(1)(i)(B) of this section.

(iii) *Exclusive means of correction.* A failure to satisfy the requirements of paragraph (a)(1) of this section may not be corrected using any method other than one described in paragraph (b)(1)(i) or (ii) of this section. Thus, excess aggregate contributions for a plan year may not be corrected by forfeiting vested matching contributions, distributing nonvested matching contributions, recharacterizing matching contributions, or not making matching contributions required under the terms of the plan. Similarly, excess aggregate contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year. In addition, excess aggregate contributions may not be corrected using the retroactive correction rules of § 1.401(a)(4)–11(g). See § 1.401(a)(4)–11(g)(3)(vii) and (5).

(2) *Correction through distribution*—(i) *General rule.* This paragraph (b)(2) contains the rules for correction of excess aggregate contributions through a distribution from the plan. Correction through a distribution generally involves a 4-step process. First, the plan must determine, in accordance with paragraph (b)(2)(ii) of this section, the total amount of excess aggregate contributions that must be distributed under the plan. Second, the plan must apportion the total amount of excess aggregate contributions among the HCEs in accordance with paragraph (b)(2)(iii) of this section. Third, the plan must determine the income allocable to excess aggregate contributions in accordance with paragraph (b)(2)(iv) of this section. Finally, the plan must distribute the apportioned contributions, together with allocable income (or forfeit the apportioned matching contributions, if forfeitable) in accordance with paragraph (b)(2)(v) of this section. Paragraph (b)(2)(vi) of this section provides rules relating to the tax treatment of these distributions.

(ii) *Calculation of total amount to be distributed.* The following procedures must be used to determine the total amount of the excess aggregate contributions to be distributed—

(A) *Calculate the dollar amount of excess aggregate contributions for each HCE.* The amount of excess aggregate contributions attributable to an HCE for a plan year is the amount (if any) by which the HCE's contributions taken into account under this section must be reduced for the HCE's ACR to equal the highest permitted ACR under the plan. To calculate the highest permitted ACR under a plan, the ACR of the HCE with the highest ACR is reduced by the amount required to cause that HCE's ACR to equal the ACR of the HCE with the next highest ACR. If a lesser reduction would enable the plan to satisfy the requirements of paragraph (b)(2)(ii)(C) of this section, only this lesser reduction applies.

(B) *Determination of the total amount of excess aggregate contributions.* The process described in paragraph

(b)(2)(ii)(A) of this section must be repeated until the plan would satisfy the requirements of paragraph (b)(2)(ii)(C) of this section. The sum of all reductions for all HCEs determined under paragraph (b)(2)(ii)(A) of this section is the total amount of excess aggregate contributions for the plan year.

(C) *Satisfaction of ACP.* A plan satisfies this paragraph (b)(2)(ii)(C) if the plan would satisfy the requirements of paragraph (a)(1)(i) of this section if the ACR for each HCE were determined after the reductions described in paragraph (b)(2)(ii)(A) of this section.

(iii) *Apportionment of total amount of excess aggregate contributions among the HCEs.* The following procedures must be used in apportioning the total amount of excess aggregate contributions determined under paragraph (b)(2)(ii) of this section among the HCEs—

(A) *Calculate the dollar amount of excess aggregate contributions for each HCE.* The contributions with respect to the HCE with the highest dollar amount of contributions taken account under this section are reduced by the amount required to cause that HCE's contributions to equal the dollar amount of contributions taken into account under this section for the HCE with the next highest dollar amount of such contributions. If a lesser apportionment to the HCE would enable the plan to apportion the total amount of excess aggregate contributions, only the lesser apportionment would apply.

(B) *Limit on amount apportioned to any HCE.* For purposes of this paragraph (b)(2)(iii), the contributions for an HCE who is an eligible employee in more than one plan of an employer to which matching contributions and employee contributions are made is determined by adding together all contributions otherwise taken into account in determining the ACR of the HCE under the rules of paragraph (a)(3)(ii) of this section. However, the amount of contributions apportioned with respect to an HCE must not exceed the amount of contributions taken into account under this section that were actually made on behalf of the HCE to the plan for the plan year. Thus, in the case of an HCE who is an eligible employee in more than one plan of the same employer to which employee contributions or matching contributions are made and whose ACR is calculated in accordance with paragraph (a)(3)(ii) of this section, the amount distributed under this paragraph (b)(2)(iii) will not exceed such contributions actually contributed to the plan for the plan year that are taken into account under this section for the plan year.

(C) *Apportionment to additional HCEs.* The procedure in paragraph (b)(2)(iii)(A) of this section must be repeated until the total amount of excess aggregate contributions have been apportioned.

(iv) *Income allocable to excess aggregate contributions*—(A) *General rule.* The income allocable to excess aggregate contributions is equal to the sum of the allocable gain or loss for the plan year and, to the extent the excess aggregate contributions are or will be credited with gain or loss for the gap period (i.e., the period after the close of the plan year and prior to the distribution) if there was a total distribution of the account, the allocable gain or loss during that period.

(B) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess aggregate contributions, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income to participants' accounts. See § 1.401(a)(4)–1(c)(8). A plan will not fail to use a reasonable method for computing the income allocable to excess contributions merely because the income allocable to excess aggregate contributions is determined on a date that is no more than 7 days before the distribution.

(C) *Alternative method of allocating income for the plan year.* A plan may allocate income to excess aggregate contributions for the plan year by multiplying the income for the plan year allocable to employee contributions, matching contributions and other amounts taken into account under this section (including the contributions for the year), by a fraction, the numerator of which is the excess aggregate contributions for the employee for the plan year, and the denominator of which is the sum of the—

(*1*) Account balance attributable to employee contributions and matching contributions and other amounts taken into account under this section as of the beginning of the plan year; and

(*2*) Any additional such contributions for the plan year.

(D) *Safe harbor method of allocating gap period income.* A plan may use the safe harbor method in this paragraph (b)(2)(iv)(D) to determine income on excess aggregate contributions for the gap period. Under this safe harbor method, income on excess aggregate contributions for the gap period is equal to 10% of the income allocable to excess aggregate contributions for the plan year that would be determined under paragraph (b)(2)(iv)(C) of this section, multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of calculating the number of calendar months that have elapsed under the safe harbor method, a corrective distribution that is made on or before the fifteenth day of a month is treated as made on the last day of the preceding month and a distribution made after the fifteenth day of a month is treated as made on the last day of the month.

(E) *Alternative method of allocating plan year and gap period income.* A plan may determine the allocable gain or loss for the aggregate of the plan year and the gap period by applying the alternative method provided by paragraph (b)(2)(iv)(C) of this section to that aggregate period. This is accomplished by substituting the income for the plan year and the gap period for the income for the plan year and by substituting the contributions taken into account under this section for the plan year and the gap period for the contributions taken into account for the plan year in determining the fraction that is multiplied by that income.

(F) *Allocable income for recharacterized elective contributions.* If recharacterized elective contributions are distributed as excess aggregate contributions, the income allocable to the excess aggregate contributions is determined as if recharacterized elective contributions had been distributed as excess contributions. Thus, income must be allocated to the recharacterized amounts distributed using the methods in § 1.401(k)–2(b)(2)(iv).

(v) *Distribution and forfeiture.* Within 12 months after the close of the plan year in which the excess aggregate contribution arose, the plan must distribute to each HCE the contributions apportioned to such HCE under paragraph (b)(2)(iii) of this section (and the allocable income) to the extent they are vested or forfeit such amounts, if forfeitable. Except as otherwise provided in this paragraph (b)(2)(v), a distribution of excess aggregate contributions must be in addition to any other distributions made during the year and must be designated as a corrective distribution by the employer. In the event of a complete termination of the plan during the plan year in which an excess aggregate contribution arose, the corrective distribution must be made as soon as administratively feasible after the date of termination of the plan, but in no event later than 12 months after the date of termination. If the entire account balance of an HCE is distributed prior to when the plan makes a distribution of excess aggregate

contributions in accordance with this paragraph (b)(2), the distribution is deemed to have been a corrective distribution of excess aggregate contributions (and income) to the extent that a corrective distribution would otherwise have been required.

(vi) *Tax treatment of corrective distributions*—(A) *General rule.* Except as otherwise provided in this paragraph (b)(2)(vi), a corrective distribution of excess aggregate contributions (and income) that is made within 2½ months after the end of the plan year for which the excess aggregate contributions were made is includible in the employee's gross income for the taxable year of the employee ending with or within the plan year for which the excess aggregate contributions were made. A corrective distribution of excess aggregate contributions (and income) that is made more than 2½ months after the plan year for which the excess aggregate contributions were made is includible in the employee's gross income in the taxable year of the employee in which distributed. The portion of the distribution that is treated as an investment in the contract (and is therefore not subject to tax under section 72) is determined without regard to any plan contributions other than those distributed as excess aggregate contributions. Regardless of when the corrective distribution is made, it is not subject to the early distribution tax of section 72(t). See paragraph (b)(4) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months after the end of the plan year. See also § 1.402(c)–2, A–4 prohibiting rollover of distributions that are excess aggregate contributions.

(B) *Rule for de minimis distributions.* If the total amount of excess aggregate contributions determined under this paragraph (b)(2), and excess contributions determined under § 1.401(k)–2(b)(2) distributed to a recipient under a plan for any plan year is less than $100 (excluding income), a corrective distribution of excess aggregate contributions (and income) is includible in gross income in the recipient's taxable year in which the corrective distribution is made, except to the extent the corrective distribution is a return of employee contributions.

(3) *Other rules*—(i) *No employee or spousal consent required.* A distribution of excess aggregate contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(ii) *Treatment of corrective distributions and forfeited contributions as employer contributions.* Excess aggregate contributions (other than amounts attributable to employee contributions), including forfeited matching contributions, are treated as employer contributions for purposes of sections 404 and 415 even if distributed from the plan. Forfeited matching contributions that are reallocated to the accounts of other participants for the plan year in which the forfeiture occurs are treated under section 415 as annual additions for the participants to whose accounts they are reallocated and for the participants from whose accounts they are forfeited.

(iii) *No reduction of required minimum distribution.* A distribution of excess aggregate contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9). See § 1.401(a)(9)–5, A–9(b).

(iv) *Partial correction.* Any distribution of less than the entire amount of excess aggregate contributions (and allocable income) is treated as a pro rata distribution of excess aggregate contributions and allocable income.

(v) *Matching contributions on excess contributions, excess deferrals and excess aggregate contributions*—(A) *Corrective distributions not permitted.* A matching contribution may not be distributed merely because the contribution to which it relates is treated as an excess contribution, excess deferral, or excess aggregate contribution.

(B) *Coordination with section 401(a)(4).* A matching contribution is taken into account under section 401(a)(4) even if the match is distributed, unless the distributed contribution is an excess aggregate contribution. This requires that, after correction of excess aggregate contributions, each level of matching contributions be currently and effectively available to a group of employees that satisfies section 410(b). See § 1.401(a)(4)–4(e)(3)(iii)(G). Thus, a plan that provides the same rate of matching contributions to all employees will not meet the requirements of section 401(a)(4) if employee contributions are distributed under this paragraph (b) to HCEs to the extent needed to meet the requirements of section 401(m)(2), while matching contributions attributable to employee contributions remain allocated to the HCEs' accounts. This is because the level of matching contributions will be higher for a group of employees that consists entirely of HCEs. Under section 411(a)(3)(G) and § 1.411(a)–4(b)(7), a plan may forfeit matching contributions attributable to excess contributions, excess aggregate contributions and excess deferrals to avoid a violation of section 401(a)(4). See also § 1.401(a)(4)–11(g)(3)(vii)(B) regarding the use of additional allocations to the accounts of NHCEs for the purpose of correcting a discriminatory rate of matching contributions. A plan is permitted to provide for which contributions are to be distributed to satisfy the ACP test so as to avoid discriminatory matching rates that would otherwise violate section 401(a)(4). For example, the plan may provide that unmatched employee contributions will be distributed before matched employee contributions.

(vi) *No requirement for recalculation.* If the distributions and forfeitures described in paragraph (b)(2) of this section are made, the employee contributions and matching contributions are treated as meeting the nondiscrimination test of section 401(m)(2) regardless of whether the ACP for the HCEs, if recalculated after the distributions and forfeitures, would satisfy section 401(m)(2).

(4) *Failure to timely correct*—(i) *Failure to correct within 2½ months after end of plan year.* If a plan does not correct excess aggregate contributions within 2½ months after the close of the plan year for which the excess aggregate contributions are made, the employer will be liable for a 10% excise tax on the amount of the excess aggregate contributions. See section 4979 and § 54.4979–1 of this chapter. Qualified nonelective contributions properly taken into account under paragraph (a)(6) of this section for a plan year may enable a plan to avoid having excess aggregate contributions, even if the contributions are made after the close of the 2½ month period.

(ii) *Failure to correct within 12 months after end of plan year.* If excess aggregate contributions are not corrected within 12 months after the close of the plan year for which they were made, the plan will fail to meet the requirements of section 401(a)(4) for the plan year for which the excess aggregate contributions were made and all subsequent plan years in which the excess aggregate contributions remain in the trust.

(5) *Examples.* The following examples illustrate the application of this paragraph. See also § 1.401(k)–2(b) for additional examples of the parallel correction rules applicable to cash or deferred arrangements. For purposes of these examples, none of the plans provide for catch-up contributions under section 414(v). The examples are as follows:

Example 1. (i) Employer L maintains a plan that provides for employee contributions and fully vested matching contributions. The plan provides that failures of the ACP test are corrected by distribution. In 2006, the ACP for the eligible NHCEs is 6%. Thus, the ACP for the eligible HCEs may not exceed 8%. The three HCEs who participate have the following compensation, contributions, and ACRs:

Employee	Compensation	Employee contributions and matching contributions	Actual contribution ratio (percent)
A	200,000	14,000	7
B	150,000	13,500	9
C	100,000	12,000	12
			Average 9.33

(ii) The total amount of excess aggregate contributions for the HCEs is determined under paragraph (b)(2)(ii) of this section as follows: the matching and employee contributions of Employee C (the HCE with the highest ACR) is reduced by 3% of compensation (or $3,000) in order to reduce the ACR of that HCE to 9%, which is the ACR of Employee B.

(iii) Because the ACP of the HCEs determined after the $3,000 reduction still exceeds 8%, further reductions in matching contributions and employee contributions are necessary in order to reduce the ACP of the HCEs to 8%. The employee contributions and matching contributions for Employees B and C are reduced by an additional .5% of compensation or $1,250 ($750 and $500 respectively). Because the ACP of the HCEs determined after the reductions now equals 8%, the plan would satisfy the requirements of (a)(1)(ii) of this section.

(iv) The total amount of excess aggregate contributions ($4,250) is apportioned among the HCEs under paragraph (b)(2)(iii) of this section first to the HCE with the highest amount of matching contributions and employee contributions. Therefore, Employee A is apportioned $500 (the amount required to cause A's matching contributions and employee contributions to equal the next highest dollar amount of matching contributions and employee contributions).

(v) Because the total amount of excess aggregate contributions has not been apportioned, further apportionment is necessary. The balance ($3,750) of the total amount of excess aggregate contributions is apportioned equally among Employees A and B ($1,500 to each, the amount required to cause their contributions to equal the next highest dollar amount of matching contributions and employee contributions).

(vi) Because the total amount of excess aggregate contributions has not been apportioned, further apportionment is necessary. The balance ($750) of the total amount of excess aggregate contributions is apportioned equally among Employees A, B and C ($250 to each, the amount required to allocate the total amount of excess aggregate contributions for the plan).

(vii) Therefore, the plan will satisfy the requirements of paragraph (a)(1) of this section if, by the end of the 12 month period following the end of the 2006 plan year, Employee A receives a corrective distribution of excess aggregate contributions equal to $2,250 ($500 + $1,500 + $250) and allocable income, Employee B receives a corrective distribution of $250 and allocable income and Employee C receives a corrective distribution of $1,750 ($1,500 + $250) and allocable income.

Example 2. (i) Employee D is the sole HCE who is eligible to participate in a cash or deferred arrangement maintained by Employer M. The plan that includes the arrangement, Plan X, permits employee contributions and provides a fully vested matching contribution equal to 50% of elective contributions. Plan X is a calendar year plan. Plan X corrects excess contributions by recharacterization and provides that failures of the ACP test are corrected by distribution. For the 2006 plan year, D's compensation is $200,000, and D's elective contributions are $15,000. The actual deferral percentages and actual contribution percentages for Employee D and the other eligible employees under Plan X are shown in the following table:

	Actual deferral percentage	Actual contribution percentage
Employee D	7.5	3.75
NHCEs	4	2

(ii) In February 2007, Employer M determines that D's actual deferral ratio must be reduced to 6%, or $12,000, which requires a recharacterization of $3,000 as an employee contribution. This increases D's actual contribution ratio to 5.25% ($7,500 in matching contributions plus $3,000 recharacterized as employee contributions, divided by $200,000 in compensation). Since D's actual contribution ratio must be limited to 4% for Plan X to satisfy the actual contribution percentage test, Plan X must distribute 1.25% or $2,500 of D's employee contributions and matching contributions together with allocable income. If $2,500 in matching contributions and allocable income is distributed, this will correct the excess aggregate contributions and will not result in a discriminatory rate of matching contributions. See *Example 8.*

Example 3. (i) The facts are the same as in *Example 2,* except that Employee D also had elective contributions under Plan Y, maintained by an employer unrelated to M. In January 2007, D requests and receives a distribution of $1,200 in excess deferrals from Plan X. Pursuant to the terms of Plan X, D forfeits the $600 match on the excess deferrals to correct a discriminatory rate of match.

(ii) The $3,000 that would otherwise have been recharacterized for Plan X to satisfy the actual deferral percentage test is reduced by the $1,200 already distributed as an excess deferral, leaving $1,800 to be recharacterized. See § 1.401(k)–2(b)(4)(i)(A). D's actual contribution ratio is now 4.35% ($7,500 in matching contributions plus $1,800 in recharacterized contributions less $600 forfeited matching contributions attributable to the excess deferrals, divided by $200,000 in compensation).

(iii) The matching and employee contributions for Employee D must be reduced by .35% of compensation in order to reduce the ACP of the HCEs to 4%. The plan must provide for forfeiture of additional matching contributions to prevent a discriminatory rate of matching contributions. See *Example 8.*

Example 4. (i) The facts are the same as in *Example 3,* except that D does not request a distribution of excess deferrals until March 2007. Employer X has already recharacterized $3,000 as employee contributions.

(ii) Under § 1.402(g)–1(e)(6), the amount of excess deferrals is reduced by the amount of excess contributions that are recharacterized. Because the amount recharacterized is greater than the excess deferrals, Plan X is neither required nor permitted to make a distribution of excess deferrals, and the recharacterization has corrected the excess deferrals.

Example 5. (i) For the 2006 plan year, Employee F defers $10,000 under Plan M and $6,000 under Plan N. Plans M and N, which have calendar plan years are maintained by unrelated employers. Plan M provides a fully vested, 100% matching contribution, does not take elective contributions into account under section 401(m) or take matching contributions into account under section 401(k) and provides that excess contributions and excess aggregate contributions are

corrected by distribution. Under Plan M, Employee F is allocated excess contributions of $600 and excess aggregate contributions of $1,600. Employee F timely requests and receives a distribution of the $1,000 excess deferral from Plan M and, pursuant to the terms of Plan M, forfeits the corresponding $1,000 matching contribution.

(ii) No distribution is required or permitted to correct the excess contributions because $1,000 has been distributed by Plan M as excess deferrals. The distribution required to correct the excess aggregate contributions (after forfeiting the matching contribution) is $600 ($1,600 in excess aggregate contributions minus $1,000 in forfeited matching contributions). If Employee F had corrected the excess deferrals of $1,000 by withdrawing $1,000 from Plan N, Plan M would have had to correct the $600 excess contributions in Plan M by distributing $600. Since Employee F then would have forfeited $600 (instead of $1,000) in matching contributions, Employee F would have had $1,000 ($1,600 in excess aggregate contributions minus $600 in forfeited matching contributions) remaining of excess aggregate contributions in Plan M. These would have been corrected by distributing an additional $1,000 from Plan M.

Example 6. (i) Employee G is the sole HCE in a profit sharing plan under which the employer matches 100% of employee contributions up to 2% of compensation, and 50% of employee contributions up to the next 4% of compensation. For the 2008 plan year, Employee G has compensation of $100,000 and makes a 7% employee contribution of $7,000. Employee G receives a 4% matching contribution or $4,000. Thus, Employee G's actual contribution ratio (ACR) is 11%. The actual contribution percentage for the NHCEs is 5%, and the employer determines that Employee G's ACR must be reduced to 7% to comply with the rules of section 401(m).

(ii) In this case, the plan satisfies the requirements of section if it distributes the unmatched employee contributions of $1,000, and $2,000 of matched employee contributions with their related matches of $1,000. This would leave Employee G with 4% employee contributions, and 3% matching contributions, for an ACR of 7%. Alternatively, the plan could distribute all matching contributions and satisfy this section. However, the plan could not distribute $4,000 of Employee G's employee contributions without forfeiting the related matching contributions because this would result in a discriminatory rate of matching contributions. See also *Example 7.*

Example 7. (i) Employee H is an HCE in Employer X's profit sharing plan, which matches 100% of employee contributions up to 5% of compensation. The matching contribution is vested at the rate of 20% per year. In 2006, Employee H makes $5,000 in employee contributions and receives $5,000 of matching contributions. Employee H is 60% vested in the matching contributions at the end of the 2006 plan year. In February 2007, Employer X determines that Employee H has excess aggregate contributions of $1,000. The plan provides that only matching contributions will be distributed as excess aggregate contributions.

(ii) Employer X has two options available in distributing Employee H's excess aggregate contributions. The first option is to distribute $600 of vested matching contributions and forfeit $400 of nonvested matching contributions. These amounts are in proportion to Employee H's vested and nonvested interests in all matching contributions. The second option is to distribute $1,000 of vested matching contributions, leaving the nonvested matching contributions in the plan.

(iii) If the second option is chosen, the plan must also provide a separate vesting schedule for vesting these nonvested matching contributions. This is necessary because the nonvested matching contributions must vest as rapidly as they would have had no distribution been made. Thus, 50% must vest in each of the next 2 years.

(iv) The plan will not satisfy the nondiscriminatory availability requirement of section 401(a)(4) if only nonvested matching contributions are forfeited because the effect is that matching contributions for HCEs vest more rapidly than those for NHCEs. See § 1.401(m)–2(b)(3)(v)(B).

Example 8. (i) Employer Y maintains a calendar year profit sharing plan that includes a cash or deferred arrangement. Elective contributions are matched at the rate of 100%. After-tax employee contributions are permitted under the plan only for NHCEs and are matched at the same rate. No employees make excess deferrals. Employee J, an HCE, makes an $8,000 elective contribution and receives an $8,000 matching contribution.

(ii) Employer Y performs the actual deferral percentage (ADP) and the actual contribution percentage (ACP). To correct failures of the ADP and ACP tests, the plan distributes to A $1,000 of excess contributions and $500 of excess aggregate contributions. After the distributions, Employee J's contributions for the year are $7,000 of elective contributions and $7,500 of matching contributions. As a result, Employee J has received a higher effective rate of matching contributions than NHCEs ($7,000 of elective contributions matched by $7,500 is an effective matching rate of 107 percent). If this amount remains in Employee J's account without correction, it will cause the plan to fail to satisfy section 401(a)(4), because only an HCE receives the higher matching contribution rate. The remaining $500 matching contribution may be forfeited (but not distributed) under section 411(a)(3)(G), if the plan so provides. The plan could instead correct the discriminatory rate of matching contributions by making additional allocations to the accounts of NHCEs. See § 1.401(a)(4)–11(g)(3)(vii)(B) and (6), Example 7.

(c) *Additional rules for prior year testing method*—(1) *Rules for change in testing method.* A plan is permitted to change from the prior year testing method to the current year testing method for any plan year. A plan is permitted to change from the current year testing method to the prior year testing method only in situations described in § 1.401(k)–2(c)(1)(ii). For purposes of this paragraph (c)(1), a plan that uses the safe harbor method described in § 1.401(m)–3 or a SIMPLE 401(k) plan is treated as using the current year testing method for that plan year

(2) *Calculation of ACP under the prior year testing method for the first plan year*—(i) *Plans that are not successor plans.* If, for the first plan year of any plan (other than a successor plan), a plan uses the prior year testing method, the plan is permitted to use either that first plan year as the applicable year for determining the ACP for the eligible NHCEs, or 3% as the ACP for eligible NHCEs, for applying the ACP test for that first plan year. A plan (other than a successor plan) that uses the prior year testing method but has elected for its first plan year to use that year as the applicable year for determining the ACP for the eligible NHCEs is not treated as changing its testing method in the second plan year and is not subject to the limitations on double counting under paragraph (a)(6)(vi) of this section for the second plan year.

(ii) *First plan year defined.* For purposes of this paragraph (c)(2), the first plan year of any plan is the first year in which the plan provides for employee contributions or matching contributions. Thus, the rules of this paragraph (c)(2) do not apply to a plan (within the meaning of § 1.410(b)–7) for a plan year if for such plan year the plan is aggregated under § 1.401(m)–1(b)(4) with any other plan that provides for employee or matching contributions in the prior year.

(iii) *Plans that are successor plans.* A plan is a successor plan if 50% or more of the eligible employees for the first plan year were eligible employees under another plan maintained by the employer in the prior year that provides for employee contributions or matching contributions. If a plan that is a successor plan uses the prior year testing method for its first plan year, the ACP for the group of NHCEs for the applicable year must be determined under paragraph (c)(4) of this section.

(3) *Plans using different testing methods for the ACP and ADP test.* Except as otherwise provided in this paragraph (c)(3), a plan may use the current year testing method or prior year testing method for the ACP test for a plan year without regard to whether the current year testing method or prior year testing method is used for the ADP test for that year. For example, a plan may use the prior year testing method for the ACP test and the current year testing method for its ADP test for the plan year. However, plans that use different

testing methods under this paragraph (c)(3) cannot use—

(i) The recharacterization method of § 1.401(k)–2(b)(3) to correct excess contributions for a plan year;

(ii) The rules of paragraph (a)(6)(ii) of this section to take elective contributions into account under the ACP test (rather than the ADP test); or

(iii) The rules of paragraph § 1.401(k)–2(a)(6) to take qualified matching contributions into account under the ADP test (rather than the ACP test).

(4) *Rules for plan coverage change*—(i) *In general.* A plan that uses the prior year testing method that experiences a plan coverage change during a plan year satisfies the requirements of this section for that year only if the plan provides that the ACP for the NHCEs for the plan year is the weighted average of the ACPs for the prior year subgroups.

(ii) *Optional rule for minor plan coverage changes.* If a plan coverage change occurs and 90% or more of the total number of the NHCEs from all prior year subgroups are from a single prior year subgroup, then, in lieu of using the weighted averages described in paragraph (c)(4)(i) of this section, the plan may provide that the ACP for the group of eligible NHCEs for the prior year under the plan is the ACP of the NHCEs for the prior year of the plan under which that single prior year subgroup was eligible.

(iii) *Definitions.* The following definitions apply for purposes of this paragraph (c)(4)—

(A) *Plan coverage change.* The term *plan coverage change* means a change in the group or groups of eligible employees under a plan on account of—

(*1*) The establishment or amendment of a plan;

(*2*) A plan merger or spinoff under section 414(l);

(*3*) A change in the way plans (within the meaning of § 1.410(b)–7) are combined or separated for purposes of § 1.401(m)–1(b)(4) (*e.g.,* permissively aggregating plans not previously aggregated under § 1.410(b)–7(d), or ceasing to permissively aggregate plans under § 1.410(b)–7(d));

(*4*) A reclassification of a substantial group of employees that has the same effect as amending the plan (*e.g.,* a transfer of a substantial group of employees from one division to another division); or

(*5*) A combination of any of paragraphs (c)(4)(iii)(A)(*1*) through (*4*) of this section.

(B) *Prior year subgroup.* The term *prior year subgroup* means all NHCEs for the prior plan year who, in the prior year, were eligible employees under a specific plan that provides for employee contributions or matching contributions maintained by the employer and who would have been eligible employees in the prior year under the plan being tested if the plan coverage change had first been effective as of the first day of the prior plan year instead of first being effective during the plan year. The determination of whether an NHCE is a member of a prior year subgroup is made without regard to whether the NHCE terminated employment during the prior year.

(C) *Weighted average of the ACPs for the prior year subgroups.* The term *weighted average of the ACPs for the prior year subgroups* means the sum, for all prior year subgroups, of the adjusted ACPs for the plan year. The term *adjusted ACP with respect to a prior year subgroup* means the ACP for the prior plan year of the specific plan under which the members of the prior year subgroup were eligible employees on the first day of the prior plan year, multiplied by a fraction, the numerator of which is the number of NHCEs in the prior year subgroup and denominator of which is the total number of NHCEs in all prior year subgroups.

(iv) *Example.* The following example illustrate the application of this paragraph (c)(4). See also § 1.401(k)–2(c)(4) for examples of the parallel rules applicable to the ADP test. The example is as follows:

Example. (i) Employer B maintains two plans, Plan N and Plan P, each of which provides for employee contributions or matching contributions. The plans were not permissively aggregated under § 1.410(b)–7(d) for the 2005 testing year. Both plans use the prior year testing method. Plan N had 300 eligible employees who were NHCEs for 2005, and their ACP for that year was 6%. Plan P had 100 eligible employees who were NHCEs for 2005, and the ACP for those NHCEs for that plan was 4%. Plan N and Plan P are permissively aggregated under § 1.410(b)–7(d) for the 2006 plan year.

(ii) The permissive aggregation of Plan N and Plan P for the 2006 testing year under § 1.410(b)–7(d) is a plan coverage change that results in treating the plans as one plan (Plan NP). Therefore, the prior year ACP for the NHCEs under Plan NP for the 2006 testing year is the weighted average of the ACPs for the prior year subgroups.

(iii) The first step in determining the weighted average of the ACPs for the prior year subgroups is to identify the prior year subgroups. With respect to the 2006 testing year, an employee is a member of a prior year subgroup if the employee was an NHCE of Employer B for the 2005 plan year, was an eligible employee for the 2005 plan year under any section 401(k) plan maintained by Employer B, and would have been an eligible employee in the 2005 plan year under Plan NP if Plan N and Plan P had been permissively aggregated under § 1.410(b)–7(d) for that plan year. The NHCEs who were eligible employees under separate plans for the 2005 plan year comprise separate prior year subgroups. Thus, there are two prior year subgroups under Plan NP for the 2006 testing year: the 300 NHCEs who were eligible employees under Plan N for the 2005 plan year and the 100 NHCEs who were eligible employees under Plan P for the 2005 plan year.

(iv) The weighted average of the ACPs for the prior year subgroups is the sum of the adjusted ACP with respect to the prior year subgroup that consists of the NHCEs who were eligible employees under Plan N, and the adjusted ACP with respect to the prior year subgroup that consists of the NHCEs who were eligible employees under Plan P. The adjusted ACP for the prior year subgroup that consists of the NHCEs who were eligible employees under Plan N is 4.5%, calculated as follows: 6% (the ACP for the NHCEs under Plan N for the prior year) × 300/400 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups), which equals 4.5%. The adjusted ACP for the prior year subgroup that consists of the NHCEs who were eligible employees under Plan P is 1%, calculated as follows: 4% (the ACP for the NHCEs under Plan P for the prior year) x 100/400 (the number of NHCEs in that prior year subgroup divided by the total number of NHCEs in all prior year subgroups), which equals 1%. Thus, the prior year ACP for NHCEs under Plan NP for the 2006 testing year is 5.5% (the sum of adjusted ACPs for the prior year subgroups, 4.5% plus 1%).

§ 1.401(m)–3 Safe harbor requirements.

(a) *ACP test safe harbor.* Matching contributions under a plan satisfy the ACP safe harbor provisions of section 401(m)(11) for a plan year if the plan satisfies the safe harbor contribution requirement of paragraphs (b) or (c) of this section for the plan year, the limitations on matching contributions of paragraph (d) of this section, the notice requirement of paragraph (e) of this section, the plan year requirements of paragraph (f) of this section, and the additional rules of paragraphs (g), (h) and (j) of this section, as applicable. Pursuant to section 401(k)(12)(E)(ii), the safe harbor contribution requirement of paragraphs (b) and (c) of this section must be satisfied without regard to section 401(l). The contributions made under paragraphs (b) and (c) of this section are referred to as safe harbor nonelective contributions and safe harbor matching contributions, respectively.

(b) *Safe harbor nonelective contribution requirement.* A plan satisfies the safe harbor nonelective contribution requirement of this paragraph (b) if it satisfies the safe harbor nonelective contribution requirement of § 1.401(k)–3(b).

(c) *Safe harbor matching contribution requirement.* A plan satisfies the safe harbor matching contribution

requirement of this paragraph (c) if it satisfies the safe harbor matching contribution requirement of § 1.401(k)–3(c).

(d) *Limitation on contributions—(1) General rule.* A plan that provides for matching contributions meets the requirements of this section only if it satisfies the limitations on contributions set forth in this paragraph (d).

(2) *Matching rate must not increase.* A plan that provides for matching contributions meets the requirements of this paragraph (d) only if the ratio of matching contributions on behalf of an employee under the plan for a plan year to the employee's elective deferrals and employee contributions, does not increase as the amount of an employee's elective deferrals and employee contributions increases.

(3) *Limit on matching contributions.* A plan that provides for matching contributions satisfies the requirements of this section only if—

(i) Matching contributions are not made with respect to elective deferrals or employee contributions that exceed 6% of the employee's safe harbor compensation (within the meaning of § 1.401(k)–3(b)(2)); and

(ii) Matching contributions that are discretionary do not exceed 4% of the employee's safe harbor compensation.

(4) *Limitation on rate of match.* A plan meets the requirements of this section only if the ratio of matching contributions on behalf of an HCE to that HCE's elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) for that plan year is no greater than the ratio of matching contributions to elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) that would apply with respect to any NHCE for whom the elective deferrals or employee contributions (or the sum of elective deferrals and employee contributions) are the same percentage of safe harbor compensation. An employee is taken into account for purposes of this paragraph (d)(4) if the employee is an eligible employee under the cash or deferred arrangement with respect to which the contributions required by paragraph (b) or (c) of this section are being made for a plan year. A plan will not fail to satisfy this paragraph (d)(4) merely because the plan provides that matching contributions will be made separately with respect to each payroll period (or with respect to all payroll periods ending with or within each month or quarter of a plan year) taken into account under the plan for the plan year, provided that matching contributions with respect to any elective deferrals or employee contributions made during a plan year quarter are contributed to the plan by the last day of the immediately following plan year quarter.

(5) *HCEs participating in multiple plans.* The rules of section 401(m)(2)(B) and § 1.401(m)–2(a)(3)(ii) apply for purposes of determining the rate of matching contributions under paragraph (d)(4) of this section. However, a plan will not fail to satisfy the safe harbor matching contribution requirements of this section merely because an HCE participates during the plan year in more than one plan that provides for matching contributions, provided that—

(i) The HCE is not simultaneously an eligible employee under two plans that provide for matching contributions maintained by an employer for a plan year; and

(ii) The period used to determine compensation for purposes of determining matching contributions under each such plan is limited to periods when the HCE participated in the plan.

(6) *Permissible restrictions on elective deferrals by NHCEs*—(i) *General rule.* A plan does not satisfy the safe harbor requirements of this section, if elective deferrals or employee contributions by NHCEs are restricted, unless the restrictions are permitted by this paragraph (d)(6).

(ii) *Restrictions on election periods.* A plan may limit the frequency and duration of periods in which eligible employees may make or change contribution elections under a plan. However, an employee must have a reasonable opportunity (including a reasonable period after receipt of the notice described in paragraph (e) of this section) to make or change a contribution election for the plan year. For purposes of this section, a 30-day period is deemed to be a reasonable period to make or change a contribution election.

(iii) *Restrictions on amount of contributions.* A plan is permitted to limit the amount of contributions that may be made by an eligible employee under a plan, provided that each NHCE who is an eligible employee is permitted (unless the employee is restricted under paragraph (d)(6)(v) of this section) to make contributions in an amount that is at least sufficient to receive the maximum amount of matching contributions available under the plan for the plan year, and the employee is permitted to elect any lesser amount of contributions. However, a plan may require eligible employees to make contribution elections in whole percentages of compensation or whole dollar amounts.

(iv) *Restrictions on types of compensation that may be deferred.* A plan may limit the types of compensation that may be deferred or contributed by an eligible employee under a plan, provided that each eligible NHCE is permitted to make contributions under a definition of compensation that would be a reasonable definition of compensation within the meaning of § 1.414(s)–1(d)(2). Thus, the definition of compensation from which contributions may be made is not required to satisfy the nondiscrimination requirement of § 1.414(s)–1(d)(3).

(v) *Restrictions due to limitations under the Internal Revenue Code.* A plan may limit the amount of contributions made by an eligible employee under a plan—

(A) Because of the limitations of section 402(g) or section 415; or

(B) Because, on account of a hardship distribution, an employee's ability to make contributions has been suspended for 6 months in accordance with § 1.401(k)–1(d)(3)(iv)(E).

(e) *Notice requirement.* A plan satisfies the notice requirement of this paragraph (e) if it satisfies the notice requirement of § 1.401(k)–3(d).

(f) *Plan year requirement*—(1) *General rule.* Except as provided in this paragraph (f) or in paragraph (g) of this section, a plan will fail to satisfy the requirements of section 401(m)(11) and this section unless plan provisions that satisfy the rules of this section are adopted before the first day of that plan year and remain in effect for an entire 12-month plan year. In addition, except as provided in paragraph (h) of this section, a plan which includes provisions that satisfy the rules of this section will not satisfy the requirements of § 1.401(m)–1(b) if it is amended to change such provisions for that plan year. Moreover, if, as described in paragraph (j)(4) of this section, safe harbor matching or nonelective contributions will be made to another plan for a plan year, provisions under that other plan specifying that the safe harbor contributions will be made and providing that the contributions will be QNECs or QMACs must also be adopted before the first day of that plan year.

(2) *Initial plan year.* A newly established plan (other than a successor plan within the meaning of § 1.401(m)–2(c)(2)(iii)) will not be treated as violating the requirements of this paragraph (f) merely because the plan year is less than 12 months, provided that the plan year is at least 3 months long (or, in the case of a newly

established employer that establishes the plan as soon as administratively feasible after the employer comes into existence, a shorter period). Similarly, a plan will not fail to satisfy the requirements of this paragraph (f) for the first plan year in which matching contributions are provided under the plan provided that—

(i) The plan is not a successor plan; and

(ii) The amendment providing for matching contributions is made effective at the same time as the adoption of a cash or deferred arrangement that satisfies the requirements of § 1.401(k)–3, taking into account the rules of § 1.401(k)–3(e)(2).

(3) *Change of plan year.* A plan that has a short plan year as a result of changing its plan year will not fail to satisfy the requirements of paragraph (f)(1) of this section merely because the plan year has less than 12 months, provided that—

(i) The plan satisfied the requirements of this section for the immediately preceding plan year; and

(ii) The plan satisfies the requirements of this section (determined without regard to paragraph (h) of this section) for the immediately following plan year or for the immediately following 12 months if the immediately following plan year is less than 12 months.

(4) *Final plan year.* A plan that terminates during a plan year will not fail to satisfy the requirements of paragraph (f)(1) of this section merely because the final plan year is less than 12 months, provided that the plan satisfies the requirement of this section through the date of termination and either—

(i) The plan would satisfy the requirements of paragraph (h) of this section, treating the termination of the plan as a reduction or suspension of safe harbor matching contributions, other than the requirement that employees have a reasonable opportunity to change their cash or deferred elections and, if applicable, employee contribution elections; or

(ii) The plan termination is in connection with a transaction described in section 410(b)(6)(C) or the employer incurs a substantial business hardship, comparable to a substantial business hardship described in section 412(d).

(g) *Plan amendments adopting nonelective safe harbor contributions.* Notwithstanding paragraph (f)(1) of this section, a plan that provides for the use of the current year testing method may be amended after the first day of the plan year and no later than 30 days before the last day of the plan year to adopt the safe harbor method of this section, effective as of the first day of the plan year, using nonelective contributions under paragraph (b) of this section if the plan satisfies the requirements of § 1.401(k)–3(f).

(h) *Permissible reduction or suspension of safe harbor matching contributions*—(1) *General rule.* A plan that provides for safe harbor matching contributions will not fail to satisfy the requirements of section 401(m)(2) for a plan year merely because the plan is amended during a plan year to reduce or suspend safe harbor matching contributions on future elective deferrals and, if applicable, employee contributions provided—

(i) All eligible employees are provided the supplemental notice in accordance with paragraph (h)(2) of this section;

(ii) The reduction or suspension of safe harbor matching contributions is effective no earlier than the later of 30 days after eligible employees are provided the notice described in paragraph (h)(2) of this section and the date the amendment is adopted;

(iii) Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of safe harbor matching contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;

(iv) The plan is amended to provide that the ACP test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method described in § 1.401(m)–2(a)(1)(ii); and

(v) The plan satisfies the requirements of this section (other than this paragraph (h)) with respect to amounts deferred through the effective date of the amendment.

(2) *Notice of suspension requirement.* The notice of suspension requirement of this paragraph (h)(2) is satisfied if each eligible employee is given notice that satisfies the requirements of § 1.401(k)–3(g)(2).

(i) [Reserved]

(j) *Other rules*—(1) *Contributions taken into account.* A contribution is taken into account for purposes of this section for a plan year under the same rules as § 1.401(k)–3(h)(1).

(2) *Use of safe harbor nonelective contributions to satisfy other nondiscrimination tests.* A safe harbor nonelective contribution used to satisfy the nonelective contribution requirement under paragraph (b) of this section may also be taken into account for purposes of determining whether a plan satisfies section 401(a)(4) under the same rules as § 1.401(k)–3(h)(2).

(3) *Early participation rules.* Section 401(m)(5)(C) and § 1.401(m)–2(a)(1)(iii)(A) which provide an alternative nondiscrimination rule for certain plans that provide for early participation, does not apply for purposes of section 401(m)(11) and this section. Thus, a plan is not treated as satisfying this section with respect to the eligible employees who have not completed the minimum age and service requirements of section 410(a)(1)(A) unless the plan satisfies the requirements of this section with respect to such eligible employees.

(4) *Satisfying safe harbor contribution requirement under another defined contribution plan.* Safe harbor matching or nonelective contributions may be made to another defined contribution plan under the same rules as § 1.401(k)–3(h)(4). Consequently, each NHCE under the plan providing for matching contributions must be eligible under the same conditions under the other defined contribution plan and the plan to which the contributions are made must have the same plan year as the plan providing for matching contributions.

(5) *Contributions used only once.* Safe harbor matching or nonelective contributions cannot be used to satisfy the requirements of this section with respect to more than one plan.

(6) *Plan must satisfy ACP with respect to employee contributions.* If the plan provides for employee contributions, in addition to satisfying the requirements of this section, it must also satisfy the ACP test of § 1.401(m)–2. See § 1.401(m)–2(a)(5)(iv) for special rules under which the ACP test is permitted to be performed disregarding some or all matching when this section is satisfied with respect to the matching contributions.

§ 1.401(m)–4 Special rules for mergers, acquisitions and similar events. [Reserved]

§ 1.401(m)–5 Definitions.

Unless otherwise provided, the definitions of this section govern for purposes of section 401(m) and the regulations thereunder.

Actual contribution percentage (ACP). Actual contribution percentage or *ACP* means the ACP of the group of eligible employees as defined in § 1.401(m)–2(a)(2)(i).

Actual contribution percentage (ACP) test. Actual contribution percentage test or *ACP test* means the test described in § 1.401(m)–2(a)(1).

Actual contribution ratio (ACR). Actual contribution ratio or *ACR* means the ACR of an eligible employee as defined in § 1.401(m)–2(a)(3).

Actual deferral percentage (ADP) test. Actual deferral percentage test or *ADP test* means the test described in § 1.401(k)–2(a)(1).

Compensation. Compensation means compensation as defined in section 414(s) and § 1.414(s)–1. The period used to determine an employee's compensation for a plan year must be either the plan year or the calendar year ending within the plan year. Whichever period is selected must be applied uniformly to determine the compensation of every eligible employee under the plan for that plan year. A plan may, however, limit the period taken into account under either method to that portion of the plan year or calendar year in which the employee was an eligible employee, provided that this limit is applied uniformly to all eligible employees under the plan for the plan year. See also section 401(a)(17) and § 1.401(a)(17)–1(c)(1). For this purpose, in case of an HCE whose ACR is determined under § 1.401(m)–2(a)(3)(ii), period of participation includes periods under another plan for which matching contributions or employee contributions are aggregated under § 1.401(m)–2(a)(3)(ii).

Current year testing method. Current year testing method means the testing method under which the applicable year is the current plan year, as described in § 1.401(k)–2(a)(2)(ii) or 1.401(m)–2(a)(2)(ii)

Elective contributions. Elective contributions means elective contributions as defined in § 1.401(k)–6.

Elective deferrals. Elective deferrals means elective deferrals described in section 402(g)(3).

Eligible employee—(1) *General rule. Eligible employee* means an employee who is directly or indirectly eligible to make an employee contribution or to receive an allocation of matching contributions (including matching contributions derived from forfeitures) under the plan for all or a portion of the plan year. For example, if an employee must perform purely ministerial or mechanical acts (*e.g.*, formal application for participation or consent to payroll withholding) in order to be eligible to make an employee contribution for a plan year, the employee is an eligible employee for the plan year without regard to whether the employee performs these acts.

(2) *Conditions on eligibility.* An employee who is unable to make employee contributions or to receive an allocation of matching contributions because the employee has not contributed to another plan is also an eligible employee. By contrast, if an employee must perform additional service (*e.g.*, satisfy a minimum period of service requirement) in order to be eligible to make an employee contribution or to receive an allocation of matching contributions for a plan year, the employee is not an eligible employee for the plan year unless the service is actually performed. An employee who would be eligible to make employee contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, is treated as an eligible employee for purposes of section 401(m) for a plan year even though the employee may not make employee contributions or receive an allocation of matching contributions by reason of the suspension. Finally, an employee does not fail to be treated as an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1).

(3) *Certain one-time elections.* An employee is not an eligible employee merely because the employee, no later than the employee's first becoming eligible under any plan or arrangement described in section 219(g)(5)(A) and providing for employee or matching contributions, is given a one-time opportunity to elect, and the employee in fact does elect, not to be eligible to make employee contributions or to receive allocations of matching contributions under the plan or any other plan or arrangement maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer. In no event is an election made after December 23, 1994, treated as a one-time irrevocable election under this paragraph if the election is made by an employee who previously became eligible under another plan or arrangement (whether or not terminated) of the employer.

Eligible HCE. Eligible HCE means an eligible employee who is an HCE.

Eligible NHCE. Eligible NHCE means an eligible employee who is not an HCE.

Employee. Employee means an employee within the meaning of § 1.410(b)–9.

Employee contributions. Employee contributions means employee contributions as defined in § 1.401(m)–1(a)(3).

Employee stock ownership plan (ESOP). Employee stock ownership plan or *ESOP* the portion of a plan that is an ESOP within the meaning of § 1.410(b)–7(c)(2).

Employer. Employer means an employer within the meaning of § 1.410(b)–9.

Excess aggregate contributions. Excess aggregate contributions means, with respect to a plan year, the amount of excess aggregate contributions apportioned to an HCE under § 1.401(m)–2(b)(2)(iii).

Excess contributions. Excess contributions means with respect to a plan year, the amount of excess contributions apportioned to an HCE under § 1.401(k)–2(b)(2)(iii).

Excess deferrals. Excess deferrals means excess deferrals as defined in § 1.402(g)–1(e)(3).

Highly compensated employee (HCE). Highly compensated employee or *HCE* has the meaning provided in section 414(q).

Matching contributions. Matching contribution is defined in § 1.401(m)–1(a)(2).

Nonelective contributions. Nonelective contributions means employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan.

Non-employee stock ownership plan (non-ESOP). Non-employee stock ownership plan or *non-ESOP* means the portion of a plan that is not an ESOP within the meaning of § 1.410(b)–7(c)(2).

Non-highly compensated employee (NHCE). Non-highly compensated employee or *NHCE* means an employee who is not an HCE.

Plan. Plan means plan as defined in § 1.401(m)–1(b)(4).

Prior year testing method. Prior year testing method means the testing method under which the applicable year is the prior plan year, as described in § 1.401(k)–2(a)(2)(ii) or 1.401(m)–2(a)(2)(ii)

Qualified matching contributions (QMAC). Qualified matching contributions or *QMAC* means matching contributions that satisfy the requirements of § 1.401(k)–1(c) and (d) at the time the contribution is made, without regard to whether the contributions are actually taken into account as elective contributions under § 1.401(k)–2(a)(6). See also § 1.401(k)–2(b)(4)(iii) for a rule providing that a matching contribution does not fail to qualify as a QMAC solely because it is forfeitable under section 411(a)(3)(G) because it is a matching contribution with respect to an excess deferral, excess contribution, or excess aggregate contribution.

Qualified nonelective contributions (QNEC). Qualified nonelective contributions or *QNEC* means employer contributions, other than elective contributions or matching contributions, that satisfy the requirements of § 1.401(k)–1(c) and (d) at the time the

contribution is made, without regard to whether the contributions are actually taken into account under the ADP test under § 1.401(k)–2(a)(6) or the ADP test under § 1.401(m)–2(a)(6).

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 6.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7808.

■ **Par. 7.** In § 602.101, paragraph (b) is amended by revising the entry for ''1.401(k)–1'' to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.401(k)–1	1545–1039 1545–1069 1545–1669
* * * * *	

■ **Par. 8.** In § 602.101, paragraph (b) is amended by adding entries in numerical order to the table to read, in part, as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.401(k)–2	1545–1669
1.401(k)–3	1545–1669
1.401(k)–4	1545–1669
* * * * *	
1.401(m)–3	1545–1699
* * * * *	

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: December 15, 2004.

Gregory F. Jenner,

Acting Assistant Secretary of the Treasury.

[FR Doc. 04–28011 Filed 12–28–04; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Wednesday,
December 29, 2004

Part IV

Department of Transportation

Federal Transit Administration

FTA Fiscal Year 2005 Apportionments, Allocations and Program Information; Notice

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

FTA Fiscal Year 2005 Apportionments, Allocations and Program Information

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: The ''Consolidated Appropriations Act, 2005'', (Public Law 108–447), signed into law by President Bush on December 8, 2004, appropriates funds for all of the surface transportation programs of the Department of Transportation for the fiscal year ending September 30, 2005. This notice provides information on the FY 2005 transit appropriations for the FTA assistance programs, program guidance and requirements, and information on several program issues important in the coming year.

FOR FURTHER INFORMATION CONTACT: For general information about this notice contact Mary Martha Churchman, Director, Office of Resource Management and State Programs, (202) 366–2053. Please contact the appropriate FTA regional office for any specific requests for information or technical assistance. The Appendix at the end of this notice includes contact information for FTA regional offices and key headquarters program staff.

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I. Overview

This document apportions or allocates annual appropriations among potential program recipients. Although the agency has received its annual appropriation, our authorizing legislation is scheduled to expire May 31, 2005. Because of this, we will show two amounts—one reflecting the annual appropriation amount and one showing the amount currently available, as limited by the 8-month authorization. In addition, the document contains important information about FTA programs and areas of emphasis for the fiscal year, including FTA's Strategic Business Plan Initiative. For each FTA program included, we have provided relevant information on its total fiscal year (FY) 2005 apportionments/allocations, requirements, period of availability, and other related information and highlights, as appropriate. A separate section of the document provides information on requirements and guidance that are applicable to all FTA programs. The document also includes a section that delineates various requirements and guidance specific to the FTA planning programs that grantees should be aware of for FY 2005.

II. FY 2005 Funding for FTA Programs

A. Funding Based on FY 2005 Appropriations Act and Extension of Authorization

The Consolidated Appropriations Act, 2005 (Pub. L. 108–447, December 8, 2004; hereafter called the 2005 Appropriations Act) provides a combination of trust and general funds that total $7.708 billion for FTA programs. This amount is reduced to $7.646 billion by a government-wide across-the-board 0.80 percent rescission, as directed by Section 122 of Division J of the 2005 Appropriations Act. Table 1 of this document shows the funding for the FTA programs for the entire fiscal year, as provided for in the 2005 Appropriations Act. However, because our current program authorization, the Surface Transportation Extension Act of 2004, Part V (Pub. L. 108–310, September 30, 2004), only provides contract authority for the trust funds through May 31, 2005, we also show in Table 1 the amount of FY 2005 funds currently available for obligation for each program based on the extension of TEA–21 through May 31, 2005. The amount currently available includes all of the general funds but only a portion of the trust funds included in the total obligation limitation for FTA programs in the 2005 Appropriations Act. The percentage of the annual amount currently available varies slightly from program to program, depending on the mix of general and trust funds appropriated for the program and the

reallocation of any prior year funds to the program.

B. Apportionments and Allocations

FTA is publishing tables for each program that contain both the apportionments and allocations based on the full program levels in the 2005 Appropriations Act; and the apportionments and allocations based on FY 2005 funds currently available for the FTA program. The column labeled ''Apportionment'' or ''Allocation'' includes both trust funds (contract authority) and general funds, and reflects the total dollar amount of obligation limitation and appropriations in the 2005 Appropriations Act, once a full-year contract authority is made available. This amount is not the amount that is actually available for obligation at this time. The amount shown in the column labeled ''Available Apportionment'' or ''Available Allocation'' is available for obligation. All apportionments and allocations reflect the 0.80 percent rescission, which has been proportionately applied to the discretionary budget authority and obligation limitation, and to each program, project and activity.

C. Program Funds Set-aside for Project Management Oversight

FTA draws money from funds appropriated to the Urbanized Area Formula Program, Nonurbanized Area Formula Program, and Capital Investment Program for program oversight activities conducted by FTA. The funds are used to provide necessary oversight activities, including oversight of the construction of any major project under these statutory programs; to conduct safety, civil rights, procurement, management and financial reviews and audits; and to provide technical assistance to correct deficiencies identified in compliance reviews and audits. Project management oversight is authorized by 49 U.S.C. Section 5327. The percent of Urbanized Area Formula and Nonurbanized Area Formula funds made available for oversight is one-half percent. The percentage of Capital Investment Program funding made available for oversight was increased from three-quarters percent to one percent by Section 319 of the FY 2002 DOT Appropriations Act and continues to be drawn at the higher rate.

III. Fiscal Year 2005 Key Program Initiatives

Each year, FTA's apportionment notice draws attention to significant initiatives or focus areas for the year. Under our Strategic Business Plan (SBP), we have several initiatives focused on improved efficiency and enhanced customer service, several of which are discussed in this section.

In addition, efforts to improve the coordination of human service program transportation have been paying handsome dividends, and a 2004 Executive Order on Coordinated Human Service Transportation is expected to further energize and focus government-wide efforts to address the complex impediments to delivering effective transportation options at the local level. We discuss this in detail in this section, as well.

Another key issue discussed in this section is Single Audit Act findings and the closure of findings. Additional information about these focus areas is available from your regional office (see the Appendix at the end of this document.)

A. Improved Customer Service

One of the four ''core-accountabilities'' under FTA's SBP is to reduce grant processing time. This is the third year FTA will track grant processing time, and, as in last year's SBP, the goal is to achieve an average processing time of 36 days from the date a complete application is submitted in TEAM-Web, our electronic grant-making system. Reduced grant processing time has been adopted as a core accountability for several reasons. First, it requires FTA to continually examine how we review and approve grants, and to find ways to improve our internal processes. More importantly, it reduces the amount of time a grantee must wait from the date of submission of a grant until final approval, responding to the needs of grantees to receive funds on a timely basis in order to maintain their programs.

Because tracking comparable data is key to any performance measurement, FTA uses the date on which a grant number is assigned (the date of submission) to measure how long it takes to process a grant. Inherent in this measure is an assumption that regional offices have received a complete application from the grantee. We know that this has been an area of some disagreement in years past, and that some regions have assigned grant numbers before grant applications were actually complete.

To continue to meet our efficiency goal and to ensure that we minimize the time it takes to process a grant, we provide below some information that will aid in the overall understanding of what constitutes a complete application. Of course, you can receive additional information and technical assistance from your regional office at any time. (Complete contact information is available in the Appendix at the end of this document.)

For the regional office to be able to assign a grant number, enabling submission, the application must meet the following requirements:

1. The project is listed in a currently approved Transportation Improvement Program (TIP); Statewide Transportation Improvement Program (STIP), or Unified Planning Work Program (UPWP).
2. All eligibility issues have been resolved.
3. Required environmental findings have been made.
4. The project budget's Activity Line Items (ALI), scope, and project description meet FTA requirements.
5. Local share funding source(s) have been identified.
6. The grantee's required Civil Rights submissions are current.
7. Certifications and assurances are properly submitted.
8. Funding is available, including any flexible funds included in the budget.
9. For projects involving new construction (using New Starts or formula funds), FTA engineering staff has reviewed the project management plan and given approval.
10. When required for grants related to New Starts projects, preliminary engineering (PE) and/or final design (FD) has been approved.
11. Milestone information is complete, or FTA determines that milestone information can be finalized before the grant is ready for award.

In every appropriations act, several FTA programs include Congressional project designations. Congress earmarked over 500 transit projects for FY 2005. A significant number of project sponsors that have received Congressional designations for FY 2005 Bus and Bus-Related Facilities and JARC projects and activities and unobligated prior year designations will be first-time (new) FTA grantees or sub-recipients. With respect to new grantees, historically, the following issues have presented the most significant hurdles to successful and timely implementation of earmarked projects: (1) Grantee inability to identify eligible project activities within the scope of the earmark; (2) misunderstanding and/or lack of awareness of applicable requirements; and (3) difficulty generating the required local match.

While we provide ''pre-award authority'' (see section V. A of this document for a complete explanation), we do not recommend that first-time grant recipients utilize the automatic

pre-award authority to incur expenses before the grant is actually awarded by FTA. As a new grantee, it is easy to misunderstand pre-award authority conditions and not be aware of all of the applicable FTA requirements that must be met in order to be reimbursed for project expenditures incurred in advance of grant award. FTA programs have specific statutory requirements that are often different from those for other Federal grant programs with which new grantees may be familiar. If funds are expended for an ineligible project or activity, FTA will be unable to reimburse the project sponsor.

We encourage project sponsors of both Bus and JARC earmarked projects who will be first-time FTA grantees to contact their FTA regional office staff to discuss the project and relevant FTA requirements. The regional staff will assist you with identifying requirements and understanding FTA's grant application procedures, and help you develop an approvable application. (See the Appendix to this document for contact information)

B. Transportation Coordination—United We Ride

Transportation is an essential link to employment, health, and educational services. Without adequate transportation services, many older Americans, persons with disabilities, and individuals with low-incomes are often unable to access work, medical services, educational resources or recreation opportunities.

In February 2004, President Bush issued Executive Order (EO) 13330 on Human Service Transportation Coordination to improve transportation for those who are transportation disadvantaged, by improving the coordination of transportation services provided under programs in ten Federal Departments. The goals of the Executive Order are to simplify access to transportation services, reduce duplication and overlap, and improve the effectiveness of the transportation services provided. In response to the EO, the Department of Transportation, with its partners at the Department of Health and Human Services, Labor, Education, and elsewhere, launched the United We Ride (UWR) initiative. To assist States and communities in moving forward, FTA and our Federal partners introduced an initiative that includes a Framework for Action, a self-assessment tool for States and communities; the National Leadership Forum on Human Service Transportation Coordination; State Coordination Grants; and Technical Assistance.

Forty-five States have been selected to receive grants for human service transportation coordination efforts in FY 2005. The State Coordination Grants may be used to: (1) Conduct a comprehensive State assessment using the UWR Framework for Action, (2) develop a comprehensive State action plan for Coordinating Human Service Transportation, and/or (3) implement one or more of the elements identified within the Framework for Action (for those States that have not established a comprehensive State action plan). Planning teams involving regional leadership from the Federal agencies named in the EO are bringing together State teams for workshops in six of the ten U.S. Department of Transportation (U.S. DOT) regional offices this year.

C. Reporting Independent Single Audit Results

A recent audit of the FY 2004 Highway Trust Fund financial statements found that provisions of the Single Audit Act (SAA), and the related Office of Management and Budget (OMB) Circular No. A–133 had not been effectively implemented. In order to correct this weakness, FTA has determined that it is critical that key information from the grantee's audit report be reviewed on an annual basis. Therefore, we are implementing the new reporting requirements described in the June 17, 2004, Dear Colleague letter from Administrator Dorn, which is posted on the FTA Web site at: *http://www.fta.dot.gov/legal/guidance/dear_colleague/2004/12128_15811_ENG_HTML.htm.*

Grantees should continue to work with FTA regional offices to resolve any FTA-related findings in these independent annual audits. FTA regional offices will be tracking progress in the resolution of these findings, and will contact grantees that have not complied with the requirements in a timely manner. Copies of responses to audit findings that relate to a resolution of the findings should be sent to the appropriate regional office.

Consistent with the requirements of OMB Circular No. A–133, FTA requires a grant recipient expending $500,000 or more (previously $300,000 or more) in Federal financial assistance to secure an independent annual audit of its financial activities. The audit report must be submitted to the Federal Clearinghouse within the earlier of 30 days after the audit report is issued, or nine months after the end of the audit period.

At the same time, grant recipients should send a copy of the Federal Clearinghouse transmittal sheet to the appropriate FTA regional office, and if there are FTA program findings or if FTA is your point-of-contact for all DBE program issues, send FTA a copy of the entire audit report.

IV. FTA Programs

This section of the notice provides FY 2005 funding and other important program-related information for the four major FTA program areas included in the notice (transit planning and research; formula grants; capital investments; and Job Access and Reverse Commute). Of the 14 separate FTA programs contained in this notice that fall under the major program area headings, the funding for seven is apportioned by statutory formula. Funding for the other seven is allocated on a discretionary or competitive basis.

Funding and other important information for each of the 14 programs is presented immediately below. This includes program apportionments or allocations, certain program requirements, length of time FY 2005 funding is available to be committed, and other significant program information pertaining to FY 2005.

A. Metropolitan Planning Program (49 U.S.C. 5303)

Section 5303 authorizes a cooperative, continuous, and comprehensive planning program for transportation investment decision-making at the metropolitan area level. State Departments of Transportation (DOTs) and Metropolitan Planning Organizations (MPOs) may receive funds for planning projects that support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency; increasing the safety and security of the transportation system for motorized and non-motorized users; increasing the accessibility and mobility options available to people and for freight; protecting and enhancing the environment, promoting energy conservation, and improving quality of life; enhancing the integration and connectivity of the transportation system, across and between modes, for people and freight; promoting efficient system management and operation; and emphasizing the preservation of the existing transportation system. For more about the Metropolitan Planning Program contact Candace Noonan, Program Manager, at (202) 366–1648.

1. Total Apportionments

The 2005 Appropriations Act provides $59,902,515 to the Metropolitan Planning Program (49

U.S.C. 5303) after the across-the-board 0.80 percent rescission. The total amount apportioned for the Metropolitan Planning Program (to States for MPOs' use in urbanized areas (UZAs)) is $60,628,846, as shown in the table below.

METROPOLITAN PLANNING PROGRAM

Appropriation	$60,385,600
Rescission	(483,085)
Prior Year Funds Added	726,331
Total Apportioned	60,628,846

States' apportionments for this program are displayed in Table 2. Also displayed in Table 2 is the amount of each State's apportionments that is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V.

FTA allocates Metropolitan Planning funds to the States according to a statutory formula. Eighty percent of the funds are distributed to the States as a basic allocation based on each State's population in the UZA, as designated by the Census Bureau. The remaining 20 percent is provided to the States as a supplemental allocation based on an FTA administrative formula to address planning needs in the larger, more complex UZAs. The amount published for each State is a combined total of both the basic and supplemental allocation.

2. Program Requirements

The State allocates Metropolitan Planning funds to MPOs in UZAs or portions thereof to provide funds for projects included in an annual work program (the Unified Planning Work Program, or UPWP) that includes both highway and transit planning projects. All States have either reaffirmed or developed, in consultation with their MPOs, new allocation formulas as a result of the 2000 Census. These formulas may be changed annually, but any changes require approval by the FTA regional office before grant approval. Program guidance for the Metropolitan Planning Program is found in FTA Circular C8100.1B, Program Guidance and Application Instructions for Metropolitan Planning Program Grants, dated October 25, 1996.

3. Period of Availability

The funds apportioned in this notice under the Metropolitan Planning Program will remain available to be obligated by FTA to recipients for three fiscal years following FY 2005. Any of these apportioned funds that remain unobligated at the close of business on September 30, 2008, will revert to FTA for reapportionment under the Metropolitan Planning Program.

4. Other Program or Apportionment Related Information and Highlights

Section VI of this document provides guidance and information specific to FTA planning programs, including the Metropolitan Planning Program. Please refer to that section for additional information relevant to this program.

B. Urbanized Area Formula Program (49 U.S.C. 5307)

Section 5307 authorizes Federal capital and operating assistance for transit in urbanized areas (UZAs). An UZA is an incorporated area with a population of 50,000 or more that has been designated as such by the U.S. Census Bureau. The Urbanized Area Formula Program also supports planning, in addition to that funded under the Metropolitan Planning Program described above. Funding is apportioned directly to each UZA with a population of 200,000 or more, and to the State Governors for UZAs with populations between 50,000 and 200,000. With a few exceptions, operating assistance is not an eligible expense for UZAs with populations 200,000 or more. For more information about the Urbanized Area Formula Program contact Ken Johnson, Office of Resource Management and State Programs, at (202) 366–2053.

1. Total Apportionments

The 2005 Appropriations Act provides $3,593,195,773 to the Urbanized Area Formula Program (49 U.S.C. 5307) after the across-the-board 0.80 percent rescission. The total amount apportioned for the Urbanized Area Formula Program is $3,575,229,794, as shown in the table below, after the deduction for oversight (authorized by 49 U.S.C. 5327).

URBANIZED AREA FORMULA PROGRAM

Appropriation	$3,622,173,158
Rescission	(28,977,385)
Oversight Deduction	(17,965,979)
Total Apportioned	3,575,229,794

Table 3 displays the amounts apportioned under the Urbanized Area Formula Program.[1] Also displayed in Table 3 is the amount currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V. Table 4 contains the apportionment formula for the Urbanized Area Formula Program.

Additional funds are appropriated for the Alaska Railroad for improvements to its passenger operations. The total amount allocated to the Alaska Railroad is $4,787,094 after deduction for the 0.80 percent rescission and oversight, as shown in the table below.

ALASKA RAILROAD SET-ASIDE

Appropriation	$4,849,950
Rescission	(38,800)
Oversight Deduction	(24,056)
Total Allocated	4,787,094

Of this amount $3,233,450 is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V. Funding for the Alaska Railroad is based on the set-aside amount specified in the 2005 Appropriations Act. This is in lieu of apportioning funds for the Anchorage, AK UZA, under the fixed guideway tier of the section 5307 formula using data attributable to the Alaska Railroad Corporation.

2. Program Requirements

Urbanized Area Formula Program funds are apportioned based on legislative formulas. Different formulas are used for UZAs with populations of 200,000 or more and UZAs with populations less than 200,000. For UZAs 50,000 to 199,999 in population, the formula is based simply on population and population density. For UZAs with populations of 200,000 and more, the formula is based on a combination of bus revenue vehicle miles, bus passenger miles, fixed guideway revenue vehicle miles, and fixed guideway route miles, as well as population and population density. See Table 4 for more detailed information about the formulas. Program guidance for the Urbanized Area Formula Program is found in FTA Circular C9030.1C, Urbanized Area Formula Program: Grant Application Instructions, dated October 1, 1998. There are several important program requirements we highlight below.

[1] Sec. 198 of the 2005 Appropriations Act states that Norman, OK, is to be considered part of the Oklahoma City, OK, UZA for FY 2004 and 2005. This provision has an unintended impact on the apportionments for these UZAs, and also affects the apportionment of all UZAs with populations less than 1 million. FTA anticipates a correction and has not applied this provision. If the correction is not made, we will adjust the FY 2006 apportionments to the Norman and Oklahoma City UZAs to compensate.

a. Urbanized Area Formula Apportionments to Governors

For UZAs with populations less than 200,000 (small UZAs), the funds are apportioned to the Governor of each State for distribution. The total Urbanized Area Formula apportionment for the Governor and the amount currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V, is shown in Table 3. This table also shows the apportionment amount attributable to each small UZA within the State. The Governor may determine the allocation of funds among the small UZAs with the following exception (as further discussed in item e below): funds attributed to a small UZA that is located within the planning boundaries of a Transportation Management Area (TMA) must be obligated to that small UZA.

b. Transit Enhancements

For UZAs with populations 200,000 or more, TEA–21 establishes that a minimum of one-percent of a UZA's Urbanized Area Formula apportionment be spent for transit projects and project elements that qualify as transit enhancements. One percent of the Urbanized Area Formula Program apportionment in each UZA with a population of 200,000 or more has been set aside specifically for transit enhancement expenditures. Table 3 shows the amount set aside for enhancements in these areas.

The term "transit enhancement'' includes projects or project elements that are designed to enhance mass transportation service or use and are physically or functionally related to transit facilities. Eligible enhancements include the following: (1) Historic preservation, rehabilitation, and operation of historic mass transportation buildings, structures, and facilities (including historic bus and railroad facilities); (2) bus shelters; (3) landscaping and other scenic beautification, including tables, benches, trash receptacles, and street lights; (4) public art; (5) pedestrian access and walkways; (6) bicycle access, including bicycle storage facilities and installing equipment for transporting bicycles on mass transportation vehicles; (7) transit connections to parks within the recipient's transit service area; (8) signage; and (9) enhanced access for persons with disabilities to mass transportation.

It is the responsibility of the MPO to determine how the one-percent for transit enhancements will be allotted to transit projects. The one percent minimum requirement does not preclude more than one percent being expended in a UZA for transit enhancements. However, items that are only eligible as enhancements—in particular, operating costs for historic facilities—may be assisted only within the one-percent funding level.

The recipient must submit a report to the appropriate FTA regional office listing the projects or elements of projects carried out with those funds during the previous fiscal year and the amount awarded. The report must be submitted with the Federal fiscal year's final quarterly progress report in TEAM-Web. The report should include the following elements: (a) Grantee name, (b) UZA name and number, (c) FTA project number, (d) transit enhancement category, (e) brief description of enhancement and progress towards project implementation, (f) activity line item code from the approved budget, and (g) amount awarded by FTA for the enhancement. The list of transit enhancement categories and activity line item codes may be found in FTA Circular 9030.1C, Urbanized Area Formula Program: Grant Application Instructions, dated October 1, 1998, and on TEAM-Web, which can be accessed at *http://FTATEAMWeb.fta.dot.gov.*

c. Transit Security Projects

All recipients of Urbanized Area Formula funds are required to expend at least one percent of the amount the grantee receives each fiscal year on "mass transit security projects.'' For applicants serving a UZA with a population of 200,000 or more, only capital security projects may be funded with the one percent.

d. FY 2005 Operating Assistance

There are three transit provisions that allow FY 2005 Urbanized Area Formula funds to be used for operating assistance in a UZA with a population of 200,000 or more: (1) Language in Section 3027(c) of TEA–21, as amended, which allows the use of funds for operating assistance to certain recipients of section 5307 funds that provide service exclusively for elderly persons and persons with disabilities and operate 20 or fewer vehicles; (2) the provision of 5307(b), as amended, and extended by Section 8(n) of the Surface Transportation Extension Act of 2004, Part V, which allows transit systems in UZAs that crossed the 200,000 population threshold for the first time as a result of the 2000 Census, the flexibility to use section 5307 funds for operating assistance; and (3) the provision of 5307(b), as amended, and extended by Section 8(n) of the Surface Transportation Extension Act of 2004, Part V, which allows funds apportioned to a 2000 Census UZA with a population of 200,000 or more to be used for operating assistance in that portion of the UZA that was nonurbanized under the 1990 Census. Each provision has its own requirements, which are described separately below.

(1) Section 3027(c)(3) of TEA–21, as previously amended, provides an exception to the restriction on the use of operating assistance in a UZA with a population of 200,000 or more, by allowing transit providers/grantees that provide service exclusively to elderly persons and persons with disabilities and that operate 20 or fewer vehicles to use section 5307 funds apportioned to the UZA for operating assistance. The total amount of funding made available for this purpose under Section 3027(c)(3) of TEA–21, as amended, is $1.4 million. Transit providers/grantees eligible under this provision have already been identified and notified.

(2) The Surface Transportation Extension Act of 2004, Part V, continues the provisions of Public Law 107–232, which allow transit systems in UZAs that, for the first time, exceeded 200,000 population according to the 2000 Census to use section 5307 funds for operating assistance. A list of the eligible 2000 Census UZAs (with populations 200,000 or more) that may use FY 2005 funds for operating assistance is provided in Table 6. The table also shows the maximum amount of the area's FY 2005 apportionment that may be used for operating assistance, and the amount of an area's apportionment currently available for obligation as operating assistance. The use of the UZA funds for operating assistance by these areas is restricted to projects carried out within the geographical or service area boundary of the affected 1990 Census small UZA.

(3) In addition, the Surface Transportation Extension Act of 2004, Part V, permits the continued use of Urbanized Area Formula Program (section 5307) funds for operating assistance in certain UZAs with a population of at least 200,000 when the qualifying UZA includes a portion that was not designated as a UZA under the 1990 Census and received assistance under section 5311 in FY 2002. The provision further stipulates that the portion not designated a UZA under the 1990 Census shall receive an amount of funds under section 5307 that is not less than the amount the portion received under section 5311 in FY 2002. Affected areas are not identified in Table 6. A grant applicant for an area eligible to receive operating assistance under this

provision that wants to make use of this provision must so indicate in the grant application. The application must identify the previously nonurbanized portion of the UZA that qualifies (*i.e.*, that portion of the area that was not designated as urbanized under the 1990 Census and received assistance under section 5311). Contact the appropriate FTA regional office for additional information and guidance if you intend to make use of this provision.

Unless one of the exceptions noted above applies, the use of FY 2005 Urbanized Area Formula Program funds for operating assistance is available only to small UZAs (those with populations less than 200,000). For these areas, there is no limitation on the amount of the State apportionment that may be used for operating assistance, and the Federal/local share ratio is 50/50.

e. Designated Transportation Management Areas (TMA)

Guidance for setting the boundaries of TMAs is contained in the joint transportation planning regulations codified at 23 CFR part 450 and 49 CFR part 613. In some cases, the TMA planning boundaries established by the MPO for the designated TMA includes one or more small UZAs. In addition, one small UZA (Santa Barbara, CA) has been designated as a TMA. In either of these situations, the Governor cannot allocate "Governor's Apportionment'' funds attributed to the small UZAs to other areas; that is the Governor only has discretion to allocate Governor's Apportionment funds attributable to areas that are outside of designated TMA planning boundaries.

The list of small UZAs included within the planning boundaries of designated TMAs is provided in the table below.

Designated TMA	Small urbanized area included in TMA planning boundary
Albany, NY	Saratoga Springs, NY.
Houston, TX	Galveston, TX; Lake Jackson-Angleton, TX; Texas City, TX; The Woodlands, TX.
Jacksonville, FL	St. Augustine, FL.
Orlando, FL	Kissimmee, FL.
Palm Bay-Melbourne, FL	Titusville, FL.
Philadelphia, PA–NJ–DE–MD	Pottstown, PA.
Pittsburgh, PA	Monessen, PA; Weirton, WV-Steubenville, OH–PA (PA portion); Uniontown-Connellsville, PA.
Seattle, WA	Bremerton, WA.
Washington, DC–VA–MD	Frederick, MD.

The MPO must notify the Associate Administrator for Program Management, Federal Transit Administration, 400 Seventh Street, SW., Washington, DC 20590, in writing, no later than July 1 of each year, to identify any small UZA within the planning boundaries of a TMA.

f. Urbanized Area Formula Funds Used for Highway Purposes

Funds apportioned to a TMA are eligible for transfer to FHWA for highway projects. However, before funds can be transferred, the following conditions must be met: (1) Such use must be approved by the MPO in writing, after appropriate notice and opportunity for comment and appeal are provided to affected transit providers; (2) in the determination of the Secretary, such funds are not needed for investments required by the Americans with Disabilities Act of 1990 (ADA); and (3) the MPO determines that local transit needs are being addressed.

The MPO should notify FTA of its intent to use FTA funds for highway purposes, as prescribed in section V.D, below. Urbanized Area Formula funds that are designated by the MPO for highway projects will be transferred to and administered by FHWA.

3. Period of Availability

The Urbanized Area Formula Program funds apportioned in this notice, as well as the set-aside for the Alaska Railroad, will remain available to be obligated by FTA to recipients until September 30, 2008. Any of these apportioned funds that remain unobligated at the close of business on September 30, 2008, will revert to FTA for reapportionment under the Urbanized Area Formula Program.

4. Data Used to Generate Apportionments and Dollar Unit Values

Population and population density statistics from the 2000 Census and (when applicable) validated mileage and transit service data from transit providers' 2003 National Transit Database (NTD) Report Year were used to calculate a UZA's FY 2005 Urbanized Area Formula apportionment.

We have calculated dollar unit values for the formula factors used in the Urbanized Area Formula Program apportionment calculations. These values represent the amount of money each unit of a factor is worth in this year's apportionment. The unit values change each year, based on all of the data used to calculate the apportionments. The dollar unit values for FY 2005 are displayed in Table 5. To replicate a UZA's apportionment, multiply the dollar unit value by the appropriate formula factor, i.e., the population, population × (times) population density, and (when applicable) data from the NTD (i.e., route miles, vehicle revenue miles, passenger miles, and operating cost.)

C. Clean Fuels Formula Program (49.U.S.C. 5308)

FTA's authorizing legislation, TEA–21, established the Clean Fuels Formula Grant Program to support the goals of the Clean Air Act. This program has a two-fold purpose. First, the program is intended to assist non-attainment and maintenance areas in achieving or maintaining air quality attainment status. Second, the program seeks to support emerging clean fuel and advanced propulsion technologies for transit buses, and to create markets for these technologies. No funds were provided for this program in the 2005 Appropriations Act. For more information about this program contact Nancy Grubb, Office of Resource Management and State Programs, at (202) 366–2053.

D. Capital Investment Program (49 U.S.C. 5309)—Fixed Guideway Modernization

This program provides capital assistance for the modernization of existing fixed guideway systems. Funds are allocated by a statutory formula to UZAs with fixed guideway systems that have been in operation for at least seven years. A "fixed guideway'' refers to any transit service that uses exclusive or controlled rights-of-way or rails, entirely or in part. The term includes heavy rail, commuter rail, light rail, monorail, trolleybus, aerial tramway, inclined plane, cable car, automated guideway

transit, ferryboats, that portion of motor bus service operated on exclusive or controlled rights-of-way, and high-occupancy-vehicle (HOV) lanes. For more information about Fixed Guideway Modernization contact Ken Johnson, Office of Resource Management and State Programs, at (202) 366–2053.

1. Total Apportionments

The 2005 Appropriations Act provides $1,204,684,800 to the Fixed Guideway Modernization Program after the across-the-board 0.80 percent rescission. The total amount apportioned for the Fixed Guideway Modernization Program is $1,192,637,952, after the deduction for oversight, as shown in the table below.

FIXED GUIDEWAY MODERNIZATION PROGRAM

Appropriation	$1,214,400,000
Rescission	(9,715,200)
Oversight Deduction	(12,046,848)
Total Apportioned	1,192,637,952

The FY 2005 Fixed Guideway Modernization Program apportionments to eligible areas are displayed in Table 7. Also Displayed in Table 7 is the amount of each area's apportionment that is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V.

2. Program Requirements

Fixed Guideway Modernization funds must be used for capital projects to maintain, modernize, or improve fixed guideway systems. Eligible UZAs (those with a population of at least 200,000) with fixed guideway systems that are at least seven years old are entitled to receive Fixed Guideway Modernization funds. A threshold level of more than one mile of fixed guideway is required in order to receive Fixed Guideway Modernization funds. Therefore, UZAs reporting one mile or less of fixed guideway mileage under the NTD are not included. Program guidance for Fixed Guideway Modernization is found in FTA Circular C9300.1A, Capital Program: Grant Application Instructions, dated October 1, 1998.

3. Period of Availability

The funds apportioned in this notice under the Fixed Guideway Modernization Program will remain available to be obligated by FTA to recipients for three fiscal years following FY 2005. Any of these apportioned funds that remain unobligated at the close of business on September 30, 2008, will revert to FTA for reapportionment under the Fixed Guideway Modernization Program.

4. Other Program or Apportionment Related Information and Highlights

The formula for allocating the Fixed Guideway Modernization funds contains seven tiers. The apportionment of funding under the first four tiers is based on amounts specified in law and/or NTD data used to apportion funds in FY 1997. Funding under the last three tiers is apportioned based on the latest available data on route miles and revenue vehicle miles on segments at least seven years old, as reported to the NTD. Table 8 contains information regarding the Fixed Guideway Modernization apportionment formula.

Dollar unit values for the formula factors used in the Fixed Guideway Modernization Program are displayed in Table 5. To replicate an area's apportionment, multiply the dollar unit value by the appropriate formula factor, i.e., route miles and revenue vehicle miles.

E. Capital Investment Program (49 U.S.C. 5309)—Bus and Bus-Related Facilities

This program provides capital assistance for new and replacement buses and related facilities. Funds are allocated on a discretionary basis. Eligible purposes are acquisition of buses for fleet and service expansion, bus maintenance and administrative facilities, transfer facilities, bus malls, transportation centers, intermodal terminals, park-and-ride stations, acquisition of replacement vehicles, bus rebuilds, bus preventive maintenance, passenger amenities such as passenger shelters and bus stop signs, accessory and miscellaneous equipment such as mobile radio units, supervisory vehicles, fare boxes, computers, and shop and garage equipment. For more information about Bus and Bus-Related Facilities contact Ryan Hammon, Office of Resource Management and State Programs, at (202) 366–2053.

1. Total Allocations

The 2005 Appropriations Act provides $719,200,000 for the purchase of buses, bus-related equipment and paratransit vehicles, and for the construction of bus-related facilities, after the across-the-board 0.80 percent rescission. This amount includes funds transferred from the Clean Fuels Program as described below. The total amount allocated for Bus and Bus-Related Facilities is $712,008,000, as shown in the following table.

BUS AND BUS-RELATED

Appropriation	$725,000,000
Rescission	(5,800,000)
Oversight Deduction	(7,192,000)
Total Allocation	712,008,000

* Includes $50 million transferred from Clean Fuels.

TEA–21 authorized a $100 million Clean Fuels Formula Program under 49 U.S.C. 5308 (described in section IV.C above). The program is authorized to be funded with $50 million from the Bus and Bus-Related Facilities category of the Capital Investment Program and $50 million from the Formula Grants Programs. However, the 2005 Appropriations Act directs FTA to transfer the Clean Fuels formula portion to, and merge it with, funding provided for the Bus and Bus-Related category of the Capital Investment Program. The $100 million from the Clean Fuels program, both capital and formula portion, is included in the total appropriations amount in the Bus and Bus-Related Facilities table above and the 0.80 percent across-the-board rescission has been applied to the entire amount. In FY 2005, Congress did not make available for bus and bus-related facilities any funds reallocated from projects in previous appropriations acts. Instead, prior year reallocated bus and bus facilities funds were made available to the New Starts program.

Table 9 displays the allocation of the FY 2005 Bus and Bus-Related Facilities funds by State and project. Each project allocation has been adjusted proportionally from the amount designated in the conference report accompanying the 2005 Appropriations Act to account for the across the board rescission, the amount deducted for oversight, and the shortfall between the amount designated for projects and the amount made available to the program. Also displayed in Table 9 is the amount of each Bus and Bus-Related Facilities project allocation that is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V.

2. Program Requirements

The Conference Report to FTA's 2005 Appropriation Act lists 440 discrete projects for funding under Bus and Bus-Related Facilities. The 2005 Appropriations Act includes Section 125 that contains language making these designated projects eligible under the program "notwithstanding any other provision of law.'' The Consolidated Appropriations Act 2004, included a similar provision in Section 547. This

language makes the bus projects designated in FYs 2005 and 2004 eligible for the designated purpose. However, if you want to apply to use funds designated under the bus program in any year for project activities outside the scope of the project designation included in report language, you must submit your request for reprogramming to the House and Senate Committees on Appropriations for resolution. FTA will not reprogram Congressionally-designated projects without direction from the Appropriations Committees.

Unless the law provides otherwise, projects designated prior to FY 2004 must conform to the eligibility requirements of the Bus and Bus-Related Facilities program. Requests for reprogramming of funding for projects designated prior to FY 2004 that are found not to be consistent with the statutory intent of the program should also be directed to the House and Senate Committees on Appropriations. Program guidance for Bus and Bus-Related Facilities is found in FTA Circular C9300.1A, Capital Program: Grant Application Instructions, dated October 1, 1998.

3. Period of Availability

The 2005 Appropriations Act includes a provision requiring that FY 2005 Bus and Bus-Related Facilities funds not obligated for their original purpose as of September 30, 2007, be made available for other projects under 49 U.S.C. 5309. Certain Bus and Bus-Related Facilities projects identified in previous years but not obligated were extended for one year in the reports accompanying the 2005 Appropriations Act. These project funds will lapse September 30, 2005, if they are not obligated in a grant before then. A list of these extended projects included in the Conference report and the amounts that remain unobligated as of September 30, 2004, can be found in Table 10. However, two projects in the Conference report are not included, pending clarification of Congressional intent to reallocate the balance to the New Starts program. FTA is seeking clarification from Congress regarding Congressional intent to extend other projects that are listed in the House or Senate report but not listed in the Conference Report.

4. Other Program or Allocation Related Information and Highlights

Prior year unobligated balances for Bus and Bus-Related allocations in the amount of $791,171,631 remain available for obligation in FY 2005. This includes $758,522,868 in fiscal years 2003 and 2004 unobligated allocations, and $32,648,763 for fiscal years 1998–2002 unobligated allocations that were extended in the FY 2005 Conference Report. These unobligated amounts are displayed in Table 10. Included with the FY 2004 carryover projects in Table 10 is one project that was transferred from the Job Access and Reverse Commute (JARC) program to the Bus program by Section 531 of the 2005 Appropriations Act.

F. Capital Investment Program (49 U.S.C. 5309)—New Starts

The New Starts program provides funds for construction of new fixed guideway systems or extensions to existing fixed guideway systems. Eligible purposes are light rail, rapid rail (heavy rail), commuter rail, monorail, automated fixed guideway system (such as a ''people mover''), or a busway/high occupancy vehicle (HOV) facility, Bus Rapid Transit that is fixed guideway, or an extension of any of these. Projects become candidates for funding under this program by successfully completing the appropriate steps in the major capital investment planning and project development process. Major new fixed guideway projects, or extensions to existing systems, financed with New Starts funds typically receive these funds through a full funding grant agreement (FFGA) that defines the scope of the project and specifies the total multi-year Federal commitment to the project. For more information about New Starts contact Sean Libberton, Office of Planning and Environment, at (202) 366–4033.

1. Total Allocations

The 2005 Appropriations Act provides $1,437,829,600 to New Starts after the across-the-board 0.80 percent rescission. The total amount allocated for New Starts is $1,449,596,996, as shown in the table below.

NEW STARTS

Appropriation	$1,449,425,000
Rescission	(11,595,400)
Oversight Deduction	(14,378,296)
Reallocated Prior Year Funds	[a]/26,145,692
Total Allocation	1,449,596,996

[a]/ Includes reallocated prior year New Starts and Bus funds.

The amount reallocated to New Starts includes $3,591,548 in FY 2001 funds and $22,554,144 in FY 2002 funds under the Capital Investment Grants account, in accordance with language in the 2005 Appropriations Act. FTA is in the process of clarifying with Congress the projects from which these funds are to be derived and we will publish the complete list as soon as possible.

The final allocation for each New Starts project is listed in Table 11. Each project allocation has been adjusted proportionally from the amount designated in the 2005 Appropriations Act to account for the across-the-board rescission and the amount deducted for oversight. Table 11 also shows $11,016,268 as unallocated. Following notification to Congress, FTA will reallocate these funds among certain projects on the list. Also displayed in Table 11 is the amount of each New Starts project allocation that is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V.

2. Program Requirements

Because New Starts projects are earmarked in law rather than report language, reprogramming for a purpose other than that specified must also occur in law. New Starts projects are subject to a complex set of approvals related to planning and project development set forth in 49 CFR Part 611. Program guidance for New Starts is found in FTA Circular C9300.1A, Capital Program: Grant Application Instructions, dated October 1, 1998; and C5200.1A, Full Funding Grant Agreement Guidance, dated December 5, 2002.

3. Period of Availability

The 2005 Appropriations Act includes a provision requiring that FY 2005 New Starts and Bus and Bus-Related funds not obligated for their original purpose as of September 30, 2007, shall be made available for other projects under 49 U.S.C. 5309.

Capital Investment Program funds for New Starts projects identified as having been extended for one year in the FY 2005 Conference Report accompanying the 2005 Appropriations Act will lapse September 30, 2005. A list of these extended projects and the amounts that remained unobligated as of September 30, 2004, appears in Table 12.

4. Other Program or Apportionment Related Information and Highlights

Prior year unobligated allocations for New Starts in the amount of $479,244,898 remain available for obligation in FY 2005. This amount includes $408,126,399 in fiscal years 2003 and 2004 unobligated allocations, and $71,118,499 for fiscal years 2000, 2001 and 2002 unobligated allocations that are extended in the FY 2005 Conference Report. These unobligated amounts are displayed in Table 12. Information on pre-award authority for

New Starts projects is detailed in section V below.

G. Elderly and Persons With Disabilities Program (49 U.S.C. 5310)

This program (49 U.S.C. 5310) provides formula funding to States for capital projects to assist private nonprofit groups in meeting the transportation needs of the elderly and persons with disabilities when the public transportation service provided is unavailable, insufficient, or inappropriate to meet these needs. The State (or State-designated agency) administers the Section 5310 program. The State's responsibilities include: Notifying eligible local entities of funding availability; developing project selection criteria; determining applicant eligibility; selecting projects for funding; and ensuring that all subrecipients comply with Federal requirements. Eligible nonprofit organizations or public bodies must apply directly to the designated State agency for assistance under this program. For more information about the Elderly and Persons with Disabilities Program contact Sue Masselink, Office of Resource Management and State Programs, at (202) 366–2053.

1. Total Apportionments

The 2005 Appropriations Act provides $94,526,689 to the Elderly and Persons with Disabilities Program (49 U.S.C. 5310) after the across-the-board 0.80 percent rescission, which is the total amount apportioned for the program, as shown in the table below.

ELDERLY AND PERSONS WITH DISABILITIES PROGRAM

Appropriation	95,289,001
Rescission	(762,312)
Total Apportioned	94,526,689

The FY 2005 Elderly and Persons with Disabilities Program apportionments to the States are displayed in Table 13. Also displayed in Table 13 is the amount of a State's apportionment currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V.

FTA allocates funds to the States by an administrative formula consisting of a $125,000 floor for each State ($50,000 for smaller territories) with the balance allocated based on 2000 Census population data for persons aged 65 and over and for persons with disabilities.

2. Program Requirements

The funds provide capital assistance for transportation for elderly persons and persons with disabilities. Eligible capital expenses may include, at the option of the recipient, the acquisition of transportation services by a contract, lease, or other arrangement.

While the assistance is intended primarily for private non-profit organizations, public bodies that coordinate services for the elderly and persons with disabilities, or any public body that certifies to the State that there are no non-profit organizations in the area that are readily available to carry out the service, may receive these funds. Program guidance for the Elderly and Persons with Disabilities Program is found in FTA Circular C9070.1E, The Elderly and Persons with Disabilities Program Guidance and Application Instructions, dated October 1, 1998.

3. Period of Availability

Funds allocated to States under the Elderly and Persons with Disabilities Program in this notice must be obligated by September 30, 2005. Any funding that remains unobligated as of that date will revert to FTA for reapportionment among the States under the Elderly and Persons with Disabilities Program. FTA extended the period of availability for FY 2004 funds through March 31, 2005, because full year funding was not available for obligation until late in the fiscal year. If TEA–21 has not been extended through the end of FY 2005 when the current extension through May 31, 2005 expires, FTA will consider extending the availability of FY 2005 Section 5310 funds.

4. Other Program or Apportionment Related Information and Highlights

These funds may be transferred by the Governor to supplement Urbanized Area Formula or Nonurbanized Area Formula capital funds during the last 90 days of the fiscal year.

H. Nonurbanized Area Formula Program (49 U.S.C. 5311)

This program provides formula funding to States for the purpose of supporting public transportation in areas of less than 50,000 population. Funding may be used for capital, operating, State administration, and project administration expenses. Each State prepares an annual program of projects, which must provide for fair and equitable distribution of funds within the States, including Indian reservations, and must provide for maximum feasible coordination with transportation services assisted by other Federal sources. For more information about the Nonurbanized Area Formula Program contact Lorna Wilson, Office of Resource Management and State Programs, at (202) 366–2053.

1. Total Apportionments

The 2005 Appropriations Act provides $250,889,588 to the Nonurbanized Area Formula Program (49 U.S.C. 5311) after across-the-board 0.80 percent rescission. The total amount apportioned for the Nonurbanized Area Formula Program is $249,635,140, after the deduction for oversight, as shown in the table below.

NONURBANIZED AREA FORMULA PROGRAM

Appropriation	252,912,891
Rescission	(2,023,303)
Oversight Deduction	(1,254,448)
Total Apportioned	249,635,140

The FY 2005 Nonurbanized Area Formula apportionments to the States are displayed in Table 14. Also displayed in Table 14 is the amount of each State's apportionment that is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V.

2. Program Requirements

The Nonurbanized Area Formula Program provides capital, operating and administrative assistance for areas under 50,000 in population. Funds are apportioned in proportion to each State's nonurbanized population. Each State must spend no less than 15 percent of its FY 2005 Nonurbanized Area Formula apportionment for the development and support of intercity bus transportation, unless the Governor certifies to the Secretary that the intercity bus service needs of the State are being adequately met. Program guidance for the Nonurbanized Area Formula Program is found in C9040.1E, Nonurbanized Area Formula Program Guidance and Grant Application Instructions, dated October 1, 1998.

3. Period of Availability

Funds apportioned to nonurbanized areas under the Nonurbanized Area Formula Program will remain available for two fiscal years following FY 2005. Any funds that remain unobligated at the close of business on September 30, 2007, will revert to FTA for allocation among the States under the Nonurbanized Area Formula Program.

4. Other Program or Apportionment Related Information and Highlights

Given the ongoing changes in the intercity bus industry, FTA encourages States to consult with intercity bus operators and communities affected by loss of service when evaluating the intercity bus needs of the State.

The dollar unit value shown for the Nonurbanized Area Formula Program in Table 5 of this notice may be multiplied by the States nonurbanized population to replicate FTA's calculation of each State's apportionment.

I. Rural Transit Assistance Program (49 U.S.C. 5311(b)(2))

This program provides funding to assist in the design and implementation of training and technical assistance projects, research, and other support services tailored to meet the needs of transit operators in nonurbanized areas. For more information about Rural Transit Assistance Program (RTAP) contact Lorna Wilson, Office of Resource Management and State Programs, at (202) 366–2053.

1. Total Apportionments

The 2005 Appropriations Act provides $5,208,000 to RTAP (49 U.S.C. 5311(b)(2)) after the across-the-board 0.80 percent rescission, which is the total amount apportioned for RTAP, as shown in the table below.

EMSP;

Appropriation	5,250,000
Rescission	(42,000)
Total Apportioned	5,208,000

The FY 2005 RTAP allocations to the States are displayed in Table 14. Also displayed in Table 14 is the amount of each State's allocation that is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V. Funds are allocated to the States by an administrative formula consisting of a $65,000 floor for each State ($10,000 for territories), with the balance allocated based on nonurbanized population in the 2000 Census.

2. Program Requirements

The funds are allocated to the States to undertake research, training, technical assistance, and other support services to meet the needs of transit operators in nonurbanized areas. These funds are to be used in conjunction with a State's administration of the Nonurbanized Area Formula Program.

3. Period of Availability

Funds apportioned to nonurbanized areas under RTAP will remain available for two fiscal years following FY 2005. Any funds that remain unobligated at the close of business on September 30, 2007, will revert to FTA for allocation among the States under the RTAP.

4. Other Program or Apportionment Related Information and Highlights

FTA also supports RTAP activities at the national level with the National Planning and Research Program (NPRP). The National RTAP activities support the States in their provision of training and technical assistance. Congress did not designate any NPRP funds for the National RTAP in the Conference Report accompanying the Consolidated Appropriations Act, 2005. FTA will, however, consider the National RTAP among projects to be funded from the limited available NPRP funds.

J. Statewide Planning and Research Program (49 U.S.C. 5313(b))

This program provides financial assistance to States for Statewide planning and other technical assistance activities (including supplementing the technical assistance program provided through the Metropolitan Planning Formula Program), planning support for nonurbanized areas, research, development and demonstration projects, fellowships for training in the public transportation field, university research, and human resource development. For more about the Statewide Planning and Research Program contact Candace Noonan, Program Manager, at (202) 366–1626.

1. Total Apportionments

The 2005 Appropriations Act provides $12,513,485 to the Statewide Planning and Research Program (49 U.S.C. 5313(b)) after the across-the-board 0.80 percent rescission. The total amount apportioned for the Statewide Planning and Research Program (SPRP) is $12,659,599, as shown in the table below.

STATEWIDE PLANNING AND RESEARCH PROGRAM

Appropriation	12,614,400
Rescission	(100,915)
Prior Year Funds Added	146,114
Total Apportioned	12,659,599

State apportionments for this program are displayed in Table 2. Also displayed in Table 2 is the amount of each State's apportionment that is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V. Funds are allocated by a formula that is based on information received from the latest decennial census, and the State's UZA population as compared to the UZA population of all States. However, a State must receive at least 0.5 percent of the amount apportioned under this program.

2. Program Requirements

Statewide Planning and Research funds are apportioned to States by statutory formula to provide funds for Statewide Planning and Research Programs. These funds may be used for a variety of purposes such as planning, technical studies and assistance, demonstrations, management training, and cooperative research. In addition, a State may authorize a portion of these funds to be used to supplement metropolitan planning funds allocated by the State to its UZAs, as the State deems appropriate. Program guidance for the Statewide Planning and Research Program is found in FTA Circular C8200.1, Program Guidance and Application Instructions for State Planning and Research Program Grants, dated December 27, 2001.

3. Period of Availability

The funds apportioned in this notice under the Statewide Planning and Research Program will remain available to be obligated by FTA to recipients for three fiscal years following FY 2005. Any of these apportioned funds that remain unobligated at the close of business on September 30, 2008, will revert to FTA for reapportionment under the program.

4. Other Program or Apportionment Related Information and Highlights

Section VI of this document provides various guidance and information specific to FTA planning programs, including the Statewide Planning and Research Program. Refer to that section for additional information relevant to this program.

K. National Planning and Research Program (49 U.S.C. 5314)

Through funding under this program, FTA seeks to deliver solutions that improve public transportation. FTA's Strategic Research Goals are to increase transit ridership, improve capital and operating efficiencies, improve safety and emergency preparedness, and to protect the environment and promote energy independence. For more about the National Planning and Research Program contact Bruce Robinson, Office

of Research, Demonstration and Innovation, at (202) 366–4209.

1. Total Apportionments

The 2005 Appropriations Act provides $37,200,000 for the National Planning and Research Program after the across-the-board 0.80 percent rescission. Of this amount $20,892,622 is allocated for specific activities, after applicable reductions for the Small Business Innovation Research program.

NATIONAL PLANNING AND RESEARCH PROGRAM

Appropriation	37,500,000
Rescission	(300,000)
Total Apportioned	37,200,000

All research and research and development projects are subject to a 2.6% reduction for the Small Business Innovative Research Program. This determination is made by FTA based on the proposed statement of work. The project allocations are listed in Table 15, along with the amount that is currently available for obligation, in accordance with the Surface Transportation Extension Act of 2004, Part V.

2. Program Requirements

Application Instructions and Program Management Guidelines are set forth in FTA Circular 6100.1C. Research projects must support FTA's Strategic Research Goals and meet the Office of Management and Budget's Research and Development Investment Criteria. All research recipients are required to work with FTA to develop approved Statements of Work and plans to evaluate research results before award.

3. Period of Availability

Funds are available until expended.

4. Other Program or Apportionment Related Information and Highlights

Funds not designated by Congress for specific projects and activities will be programmed by FTA based on national priorities.

L. Job Access and Reverse Commute Program

The Job Access and Reverse Commute (JARC) Program provides funding for transportation services designed to increase access to jobs and employment-related activities. Job Access projects are those that transport welfare recipients and low-income individuals, including economically disadvantaged persons with disabilities, in urban, suburban, or rural areas to and from jobs and activities related to their employment. Reverse Commute projects provide transportation services for the general public from urban, suburban, and rural areas to suburban employment opportunities. A total of up to $10,000,000 from the appropriation may be used for Reverse Commute Projects. For more information about the JARC program contact Gregory D. Brown, Office of Resource Management and States Program, at (202) 366–2053.

1. Total Apportionments

The 2005 Appropriations Act provides $124,000,000 for the Job Access and Reverse Commute (JARC) Program after the across-the-board 0.80 percent rescission. The total amount allocated to JARC projects is $123,702,400, as shown in the table below.

JOB ACCESS AND REVERSE COMMUTE

Appropriation	$125,000,000
Rescission	(1,000,000)
Tech. Asst. Takedown	(297,600)
Total Allocation	123,702,400

JARC project allocations designated in the Conference Report are included in this notice as Table 16. The amounts designated in the report have been adjusted to reflect the rescission, and the $297,600 set-aside for technical assistance and evaluation of the program.

2. Program Requirements

Although TEA–21 requires that JARC project selections be made through a national competition based on statutorily specified criteria, the 2005 Appropriations Act overrides the requirement for competitive selection by directing FTA to award grants for the JARC designations included in the Conference report language upon receipt of an application. The Federal share for JARC projects, both capital and operating assistance, is 50 percent of net project cost. Planning is not an eligible activity.

Unless statutorily directed otherwise, FTA will honor the discretionary project designations included in Conference Report language for JARC, to the extent that the projects meet the statutory intent of the program. Section 125 of the 2005 Appropriations Act, made the JARC funds designated to projects in FY 2005 available upon FTA's receipt of an application. Section 547 in the Consolidated Appropriations Act, 2004, provided likewise for JARC projects designated in FY 2004. Requests for reprogramming of funding must be directed to the House and Senate Committees on Appropriations for resolution.

3. Period of Availability

Funds for JARC projects competitively selected by FTA remain available for two fiscal years following the fiscal year of selection. No projects competitively selected in previous fiscal years remain available for obligation in FY 2005. Congressional allocations of JARC projects remain available to the designated entity unless reallocated by Congress. Congress did not reallocate unobligated Congressional allocations for JARC projects from fiscal years 2002 in the 2005 Appropriations Act, so they remain available for obligation. Projects designated prior to FY 2002 were reallocated in prior years.

4. Other Program or Apportionment Related Information and Highlights

Prior year unobligated balances for JARC allocations in the amount of $119,748,937 remain available for obligation in FY 2005. These balances include Congressional allocations from fiscal years 2002, 2003 and 2004. These unobligated amounts are displayed in Table 17.

M. Over-the-Road Bus Accessibility Program

The Over-the-Road Bus Accessibility (OTRB) Program authorizes FTA to make grants to operators of over-the-road buses to help finance the incremental capital and training costs of complying with the DOT over-the-road bus accessibility final rule, 49 CFR Part 37, published on September 28, 1998 (63 FR 51670). FTA conducts a national solicitation of applications, and grantees are selected on a competitive basis. For more information about the OTRB program contact Blenda Younger, Office of Resource Management and States Program, at (202) 366–2053.

1. Total Allocation

The 2005 Appropriations Act provides $6,894,400 for the Over-the-Road Bus Accessibility (OTRB) Program after the across-the-board 0.80 percent rescission, which is the total amount allocable for OTRB, as shown in the table below.

OVER-THE-ROAD BUS ACCESSIBILITY PROGRAM

Appropriation	$6,950,000
Rescission	(55,600)
Total Allocation	6,894,400

Of this amount, $5,239,744 is allocable to providers of intercity fixed-

route service, and $1,654,666 to other providers of over-the-road bus services, including local fixed-route service, commuter service, and charter and tour service. The total amount of $4,656,832 is currently available for obligation in accordance with the Surface Transportation Extension Act of 2004, Part V. This includes $3,539,192 for intercity fixed-route service and $1,117,640 for other over-the-road bus services.

2. Program Requirements

Projects are competitively selected. The Federal share of the project is 90 percent of net project cost. Program guidance is provided in the **Federal Register** notice soliciting applications. The FY 2004 notice was published November 24, 2003, and is available at *http://www.fta.dot.gov/legal/federal_register/2004/12174_12199_ENG_HTML.htm.* Assistance is available to operators of buses used substantially or exclusively in intercity, fixed route, over-the-road bus service. Capital projects eligible for funding include projects to add lifts and other accessibility components to new vehicle purchases and to purchase lifts to retrofit existing vehicles. Eligible training costs include developing training materials or providing training for local providers of over-the-road bus services.

3. Period of Availability

Funds are available until expended.

4. Other Program or Apportionment Related Information and Highlights

A **Federal Register** notice providing program guidance and application procedures for FY 2005 will be published at a later date and synopsized at *www.grants.gov.* A **Federal Register** notice of FY 2004 project selections was published November 16, 2004, and is available at *http://www.fta.dot.gov/legal/federal_register/2004/12174_16182_ENG_HTML.htm.*

V. FTA Program Guidance and Requirements

A. Automatic Pre-Award Authority to Incur Project Costs

This information incorporates and elaborates on guidance previously provided in the FTA Fiscal Years 2002—2004 Apportionments and Allocations Notices, which can be found on the FTA Web site at *http://www.fta.dot.gov/25_ENG_HTML.htm.*

1. Policy

FTA provides blanket, or automatic, pre-award authority to certain program areas described below. This pre-award authority allows grantees to incur project costs prior to grant approval and retain their eligibility for subsequent reimbursement after grant approval. The grantee assumes all risk and is responsible for ensuring that all conditions are met to retain eligibility. This automatic pre-award spending authority permits a grantee to incur costs on an eligible transit capital or planning project without prejudice to possible future Federal participation in the cost of the project or projects. Prior to exercising pre-award authority, grantees must comply with the conditions and Federal requirements outlined in paragraphs 2 and 3 below. Failure to do so will render an otherwise eligible project ineligible for FTA financial assistance. In addition, prior to incurring costs, grantees are strongly encouraged to consult with the appropriate FTA regional office regarding the eligibility of the project for future FTA funds and the applicability of the conditions and Federal requirements.

In the June 24, 1998 **Federal Register** Notice on TEA–21, pre-award authority was extended to all formula funds and flexible funds that would be apportioned during the authorization period of TEA–21, 1998–2003. In the February 11, 2004 **Federal Register** Notice of FY 2004 Apportionments and Allocations, FTA extended pre-award authority to grantees for project costs to be reimbursed by formula funds and flexible funds to be appropriated in FY 2005. In this notice, FTA is extending this pre-award authority for formula funds and flexible funds that will be appropriated in FY 2006. Pre-award authority for operating and planning projects under the formula grant programs is not limited to the authorization period. In addition, automatic pre-award authority for section 5303 and 5313(b) has been granted through FY 2006. Pre-award authority also applies to section 5309 Capital Investment Bus and Bus-Related allocations and JARC allocations identified in this and previous notices. For such section 5309 Capital Investment Bus and Bus-Related and JARC projects, the date that costs may be incurred is the date that the appropriation bill in which they are contained was enacted. In the February 11, 2004 notice FTA extended pre-award authority to Section 330 projects, and, in this notice, FTA is also extending comparable pre-award authority to those surface transportation projects commonly referred to as Section 115 projects administered by FTA, for which amounts were provided in the Consolidated Appropriations Act, 2004 and Section 117 projects in the 2005 Appropriations Act. We strongly encourage any prospective applicant that does not have a relationship with FTA to review Federal grant requirements with the FTA regional office before incurring costs.

Blanket pre-award authority does not apply to section 5309 Capital Investment New Starts funds. Specific instances of pre-award authority for Capital Investment New Starts projects are described in paragraph 4 below. Pre-award authority does not apply to Capital Investment Bus and Bus-Related projects not specified in this or previous notices. Before an applicant may incur costs for Capital Investment New Starts projects, Bus and Bus-Related projects, or any other projects not listed in this notice or previous notices, it must first obtain a written Letter of No Prejudice (LONP) from FTA. To obtain an LONP, a grantee must submit a written request accompanied by adequate information and justification to the appropriate FTA regional office, as described V.B below.

In using pre-award authority for FY 2006 formula funds, grantees are cautioned that reauthorization may result in changes in program structure, administrative requirements, or funding availability. As with all pre-award authority, activities must be conducted in compliance with Federal requirements in order to retain eligibility for future reimbursement. New grantees are encouraged to contact the appropriate FTA regional office before incurring costs, in order to ensure that requirements are met so that expenses remain eligible.

2. Conditions

The conditions under which pre-award authority may be utilized are specified below:

a. Pre-award authority is not a legal or implied commitment that the project(s) will be approved for FTA assistance or that FTA will obligate Federal funds. Furthermore, it is not a legal or implied commitment that all items undertaken by the applicant will be eligible for inclusion in the project(s).

b. All FTA statutory, procedural, and contractual requirements must be met.

c. No action will be taken by the grantee that prejudices the legal and administrative findings that the Federal Transit Administrator must make in order to approve a project.

d. Local funds expended by the grantee pursuant to and after the date of the pre-award authority will be eligible for credit toward local match or reimbursement if FTA later makes a

grant for the project(s) or project amendment(s).

e. The Federal amount of any future FTA assistance awarded to the grantee for the project will be determined on the basis of the overall scope of activities and the prevailing statutory provisions with respect to the Federal/local match ratio at the time the funds are obligated.

f. For funds to which the pre-award authority applies, the authority expires with the lapsing of the fiscal year funds.

g. When a grant for the project is subsequently awarded, the Financial Status Report, in TEAM-Web, must indicate the use of pre-award authority.

3. Environmental, Planning, and Other Federal Requirements

All Federal grant requirements must be met at the appropriate time for the project to remain eligible for Federal funding. For example, the requirement that a project be included in a locally adopted metropolitan transportation improvement program and Federally-approved statewide transportation improvement program (23 CFR part 450) must be satisfied before the grantee may advance the project beyond planning and preliminary design with non-Federal funds under pre-award authority. For planning projects, the project must be included in a locally-approved Planning Work Program that has been coordinated with the State. Compliance with the National Environmental Policy Act (NEPA) and other environmental laws and executive orders (*e.g.*, protection of parklands, wetlands, and historic properties) must be completed before State or local funds are spent on implementation activities, such as finalizing the design, site preparation, construction, and acquisition, for a project that is expected to be subsequently funded with FTA funds. The grantee may not advance the project beyond planning and preliminary design before FTA has determined the project to be a categorical exclusion, or has issued a finding of no significant impact (FONSI) or an environmental record of decision (ROD), in accordance with FTA environmental regulations, 23 CFR Part 771. The conformity requirements of the Clean Air Act, 40 CFR Part 93, if applicable, must also be fully met before the project may be advanced into implementation under pre-award authority with non-Federal funds.

In addition, Federal procurement procedures, as well as the whole range of applicable Federal requirements (*e.g.*, Buy America, Davis-Bacon Act), must be followed for projects in which Federal funding will be sought in the future. Failure to follow any such requirements could make the project ineligible for Federal funding. In short, this increased administrative flexibility requires a grantee to make certain that no Federal requirements are circumvented through the use of pre-award authority. If a grantee has questions or concerns regarding the environmental requirements, or any other Federal requirements that must be met before incurring costs, it should contact the appropriate regional office.

4. Pre-Award Authority for New Starts Projects

a. *Preliminary Engineering and Final Design*

Projects proposed for section 5309 New Starts funds are required to follow a Federally defined New Starts project development process. This New Starts process includes, among other things, FTA approval of the entry of the project into Preliminary Engineering (PE) and into Final Design (FD). In accordance with section 5309(e), FTA considers the merits of the project, the strength of its financial plan, and its readiness to enter the next phase in deciding whether or not to approve entry into PE or FD. Upon FTA approval to enter PE, FTA extends pre-award authority to incur costs for PE activities. Upon FTA approval to enter FD, FTA extends pre-award authority to incur costs for FD activities. The pre-award authority for each phase is automatic upon FTA's signing of a letter to the project sponsor approving entry into that phase. PE and FD are defined in the New Starts regulation entitled Major Capital Investment Projects, found at 49 CFR Part 611.

b. Real Property Acquisition Activities

FTA extends automatic pre-award authority for the acquisition of real property and real property rights for a New Starts project upon completion of the NEPA process for that project. The NEPA process is completed when FTA signs an environmental Record of Decision (ROD) or Finding of No Significant Impact (FONSI), or makes a Categorical Exclusion (CE) determination. With the limitations and caveats described below, real estate acquisition for a New Starts project may commence, at the project sponsor's risk, upon completion of the NEPA process.

For FTA-assisted projects, any acquisition of real property or real property rights must be conducted in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) and its implementing regulations, 49 CFR part 24. This pre-award authority is strictly limited to costs incurred: (i) to acquire real property and real property rights in accordance with the URA regulation, and (ii) to provide relocation assistance in accordance with the URA regulation. This pre-award authority is limited to the acquisition of real property and real property rights that are explicitly identified in the final environmental impact statement (FEIS), environmental assessment (EA), or CE document, as needed for the selected alternative that is the subject of the FTA-signed ROD or FONSI, or CE determination. This pre-award authority does not cover site preparation, demolition, or any other activity that is not strictly necessary to comply with the URA, with one exception. That exception is when a building that has been acquired, has been emptied of its occupants, and awaits demolition poses a potential fire-safety hazard or other hazard to the community in which it is located, or is susceptible to reoccupation by vagrants, demolition of the building is also covered by this pre-award authority upon FTA's written agreement that the adverse condition exists.

FTA's rationale for providing this pre-award authority was described in the FY 2003 Apportionments and Allocations Notice published in the **Federal Register** on March 12, 2003, (68 FR 1106 *et seq.*). The FY 2003 Notice may be found on the FTA Web site at *http://www.fta.dot.gov/library/legal/federalregister/2003/fr31203.pdf.* Project sponsors should use pre-award authority for real property acquisition and relocation assistance very carefully, with a clear understanding that it does not constitute a funding commitment by FTA.

c. National Environmental Policy Act (NEPA) Activities

NEPA requires that major projects proposed for FTA funding assistance be subjected to a public and interagency review of the need for the project, its environmental and community impacts, and alternatives to avoid and reduce adverse impacts. Projects of more limited scope also need a level of environmental review, either to support an FTA finding of no significant impact (FONSI) or to demonstrate that the action is categorically excluded from the more rigorous level of NEPA review.

FTA's regulation entitled Environmental Impact and Related Procedures at 23 CFR part 771 states that the costs incurred by a grant applicant for the preparation of environmental documents requested by FTA are eligible for FTA financial assistance (23 CFR 771.105(e)).

Accordingly, FTA extends automatic pre-award authority for costs incurred to comply with NEPA regulations and to conduct NEPA-related activities for a proposed New Starts project, effective as of the date of the Federal approval of the relevant STIP or STIP amendment that includes the project or any phase of the project. NEPA-related activities include, but are not limited to, public involvement activities, historic preservation reviews, section 4(f) evaluations, wetlands evaluations, endangered species consultations, and biological assessments. This pre-award authority is strictly limited to costs incurred to conduct the NEPA process, and to prepare environmental, historic preservation and related documents. It does not cover preliminary engineering activities beyond those necessary for NEPA compliance. As with any pre-award authority, FTA reimbursement for costs incurred is not guaranteed.

d. Other New Starts Activities Requiring Letter of No Prejudice (LONP)

Except as discussed in paragraphs (a) through (c) above, a grant applicant must obtain a written LONP from FTA before incurring costs for any activity expected to be funded by New Start funds not yet granted. To obtain an LONP, an applicant must submit a written request accompanied by adequate information and justification to the appropriate FTA regional office, as described in section V.B below.

B. Letter of No Prejudice (LONP) Policy

1. Policy

LONP authority allows an applicant to incur costs on a project utilizing non-Federal resources, with the understanding that the costs incurred subsequent to the issuance of the LONP may be reimbursable as eligible expenses or eligible for credit toward the local match should FTA approve the project at a later date. LONPs are applicable to projects and project activities not covered by automatic pre-award authority. The majority of LONPs will be for section 5309 New Starts funds not covered under a full funding grant agreement, or for section 5309 Bus and Bus-Related funds not yet appropriated by Congress. At the end of an authorization period, LONPs may be issued for formula funds beyond the life of the current authorization or FTA's extension of automatic pre-award authority.

2. Conditions and Federal Requirements

The conditions for pre-award authority specified in V.A.2 above apply to all LONPs. The Environmental, Planning and Other Federal Requirements described in V.A.3, also apply to all LONPs. Because project implementation activities may not be initiated prior to NEPA completion, FTA will normally not issue an LONP for such activities until the NEPA process has been completed with a ROD, FONSI, or Categorical Exclusion determination.

3. Request for LONP

Before incurring costs for a project not covered by automatic pre-award authority, the project sponsor must first submit a written request for an LONP, accompanied by adequate information and justification, to the appropriate regional office and obtain written approval. As a prerequisite to FTA approval of an LONP for a New Starts project, FTA will require project sponsors to demonstrate project worthiness and readiness. Projects will be assessed based upon the criteria considered in the New Start evaluation process. Specifically, upon the request for an LONP, the applicant shall provide sufficient information to allow FTA to consider the following items:

a. Description of the activities to be covered by the LONP.

b. Justification for advancing the identified activities.

c. Data that indicates that the project will maintain its ability to receive a "Recommended'' rating.

d. Allocated level of risk and contingency for the activity requested.

e. Status of procurement progress, including, if appropriate, submittal of bids for the activities covered by the LONP.

f. Strength of the capital and operating financial plan for the New Starts project and the future transit system.

g. Adequacy of the Project Management Plan.

h. Resolution of any readiness issues that would affect the project, such as land acquisition and technical capacity to carry out the project.

C. FTA FY 2005 Annual List of Certifications and Assurances

On October 26, 2004, the Federal Fiscal Year 2005 Annual List of Certifications and Assurances was published in the **Federal Register**. The 2005 Annual List contains the following changes to the previous year's **Federal Register** publication:

(1) In the preface to the certifications and assurances, a paragraph has been added to explain that not all certifications and assurances will apply to all Applicants; and that the certifications and assurances are pre-award requirements and do not encompass all Federal requirements that may apply to the Applicant and its project.

(2) Certification 13(A)(1)(j) is amended to state that in the case of an Applicant serving in a UZA with a population of 200,000 or more, only capital security projects may be financed with the one percent of the UZA formula funds set aside by 49 U.S.C. 5307(d)(1)(J) for security projects.

(3) The Affirmation of the Applicant has been edited to clarify that the criminal fraud provisions of 18 U.S.C. 1001 apply to all certifications, assurances, agreements, and other submissions to FTA.

The 2005 Annual List is accessible on the Internet at *www.fta.dot.gov.* Any questions regarding this document may be addressed to the appropriate Regional Office or to Pat Simpich, in the FTA Office of Program Management, at (202) 366–1662.

D. FHWA Funds Used for Transit Purposes

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and TEA–21 have expanded modal choice in transportation funding by including substantial flexibility to transfer funds between FTA and FHWA program funding categories.

1. Transfer Process

The process for transferring flexible formula funds between FTA and FHWA programs is described below. For information on the transfer of funds between FTA and FHWA planning programs, contact the FTA/FHWA staff identified in VI.D below.

Transfer from FHWA to FTA. FHWA funds designated for use in transit capital projects must be derived from the metropolitan and statewide planning and programming process, and must be included in an approved STIP before the funds can be transferred. By letter, the State DOT requests the FHWA Division Office to transfer highway funds for a transit project. The letter should specify the project, amount to be transferred, apportionment year, State, Federal aid apportionment category (*i.e.*, Surface Transportation Program (STP), Congestion Mitigation and Air Quality (CMAQ), Interstate Substitute, or congressional earmark), and should include a description of the project as contained in the STIP.

The FHWA Division Office confirms that the apportionment amount is available for transfer and concurs in the transfer, by letter to the State DOT and FTA. The FHWA Office of Budget and Finance then transfers obligation authority and an equal amount of cash

to FTA. All FHWA CMAQ, STP, and Congressionally earmarked funds for transit projects in the Appropriations Act or Conference Report will be transferred to one of the three FTA formula programs (*i.e.* Urbanized Area Formula (section 5307), Nonurbanized Area Formula (section 5311) or Elderly and Persons with Disabilities (section 5310).

The FTA grantee's application for the project must specify which program the funds will be used for, and the application must be prepared in accordance with the requirements and procedures governing that program. Upon review and approval of the grantee's application, FTA obligates funds for the project.

Transferred funds are treated as FTA formula funds, but are assigned a distinct identifying code for tracking purposes. The funds may be used for any capital purpose eligible under the FTA formula program to which they are transferred and, in the case of CMAQ, for certain operating costs. FTA and FHWA have issued guidance on project eligibility under the CMAQ program in a Notice at 65 FR 9040 *et seq.* (February 23, 2000). In accordance with 23 U.S.C. 104(k), all FTA requirements except local share are applicable to transferred funds; FHWA local share requirements apply to funds transferred from FHWA to FTA. Transferred funds should be combined with regular FTA funds in a single annual grant application.

In the event that transferred funds are not obligated for the intended purpose within the period of availability of the program to which they were transferred, they become available to the Governor for any eligible capital transit project.

Transfers from FTA to FHWA. The Metropolitan Planning Organization (MPO) submits a written request to the FTA Regional Office for a transfer of FTA section 5307 formula funds (apportioned to a UZA 200,000 and over in population) to FHWA based on approved use of the funds for highway purposes, as contained in the Governor's approved State Transportation Improvement Program. The MPO must certify that: (1) The funds are not needed for capital investments required by the Americans with Disabilities Act; (2) notice and opportunity for comment and appeal has been provided to affected transit providers; and (3) local funds used for non-Federal match are eligible to provide assistance for either highway or transit projects. The FTA Regional Administrator reviews and concurs in the request, then forwards the approval to FTA Headquarters, where a reduction equal to the dollar amount being transferred to FHWA is made to the grantee's Urbanized Area Formula Program apportionment.

For information regarding these procedures, please contact Kristen D. Clarke, FTA Budget Office, at (202) 366–1686; or James V. Lunetta, FHWA Finance Division, at (202) 366–2845.

2. Matching Share for FHWA Transfers

The provisions of Title 23 U.S.C. regarding the non-Federal share apply to Title 23 funds used for transit projects. Thus, FHWA funds transferred to FTA retain the same matching share that the funds would have if used for highway purposes and administered by FHWA.

There are three instances in which a Federal share higher than 80 percent would be permitted. First, in States with large areas of Indian and certain public domain lands and national forests, parks and monuments, the local share for highway projects is determined by a sliding scale rate, calculated based on the percentage of public lands within that State. This sliding scale, which permits a greater Federal share, but not to exceed 95 percent, is applicable to transfers used to fund transit projects in these public land States. FHWA develops the sliding scale matching ratios for the increased Federal share.

Second, commuter carpooling and vanpooling projects and transit safety projects using FHWA transfers administered by FTA may retain the same 100 percent Federal share that would be allowed for ride-sharing or safety projects administered by FHWA.

The third instance is the 100 percent Federally-funded safety projects; however, these are subject to a nationwide 10 percent program limitation.

3. Miscellaneous Transit Earmarks in FHWA Programs

The FY 2002 and FY 2003 Appropriations Acts and accompanying reports included Section 330, which identified a number of transit projects among projects designated to receive funding from certain Federal Highway Administration (FHWA) funding sources. In FY 2004, Section 115 similarly included transit projects among projects designated to receive funding from certain FHWA sources. Some of these FY 2002–2004 designations for transit projects have not yet been obligated. The 2005 Appropriations Act also includes a new set of designations under Section 117, which may include some projects that FHWA will identify to be administered by FTA. For those projects identified by FHWA as transit in nature, FHWA allots the funds to FTA to administer. The funds are available for the designated project until obligated and expended. However, because these are FHWA funds, FTA cannot carry over unobligated balances remaining at the end of the fiscal year. Instead FHWA re-allots carryover to FTA annually, after reconciling account balances. Because the requirements and procedures associated with these projects differ in some cases from those for the FTA programs that FTA grantees are familiar with, and the availability of funds for obligation by FTA depends on allotments from FHWA, transit applicants seeking funding under these miscellaneous FHWA designations must work closely with the appropriate FTA regional office and FHWA Division Office when applying for a grant under these designations.

E. Grant Application Procedures

Grantees must provide a Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number for inclusion in all applications for a Federal grant or cooperative agreement submitted on or after October 1, 2003. The Office of Management and Budget (OMB) published this requirement in the **Federal Register** on June 27, 2003 at 68 FR 38402 *et seq.* On August 4, 2003, FTA issued a Dear Colleague letter including instructions on how to obtain a DUNS number; the letter can be accessed at *http://www.fta.dot.gov/legal/guidance/dear_colleague/2003/178_12145_ENG_HTML.htm.* The DUNS number should be entered into the grantee profile in TEAM-Web. Additional information about this and other Federal grant streamlining initiatives mandated by the Federal Financial Assistance Management Improvement Act of 1999 (Pub. L. 106–107) can be accessed on OMB's Web site at *http://www.whitehouse.gov/omb/grants/reform.html.*

All applications for FTA funds should be submitted to the appropriate FTA regional office. FTA utilizes TEAM-Web, an Internet-accessible electronic grant application system, and all applications are filed electronically. FTA has provided exceptions to the requirement for electronic filing of applications for certain new, non-traditional grantees in the JARC and OTRB programs, as well as to a few grantees that have not successfully connected to or accessed TEAM-Web.

In FY 2005, FTA is committed to maintaining the average number of days required to process a completed grant application at 36 days or fewer, while continuing to process at least 80 percent of grants within 60 days of receipt of a completed application by the

appropriate Regional Office. In FY 2004, FTA achieved this goal, with an average processing time of 30 days and 91 percent of grants obligated within 60 days of submission of a completed application.

In order for an application to be considered complete and for FTA to assign a grant number, enabling submission in TEAM-Web, the requirements listed in III.A of this document must be met. During FY 2005, any grantee applying for funds available under an extension of TEA–21 before the full year's apportionment becomes available is encouraged to include contingency items for the remainder of the funds, so that the entire project can be certified by DOL at the time of the initial application. The FTA circulars contain more information regarding application contents. State applicants for section 5311 funds are reminded that they must certify to DOL that all subrecipients have agreed to the standard labor protection warranty for section 5311, and must provide DOL with specified related information for each grant.

Before FTA can award grants for discretionary projects and activities designated by Congress, notification must be given to members of Congress, and in the case of awards greater than $1 million, to the House and Senate appropriations committees.

F. Payments

Once a grant has been awarded and executed, funds can be drawn down. On October 6, 2004, FTA implemented its new web-based payment system called "ECHO-Web''. ECHO-Web is an Internet accessible system that provides grantees the capability to submit payment requests on-line, as well as receive user-IDs and passwords via e-mail. Each grantee may have three people with a user profile (before, there was only one ECHO ID). The new system has been improved with encryption and software applications that meet current computer security standards and regulations.

FTA's former payment system that required FTA grantees enter draw-down requests through an outdated modem connection, has been retired. Grantees that have not submitted the registration package necessary for set-up under ECHO Web should contact the appropriate FTA regional office.

G. Oversight

FTA conducts periodic oversight reviews to assess grantee compliance with Federal requirements. Each UZA grantee is reviewed every three years (a triennial review). States are reviewed periodically for their management of the section 5310 and 5311 programs. Other more detailed reviews are scheduled based on an annual grantee risk assessment.

H. Technical Assistance

FTA headquarters and regional staff will be pleased to answer your questions and provide any technical assistance you may need to apply for FTA program funds and manage the grants you receive. This notice and the program guidance circulars previously identified in this document may be accessed via the FTA Web site at *www.fta.dot.gov.*

In addition, copies of the following circulars and other useful information are available on the FTA Web site and may be obtained from FTA regional offices: 4220.1E, Third Party Contracting Requirements, dated June 19, 2003; and C5010.1C, Grant Management Guidelines, dated October 1, 1998. The FY 2005 Annual List of Certifications and Assurances is also posted on the FTA Web site. Other documents on the FTA Web site of particular interest to public transit providers and others include the annual Statistical Summaries of FTA Grant Assistance Programs and the National Transit Database Profiles. The DOT final rule on "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,'' which was effective July 16, 2003, can be found on the Department's Web site at *http://osdbu.dot.gov/business/DBE/49cfrpart26_final_rule.html.*

VI. Guidance and Information Specific to FTA Planning Programs

A. Census 2000 Planning and Programming Requirements Deadline

The 2000 Census made changes, among other things, to the number and location of UZAs. These UZA designations are used by FTA to apportion funds. Each UZA must have an MPO in place to program Federal funding for highway and transit projects. MPOs must submit updates to their planning area boundaries, based on the 2000 Census.

FY 2005 is a critical year to complete a number of planning and programming items that resulted from the designation of new and revised UZAs by the 2000 Census. Subsequent designation by the U.S. DOT of new TMAs also requires completion of other items. These items, which must be completed in order to receive Federal funding, include the following:

1. New TMAs (27) were identified by the U.S. DOT on July 8, 2002. Federal Certification of these new TMAs must be completed by July 8, 2005. Congestion Management Systems are required for these TMAs.

2. Seventy-six new UZAs were identified by the 2000 Census. Per FTA and FHWA guidance, these new UZAs must have an existing or new MPO in place with an adopted plan, TIP, and planning boundary maps no later than October 1, 2005 in order to continue to receive Federal funds.

3. Some new UZAs will require air quality conformity findings. Failure to have a plan and TIP with a conformity finding will result in a conformity lapse.

4. Existing MPOs must update their planning area boundaries (area expected to be urbanized in the next 20 years) based on the 2000 Census. Previously published guidance requires MPOs to update and send the new boundaries to the FTA regional office and the FHWA Division Office no later than the next scheduled plan update after October 1, 2002, or by October 1, 2005, whichever occurs first.

B. Local Match Waiver for Specified Planning Activities

Job Access and Reverse Commute Planning. Federal, State and local welfare reform initiatives may require the development of new and innovative public and other transportation services to ensure that former welfare recipients have adequate mobility for reaching employment opportunities. In recognition of the key role that transportation plays in ensuring the success of welfare-to-work initiatives, FTA and FHWA permit the waiver of the local match requirement for JARC planning activities undertaken with both FTA and FHWA Metropolitan Planning Program and State Planning and Research Program funds. FTA and FHWA will support requests for waivers if they are included in Metropolitan Unified Planning Work Programs and State Planning and Research Programs and meet all other requirements.

C. Planning Emphasis Areas for FY 2005

The FTA and FHWA identify Planning Emphasis Areas (PEAs) annually to promote priority themes for consideration in Statewide and metropolitan (Unified) planning work programs proposed for FTA and FHWA funding. The FY 2005 PEAs are proposed for consideration in the development of unified planning work programs (UPWPs) and State Planning and Research (SP&R) programs during FY 2005, even though the UPWP might not be approved until early in FY 2006.

FTA and FHWA provide technical assistance and informational support for

the PEAs through the Transportation Planning Capacity Building Program (TPCB), which can be accessed at *http://www.planning.dot.gov/.* The TPCB is available to respond to requests and provide opportunities for peer exchange of innovative practices in these emphasis areas throughout the year. Requests for information and technical support through the TPCB can be made by accessing the Web site noted above. In addition, training courses that address these PEAs in a variety of planning contexts are available through the National Transit Institute (NTI) and the National Highway Institute (NHI). Information on course offerings is available at the TPCB Web site noted above and at the NTI and NHI Web sites: *www.ntionline.com/* and *www.nhi.fhwa.dot.gov/default.asp.*

For FY 2005, six key planning themes have been identified: (1) Consideration of safety and security in the transportation planning process; (2) linkage of the planning and NEPA processes; (3) consideration of management and operations within planning processes; (4) State DOT consultation with non-metropolitan local officials; (5) enhancement of the technical capacity of planning processes; and 6) coordination of human service transportation.

1. *Consideration of Safety and Security in the Transportation Planning Process.* TEA–21 included safety and security as factors to consider in the development of plans and programs, in recognition of the importance of safety and security of transportation systems as a national priority. TEA–21 calls for transportation projects and strategies that ''increase the safety and security of transportation systems.'' This entails communication and collaboration among safety professionals, the enforcement community, and transportation planners in order to successfully integrate safety and security into all stages of the transportation planning process.

Information is available at *http://www.tfhrc.gov/pubrds/pubrds.htm* describing the *tools and strategies associated with the implementation of safety conscious planning within* Statewide and metropolitan transportation planning processes, including resources targeted to States and MPOs. A training course titled ''Safety Conscious Planning'' is available through NTI (see Web site above) with additional information available from TPCB Web site and FHWA and FTA, as follows: *www.fhwa.dot.gov/planning/scp/index.htm* and *http://transit-safety.volpe.dot.gov/.*

2. *Linking the Planning and NEPA Processes.* FHWA and FTA are developing guidance on the appropriate use of planning results during a NEPA review. This guidance will be derived from a study of NEPA case law that synthesizes what the Federal courts have said about the role of MPO and statewide planning in FHWA's and FTA's NEPA decision-making. The guidance will be posted on the Web site for the Transportation Planning Capacity Building Program at http://www.planning.dot.gov as soon as it is available.

A series of facilitated workshops entitled ''Linking Planning and NEPA'' were delivered in FY 2004, with another series to be delivered in FY 2005. These workshops are described at the NTI and NHI Web sites noted above.

3. *Consideration of Management and Operations within Planning Processes.* TEA–21 challenged FHWA and FTA to move beyond traditional capital programs for improving the movement of people and goods—focusing on the need to improve the way transportation systems are managed and operated. Discussion papers on the topic are available at *www.plan4operations.dot.gov.* In addition, an NHI training course on the topic is scheduled to be available in the second quarter of FY 2005. Also, ''Getting More by Working Together-Opportunities for Linking Planning and Operations'', a reference guide for use by State DOT's, MPO's, and Transit Operators on opportunities for linking planning and operations, will be released in FY 2005.

4. *State DOT Consultation With Non-Metropolitan Local Officials.* On January 23, 2003, FTA and FHWA issued a Final Rule on consultation, followed by a technical correction on February 14, 2003, which can be accessed at *http://www.fta.dot.gov/library/legal/federalregister/2003/fr12303.html* and *http://www.fta.dot.gov/library/legal/federalregister/2003/fr21403.html.* This final rule amended the 1993 Joint FTA/FHWA Planning regulation published in the **Federal Register**, Volume 58, No. 207, on October 28, 1993. By February 24, 2004, each State was required to have a documented process(es) that implements consultation with non-metropolitan local officials in the Statewide transportation planning process and development of the Statewide Transportation Improvement Program (STIP), to be separate and discrete from the State's public involvement process. By February 24, 2006 and every five years thereafter, States must review and solicit comments (for a minimum of 60 days) from non-metropolitan local officials and other interested parties on the effectiveness of the existing consultation process(es) and proposed modifications. As part of this requirement, a ''specific request for comments shall be directed to the State association of counties, State municipal league, regional planning agencies, or directly to non-metropolitan local officials.'' In the meantime, FHWA and FTA will be using the Statewide planning findings that accompany approvals of the STIP as the primary mechanism for tracking and monitoring State progress in implementing and later reviewing and refining these processes.

5. *Enhancing the Technical Capacity of Planning Processes.* Reliable information on current and projected usage and performance of transportation systems is critical to the ability of planning processes to supply credible information to decision-makers to support preparation of plans and programs that respond to each locality's unique needs and policy issues. If this expertise is found to be lacking, the responsible agencies within metropolitan and Statewide planning processes are encouraged to devote appropriate resources to enhance and maintain their technical capacity. Training courses on this topic are available through NTI and NIH, with additional information available through the TPCB Web site and the Travel Model Improvement Program, which can be accessed at *http://tmip.fhwa.dot.gov/.*

6. *Coordination of Human Service Transportation.* The importance of coordinating human service transportation and the supporting United We Ride initiative were described earlier in this publication (see III.B—Transportation Coordination—United We Ride). This initiative supports Federal, State, and local agencies working together to ensure that transportation services are seamless, comprehensive and accessible to all citizens.

For further information on these PEAs, contact Candace Noonan, FTA Office of Planning and Environment, (202) 366–1648, or John Humeston, FHWA Office of Planning, (404) 562–3667.

D. Consolidated Planning Grants

Since FY 1997, FTA and FHWA have offered States the option of participating in a pilot Consolidated Planning Grant (CPG) program. This streamlined fund drawdown process eliminates the need to monitor individual fund sources, if several have been used, and ensures that

the oldest funds will always be used first.

Under the CPG, States can report metropolitan planning expenditures (to comply with the Single Audit Act) for both FTA and FHWA under the Catalogue of Federal Domestic Assistance number for FTA's Metropolitan Planning Program. Additionally, for States with an FHWA Metropolitan Planning (PL) fund-matching ratio greater than 80 percent, the State (through FTA) can request a waiver of the 20 percent local share requirement in order that all FTA funds used for metropolitan planning in a CPG can be granted at the higher FHWA rate. For some States, this Federal match rate can exceed 90 percent. In FY 2005, the CPG program was expanded to allow the transfer of FTA planning funds to FHWA in addition to the current process whereby FHWA funds for planning are transferred to FTA. For planning projects funded through a CPG, the State DOT requests the transfer of funds in a letter to the FHWA Division Office (if transferring funds to FTA) or to the FTA regional office (if transferring funds to FHWA).

States interested in transferring planning funds between FTA and FHWA should contact the FTA regional office or FHWA Division Office for more detailed procedures.

For further information on participating in the CPG Pilot, contact Candace Noonan, Planning Oversight Division, FTA, at (202) 366–1648, or Anthony Solury, Office of Planning and Environment, FHWA, at (202) 366–5003. Information concerning participation in the CPG program can be found on the FTA Web site at *http://www.fta.dot.gov/224_6039_ENG_HTML.htm.*

Jennifer L. Dorn,

Administrator.

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Appendix

FTA Regional Offices

Region 1-Boston Kendall Square 55 Broadway, Suite 920 Cambridge, MA 02142-1093 Tel. 617 494-2055 States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.	**Region 2-New York** One Bowling Green, Room 429 New York, NY 10004-1415 Tel. No. 212 668-2170 States served: New Jersey, New York, and the Virgin Islands
Region 3-Philadelphia 1760 Market Street, Suite 500 Philadelphia, PA 19103-4124 Tel. 215 656-7100 States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia	**Region 4-Atlanta** Atlanta Federal Center Suite 17T50 61 Forsyth Street SW Atlanta, GA 30303 Tel. 404 562-3500 States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, and Tennessee
Region 5-Chicago 200 West Adams Street, Suite 320 Chicago, IL 60606 Tel. 312 353-2789 States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin	**Region 6-Ft. Worth** 819 Taylor Street, Room 8A36 Ft. Worth, TX 76102 Tel. 817 978-0550 States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas
Region 7-Kansas City, MO 901 Locust Street, Room 404 Kansas City, MO 64106 Tel. 816 329-3920 States served: Iowa, Kansas, Missouri, and Nebraska	**Region 8-Denver** 12300 West Dakota Ave., Suite 310 Lakewood, CO 80228-2583 Tel. 720-963-3300 States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming
Region 9-San Francisco 201 Mission Street, Room 2210 San Francisco, CA 94105-1926 Tel. 415 744-3133 States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands	**Region 10-Seattle** Jackson Federal Building 915 Second Avenue, Suite 3142 Seattle, WA 98174-1002 Tel. 206 220-7954 States served: Alaska, Idaho, Oregon, and Washington

Functional Directory

FTA Program	FTA Headquarters Contact
Metropolitan Planning Program	Candace Noonan, (202) 366-1648
Urbanized Area Formula Progam	Ken Johnson, (202) 366-2053
Clean Fuels Formula Program	Nancy Grubb, (202) 366-2053
Capital Investment Programs	
Fixed Guideway Modernization	Ken Johnson, 202) 366-2053
New Starts	Sean Libberton, (202) 366-4033
Bus and Bus-Related Facilities	Ryan Hammon, (202) 366-2053
Elderly and Persons with Disabilitie Program	Sue Masselink, (202) 366-2053
Nonurbanized Area Formula Program	Lorna Wilson, (202) 366-2053
Rural Transit Assistance Program	Lorna Wilson, (202) 366-2053
Statewide Planning and Research Program	Candace Noonan, (202) 366-1648
National Planning and Research Program	Bruce Robinson, (202) 366-4200
Job Access and Reverse Commute Program	Gregory D. Brown, (202) 366-2053
Over-the-Road Bus Accessibility Program	Blenda Younger, (202) 366-2053

FEDERAL TRANSIT ADMINISTRATION

TABLE 1

(Appropriation amounts include a 0.80 percent reduction directed by Section 122 of Division J of the Consolidated Appropriations Act, 2005, P. L. 108-447)

FY 2005 APPROPRIATIONS, APPORTIONMENTS, AND AVAILABLE FUNDING FOR GRANT PROGRAMS

SOURCE OF FUNDS	APPROPRIATION & APPORTIONMENT	AVAILABLE FUNDING
TRANSIT PLANNING AND RESEARCH PROGRAMS		
Section 5303 Metropolitan Planning Program	$59,902,515	$42,075,804
Reapportioned Funds Added	726,331	726,331
Total Apportioned	$60,628,846	$42,802,135
Section 5313(b) State Planning and Research Program	$12,513,485	$8,789,530
Reapportioned Funds Added	146,114	146,114
Total Apportioned	$12,659,599	$8,935,644
Section 5311(b)(2) Rural Transit Assistance Program (RTAP)	$5,208,000	$3,349,182
Total Apportioned	$5,208,000	$3,349,182
Section 5314 National Planning and Research Program	$37,200,000	$23,922,727
FORMULA GRANTS PROGRAM	$3,950,317,600 a/	$2,668,247,437 a/
Alaska Railroad (Section 5307)	4,811,150	3,249,698
Less Oversight (one-half percent)	(24,056)	(16,248)
Total Available	4,787,094	3,233,450
Section 5308 Clean Fuels Formula Program	0 a/	0 a/
Over-the-Road Bus Accessibility Program	6,894,400	4,656,832
Section 5307 Urbanized Area Formula Program		
91.23% of Total Available for Sections 5307, 5311, and 5310	$3,593,195,773	$2,427,029,009
Less Oversight (one-half percent)	(17,965,979)	(12,135,145)
Total Apportioned	$3,575,229,794	$2,414,893,864
Section 5311 Nonurbanized Area Formula Program		
6.37% of Total Available for Sections 5307, 5311, and 5310	$250,889,588	$169,463,716
Less Oversight (one-half percent)	(1,254,448)	(847,319)
Total Apportioned	$249,635,140	$168,616,397
Section 5310 Elderly and Persons with Disabilities Formula Program		
2.4% of Total Available for Sections 5307, 5311, and 5310	$94,526,689	$63,848,182
Total Apportioned	$94,526,689	$63,848,182
CAPITAL INVESTMENT PROGRAM	$3,361,714,400	$2,188,476,564
Section 5309 Fixed Guideway Modernization	$1,204,684,800	$783,808,867
Less Oversight (one percent)	(12,046,848)	(7,838,089)
Total Apportioned	$1,192,637,952	$775,970,778
Section 5309 Bus and Bus-Related	$719,200,000 b/	$469,166,901 b/
Less Oversight (one percent)	(7,192,000)	(4,691,669)
Total Allocated	$712,008,000	$464,475,232
Section 5309 New Starts	$1,437,829,600	$935,500,796
Less Oversight (one percent)	(14,378,296)	(9,355,008)
Reallocated Funds Added	26,145,692 c/	26,145,692 c/
Total Allocated	$1,449,596,996	$952,291,480
JOB ACCESS AND REVERSE COMMUTE PROGRAM (Section 3037, TEA-21)	$124,000,000	$95,500,000
TOTAL APPROPRIATION (Above Grant Programs)	**$7,550,856,000**	**$5,030,361,244**
TOTAL APPORTIONMENT/ALLOCATION (Above Grant Programs)	**$7,525,012,510**	**$5,022,495,903**

a/ The Consolidated Appropriations Act, 2005 transfers funds appropriated for the Cleans Fuels Formula Program to the Section 5309 Bus and Bus-Related Facilities category.

b/ Includes funds transferred from the Clean Fuels Program.

c/ Includes $3,591,548 in reallocated funds from New Starts projects funded under P.L. 106-346; and $22,554,144 in reallocated funds from Bus projects funded under P.L. 107-87.

FEDERAL TRANSIT ADMINISTRATION

TABLE 2

REVISED FY 2005 SECTION 5303 METROPOLITAN PLANNING PROGRAM AND SECTION 5313(b) STATE PLANNING AND RESEARCH PROGRAM APPORTIONMENTS

STATE	SECTION 5303 APPORTIONMENT	SECTION 5313(b) APPORTIONMENT	AVAILABLE SECTION 5303 APPORTIONMENT	AVAILABLE SECTION 5313(b) APPORTIONMENT
Alabama	458,936	119,785	323,995	84,549
Alaska	242,515	63,298	171,209	44,678
Arizona	1,212,515	241,159	855,999	170,220
Arkansas	242,515	63,298	171,209	44,678
California	9,537,983	1,852,405	6,733,528	1,307,505
Colorado	908,627	198,261	641,463	139,941
Connecticut	673,472	175,771	475,451	124,066
Delaware	242,515	63,298	171,209	44,678
District of Columbia	242,515	63,298	171,209	44,678
Florida	3,962,125	831,193	2,797,140	586,689
Georgia	1,562,731	309,157	1,103,241	218,215
Hawaii	242,515	63,298	171,209	44,678
Idaho	242,515	63,298	171,209	44,678
Illinois	3,362,266	600,865	2,373,659	424,114
Indiana	913,413	210,477	644,842	148,563
Iowa	263,556	68,790	186,063	48,555
Kansas	308,161	74,531	217,552	52,607
Kentucky	384,610	96,679	271,523	68,240
Louisiana	600,869	156,464	424,195	110,438
Maine	242,515	63,298	171,209	44,678
Maryland	1,359,025	265,181	959,430	187,175
Massachusetts	1,785,593	347,724	1,260,574	245,437
Michigan	1,994,602	405,941	1,408,129	286,529
Minnesota	851,214	167,333	600,931	118,110
Mississippi	242,515	63,298	171,209	44,678
Missouri	897,823	190,713	633,836	134,613
Montana	242,515	63,298	171,209	44,678
Nebraska	242,515	63,298	171,209	44,678
Nevada	443,875	103,439	313,362	73,011
New Hampshire	242,515	63,298	171,209	44,678
New Jersey	2,812,565	478,459	1,985,586	337,715
New Mexico	242,515	63,298	171,209	44,678
New York	5,360,835	956,735	3,784,588	675,302
North Carolina	889,137	232,070	627,704	163,804
North Dakota	242,515	63,298	171,209	44,678
Ohio	1,929,419	451,154	1,362,111	318,442
Oklahoma	350,758	91,550	247,625	64,620
Oregon	539,572	121,940	380,922	86,070
Pennsylvania	2,490,895	506,672	1,758,497	357,629
Puerto Rico	1,006,038	214,534	176,907	44,678
Rhode Island	250,587	63,298	710,232	151,427
South Carolina	443,005	115,627	312,748	81,614
South Dakota	242,515	63,298	171,209	44,678
Tennessee	700,913	182,943	494,823	129,128
Texas	4,450,610	913,001	3,141,997	644,432
Utah	413,277	107,868	291,761	76,137
Vermont	242,515	63,298	171,209	44,678
Virginia	1,375,904	290,841	971,336	205,287
Washington	1,292,422	265,573	912,411	187,452
West Virginia	242,515	63,298	171,209	44,678
Wisconsin	718,758	175,400	507,421	123,804
Wyoming	242,515	63,298	171,209	44,678
TOTAL	**$60,628,846**	**$12,659,599**	**$42,802,135**	**$8,935,644**

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE ONE PERCENT TRANSIT ENHANCEMENT	AVAILABLE APPORTIONMENT
OVER 1,000,000 IN POPULATION	$26,109,900	$2,610,990,233	$17,635,969	$1,763,596,947
200,000-1,000,000 IN POPULATION	6,223,256	622,324,938	4,203,501	420,350,226
50,000-200,000 IN POPULATION	0	341,914,623	0	230,946,691
NATIONAL TOTAL	$32,333,156	$3,575,229,794	$21,839,470	$2,414,893,864
Amounts Apportioned to Urbanized Areas 1,000,000 and Over in Population:				
Atlanta, GA	$552,579	$55,257,893	$373,240	$37,324,020
Baltimore, MD	379,412	37,941,247	256,275	25,627,467
Boston, MA--NH--RI	1,018,229	101,822,913	687,764	68,776,426
Chicago, IL--IN	2,162,048	216,204,840	1,460,359	146,035,855
Cincinnati, OH--KY--IN	164,575	16,457,470	111,162	11,116,221
Cleveland, OH	264,288	26,428,824	178,514	17,851,385
Columbus, OH	106,063	10,606,272	71,640	7,164,021
Dallas--Fort Worth--Arlington, TX	578,422	57,842,239	390,696	39,069,620
Denver--Aurora, CO	358,704	35,870,444	242,287	24,228,740
Detroit, MI	367,510	36,751,002	248,235	24,823,515
Houston, TX	581,293	58,129,338	392,635	39,263,541
Indianapolis, IN	99,280	9,928,040	67,059	6,705,908
Kansas City, MO--KS	116,909	11,690,941	78,967	7,896,662
Las Vegas, NV	172,145	17,214,502	116,276	11,627,559
Los Angeles--Long Beach--Santa Ana, CA	2,387,916	238,791,646	1,612,921	161,292,144
Miami, FL	831,892	83,189,152	561,902	56,190,227
Milwaukee, WI	197,410	19,740,955	133,341	13,334,055
Minneapolis--St. Paul, MN	415,736	41,573,569	280,809	28,080,924
New Orleans, LA	162,484	16,248,394	109,750	10,975,000
New York--Newark, NY--NJ--CT	6,929,352	692,935,228	4,680,441	468,044,064
Orlando, FL	164,635	16,463,523	111,203	11,120,309
Philadelphia, PA--NJ--DE--MD	1,192,133	119,213,336	805,228	80,522,811
Phoenix--Mesa, AZ	371,305	37,130,533	250,799	25,079,870
Pittsburgh, PA	326,682	32,668,172	220,658	22,065,762
Portland, OR--WA	328,250	32,825,008	221,717	22,171,697
Providence, RI--MA	192,098	19,209,823	129,753	12,975,301
Riverside--San Bernardino, CA	232,094	23,209,365	156,768	15,676,798
Sacramento, CA	168,399	16,839,851	113,745	11,374,501
San Antonio, TX	200,289	20,028,907	135,286	13,528,553
San Diego, CA	490,379	49,037,880	331,227	33,122,704
San Francisco--Oakland, CA	1,216,184	121,618,434	821,473	82,147,338
San Jose, CA	365,085	36,508,493	246,597	24,659,712
San Juan, PR	293,440	29,343,997	198,204	19,820,443
Seattle, WA	795,148	79,514,768	537,084	53,708,359
St. Louis, MO--IL	279,421	27,942,101	188,735	18,873,530
Tampa--St. Petersburg, FL	194,818	19,481,781	131,590	13,158,996
Virginia Beach, VA	145,795	14,579,539	98,478	9,847,769
Washington, DC--VA--MD	1,307,498	130,749,813	883,151	88,315,140
TOTAL	**$26,109,900**	**$2,610,990,233**	**$17,635,969**	**$1,763,596,947**

Note: The amount listed for transit enhancement is included in the apportionment amount for the urbanized area.

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE ONE PERCENT TRANSIT ENHANCEMENT	AVAILABLE APPORTIONMENT
Amounts Apportioned to Urbanized Areas 200,000 to 1,000,000 in population				
Aguadilla--Isabela--San Sebastian, PR	$12,824	$1,282,399	$8,662	$866,198
Akron, OH	62,529	6,252,934	42,236	4,223,553
Albany, NY	75,224	7,522,423	50,810	5,081,031
Albuquerque, NM	67,127	6,712,683	45,341	4,534,091
Allentown--Bethlehem, PA--NJ	65,074	6,507,419	43,954	4,395,445
Anchorage, AK	34,767	3,476,667	23,483	2,348,319
Ann Arbor, MI	41,945	4,194,529	28,332	2,833,200
Antioch, CA	55,434	5,543,393	37,443	3,744,293
Asheville, NC	14,259	1,425,916	9,631	963,137
Atlantic City, NJ	71,932	7,193,237	48,587	4,858,682
Augusta-Richmond County, GA--SC	20,019	2,001,897	13,522	1,352,184
Austin, TX	163,578	16,357,838	110,489	11,048,924
Bakersfield, CA	52,853	5,285,279	35,699	3,569,949
Barnstable Town, MA	31,114	3,111,360	21,016	2,101,572
Baton Rouge, LA	41,865	4,186,516	28,278	2,827,788
Birmingham, AL	52,702	5,270,241	35,598	3,559,791
Boise City, ID	22,347	2,234,730	15,095	1,509,452
Bonita Springs--Naples, FL	11,190	1,118,966	7,558	755,807
Bridgeport--Stamford, CT--NY	163,408	16,340,779	110,374	11,037,401
Buffalo, NY	119,545	11,954,489	80,747	8,074,676
Canton, OH	34,388	3,438,810	23,227	2,322,749
Cape Coral, FL	34,939	3,493,851	23,599	2,359,927
Charleston--North Charleston, SC	37,700	3,770,033	25,465	2,546,474
Charlotte, NC--SC	122,379	12,237,903	82,661	8,266,108
Chattanooga, TN--GA	27,271	2,727,063	18,420	1,841,998
Colorado Springs, CO	46,927	4,692,698	31,697	3,169,689
Columbia, SC	33,782	3,378,185	22,818	2,281,800
Columbus, GA--AL	18,272	1,827,165	12,342	1,234,161
Concord, CA	191,524	19,152,401	129,365	12,936,515
Corpus Christi, TX	42,623	4,262,281	28,790	2,878,964
Davenport, IA--IL	33,934	3,393,377	22,921	2,292,061
Dayton, OH	140,653	14,065,316	95,004	9,500,437
Daytona Beach--Port Orange, FL	33,761	3,376,075	22,804	2,280,374
Denton--Lewisville, TX	19,785	1,978,536	13,364	1,336,405
Des Moines, IA	48,357	4,835,708	32,663	3,266,285
Durham, NC	52,925	5,292,454	35,748	3,574,795
El Paso, TX--NM	98,622	9,862,161	66,614	6,661,410
Eugene, OR	40,911	4,091,087	27,633	2,763,330
Evansville, IN--KY	18,101	1,810,117	12,226	1,222,646
Fayetteville, NC	21,089	2,108,852	14,244	1,424,427
Flint, MI	49,135	4,913,472	33,188	3,318,811
Fort Collins, CO	19,554	1,955,386	13,208	1,320,768
Fort Wayne, IN	24,092	2,409,192	16,273	1,627,292
Fresno, CA	72,416	7,241,609	48,914	4,891,355
Grand Rapids, MI	61,492	6,149,200	41,535	4,153,486
Greensboro, NC	25,545	2,554,527	17,255	1,725,459
Greenville, SC	16,681	1,668,097	11,267	1,126,718
Gulfport--Biloxi, MS	16,509	1,650,933	11,151	1,115,125

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE ONE PERCENT TRANSIT ENHANCEMENT	AVAILABLE APPORTIONMENT
Harrisburg, PA	44,735	4,473,468	30,216	3,021,610
Hartford, CT	110,388	11,038,765	74,561	7,456,149
Honolulu, HI	251,881	25,188,145	170,134	17,013,367
Huntsville, AL	15,020	1,502,020	10,145	1,014,541
Indio--Cathedral City--Palm Springs, CA	29,163	2,916,283	19,698	1,969,807
Jackson, MS	21,946	2,194,560	14,823	1,482,319
Jacksonville, FL	135,636	13,563,596	91,615	9,161,549
Knoxville, TN	34,558	3,455,757	23,342	2,334,196
Lancaster, PA	32,727	3,272,667	22,105	2,210,527
Lancaster--Palmdale, CA	64,947	6,494,693	43,868	4,386,849
Lansing, MI	44,251	4,425,133	29,890	2,988,962
Lexington-Fayette, KY	31,812	3,181,188	21,487	2,148,738
Lincoln, NE	23,208	2,320,764	15,676	1,567,563
Little Rock, AR	33,376	3,337,609	22,544	2,254,392
Louisville, KY--IN	108,156	10,815,581	73,054	7,305,399
Lubbock, TX	25,537	2,553,660	17,249	1,724,873
Madison, WI	60,894	6,089,404	41,131	4,113,096
McAllen, TX	27,459	2,745,905	18,547	1,854,725
Memphis, TN--MS--AR	112,261	11,226,067	75,827	7,582,662
Mission Viejo, CA	82,672	8,267,168	55,841	5,584,070
Mobile, AL	25,802	2,580,163	17,428	1,742,775
Modesto, CA	34,766	3,476,551	23,482	2,348,241
Nashville-Davidson, TN	66,390	6,639,013	44,843	4,484,330
New Haven, CT	136,897	13,689,713	92,467	9,246,735
Ogden--Layton, UT	50,962	5,096,220	34,422	3,442,249
Oklahoma City, OK	65,240	6,523,997	44,066	4,406,643
Omaha, NE--IA	60,664	6,066,352	40,975	4,097,526
Oxnard, CA	68,782	6,878,169	46,459	4,645,869
Palm Bay--Melbourne, FL	40,968	4,096,796	27,672	2,767,187
Pensacola, FL--AL	25,345	2,534,545	17,120	1,711,962
Peoria, IL	25,650	2,565,040	17,326	1,732,560
Port St. Lucie, FL	19,538	1,953,783	13,197	1,319,685
Poughkeepsie--Newburgh, NY	137,878	13,787,802	93,130	9,312,990
Provo--Orem, UT	43,517	4,351,712	29,394	2,939,370
Raleigh, NC	48,526	4,852,649	32,777	3,277,729
Reading, PA	24,271	2,427,050	16,394	1,639,354
Reno, NV	44,334	4,433,371	29,945	2,994,526
Richmond, VA	87,020	8,701,992	58,778	5,877,772
Rochester, NY	80,631	8,063,072	54,462	5,446,213
Rockford, IL	22,800	2,280,048	15,401	1,540,061
Round Lake Beach--McHenry--Grayslake, IL--WI	37,250	3,724,961	25,160	2,516,030
Salem, OR	32,795	3,279,499	22,151	2,215,142
Salt Lake City, UT	194,367	19,436,727	131,286	13,128,564
Santa Rosa, CA	32,002	3,200,171	21,616	2,161,560
Sarasota--Bradenton, FL	54,932	5,493,177	37,104	3,710,374
Savannah, GA	27,638	2,763,787	18,668	1,866,803
Scranton, PA	35,301	3,530,078	23,844	2,384,396
Shreveport, LA	27,948	2,794,814	18,878	1,887,761
South Bend, IN--MI	35,471	3,547,131	23,959	2,395,915
Spokane, WA--ID	62,550	6,254,968	42,249	4,224,927
Springfield, MA--CT	79,567	7,956,663	53,743	5,374,339
Springfield, MO	18,497	1,849,723	12,494	1,249,398

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE ONE PERCENT TRANSIT ENHANCEMENT	AVAILABLE APPORTIONMENT
Stockton, CA	75,860	7,586,004	51,240	5,123,977
Syracuse, NY	48,625	4,862,451	32,843	3,284,349
Tallahassee, FL	22,234	2,223,433	15,018	1,501,821
Temecula--Murrieta, CA	20,347	2,034,668	13,743	1,374,319
Thousand Oaks, CA	24,615	2,461,479	16,626	1,662,609
Toledo, OH--MI	56,669	5,666,892	38,277	3,827,710
Trenton, NJ	48,178	4,817,766	32,542	3,254,167
Tucson, AZ	95,839	9,583,896	64,735	6,473,456
Tulsa, OK	53,934	5,393,425	36,430	3,642,997
Victorville--Hesperia--Apple Valley, CA	23,626	2,362,551	15,958	1,595,788
Wichita, KS	42,017	4,201,690	28,380	2,838,037
Winston-Salem, NC	23,279	2,327,945	15,724	1,572,413
Worcester, MA--CT	53,189	5,318,880	35,926	3,592,645
Youngstown, OH--PA	32,815	3,281,504	22,165	2,216,496
TOTAL	**$6,223,256**	**$622,324,938**	**$4,203,501**	**$420,350,226**

Note: The amount listed for transit enhancement is included in the apportionment amount for the urbanized area.

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE APPORTIONMENT
Amounts Apportioned to State Governors for Urbanized Areas 50,000 to 200,000 in Population			
ALABAMA		$6,852,495	$4,628,526
Anniston, AL		628,615	424,599
Auburn, AL		588,003	397,167
Decatur, AL		562,534	379,964
Dothan, AL		532,259	359,515
Florence, AL		672,383	454,162
Gadsden, AL		522,459	352,895
Montgomery, AL		2,192,627	1,481,013
Tuscaloosa, AL		1,153,615	779,211
ALASKA		$464,442	$313,708
Fairbanks, AK		464,442	313,708
ARIZONA		$3,223,647	$2,177,417
Avondale, AZ		814,700	550,290
Flagstaff, AZ		597,917	403,864
Prescott, AZ		620,808	419,326
Yuma, AZ--CA		1,190,222	803,937
ARKANSAS		$4,625,723	$3,124,450
Fayetteville--Springdale, AR		1,726,324	1,166,048
Fort Smith, AR--OK		1,144,059	772,756
Hot Springs, AR		453,925	306,604
Jonesboro, AR		476,735	322,011
Pine Bluff, AR		596,580	402,961
Texarkana, TX--Texarkana, AR		228,100	154,070
CALIFORNIA		$47,374,911	$31,999,447
Atascadero--El Paso de Robles (Paso Robles), CA		577,132	389,824
Camarillo, CA		865,238	584,426
Chico, CA		1,132,384	764,870
Davis, CA		1,258,141	849,813
El Centro, CA		768,443	519,046
Fairfield, CA		1,990,062	1,344,190
Gilroy--Morgan Hill, CA		993,121	670,805
Hanford, CA		918,674	620,519
Hemet, CA		1,568,561	1,059,487
Livermore, CA		1,173,607	792,715
Lodi, CA		1,296,306	875,592
Lompoc, CA		454,757	307,166
Madera, CA		738,407	498,758
Manteca, CA		820,976	554,530
Merced, CA		1,561,227	1,054,533
Napa, CA		1,200,260	810,717
Petaluma, CA		876,244	591,860
Porterville, CA		815,551	550,865
Redding, CA		1,024,885	692,260
Salinas, CA		2,989,313	2,019,135
San Luis Obispo, CA		835,488	564,331
Santa Barbara, CA		2,888,420	1,950,987
Santa Clarita, CA		2,440,312	1,648,312
Santa Cruz, CA		2,133,426	1,441,025
Santa Maria, CA		1,804,175	1,218,632
Seaside--Monterey--Marina, CA		1,779,052	1,201,663
Simi Valley, CA		1,923,670	1,299,345
Tracy, CA		1,088,145	734,989
Turlock, CA		1,108,288	748,595

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE APPORTIONMENT
Vacaville, CA		1,398,886	944,880
Vallejo, CA		2,957,354	1,997,549
Visalia, CA		1,674,989	1,131,374
Watsonville, CA		1,014,895	685,513
Yuba City, CA		1,295,451	875,014
Yuma, AZ--CA		9,071	6,127
COLORADO		$7,085,157	$4,785,678
Boulder, CO		1,694,207	1,144,354
Grand Junction, CO		939,782	634,777
Greeley, CO		1,251,226	845,142
Lafayette--Louisville, CO		661,912	447,090
Longmont, CO		1,060,539	716,342
Pueblo, CO		1,477,491	997,973
CONNECTICUT		$13,780,534	$9,308,081
Danbury, CT--NY		5,711,023	3,857,518
Norwich--New London, CT		1,645,968	1,111,772
Waterbury, CT		6,423,543	4,338,791
DELAWARE		$654,160	$441,853
Dover, DE		634,718	428,721
Salisbury, MD--DE		19,442	13,132
FLORIDA		$18,662,357	$12,605,516
Brooksville, FL		918,588	620,462
Deltona, FL		1,503,798	1,015,743
Fort Walton Beach, FL		1,526,132	1,030,828
Gainesville, FL		1,805,114	1,219,267
Kissimmee, FL		1,968,822	1,329,844
Lady Lake, FL		426,892	288,345
Lakeland, FL		2,033,103	1,373,262
Leesburg--Eustis, FL		917,547	619,758
North Port--Punta Gorda, FL		1,151,087	777,503
Ocala, FL		950,873	642,268
Panama City, FL		1,220,080	824,105
St. Augustine, FL		529,390	357,577
Titusville, FL		543,038	366,796
Vero Beach--Sebastian, FL		1,176,012	794,339
Winter Haven, FL		1,493,481	1,008,774
Zephyrhills, FL		498,400	336,645
GEORGIA		$7,445,525	$5,029,088
Albany, GA		918,435	620,358
Athens-Clarke County, GA		991,751	669,880
Brunswick, GA		461,427	311,671
Dalton, GA		492,554	332,696
Gainesville, GA		737,998	498,481
Hinesville, GA		541,232	365,576
Macon, GA		1,386,994	936,847
Rome, GA		557,284	376,418
Valdosta, GA		566,059	382,345
Warner Robins, GA		791,791	534,816

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE APPORTIONMENT
HAWAII		$1,839,591	$1,242,554
Kailua (Honolulu County)--Kaneohe, HI		1,839,591	1,242,554
IDAHO		$3,703,452	$2,501,502
Coeur d'Alene, ID		787,479	531,904
Idaho Falls, ID		777,081	524,880
Lewiston, ID--WA		334,542	225,967
Nampa, ID		1,092,040	737,620
Pocatello, ID		712,310	481,131
ILLINOIS		$9,135,581	$6,170,641
Alton, IL		862,774	582,762
Beloit, WI--IL		133,963	90,486
Bloomington--Normal, IL		1,573,537	1,062,848
Champaign, IL		1,733,454	1,170,864
Danville, IL		552,337	373,077
Decatur, IL		1,055,105	712,672
DeKalb, IL		796,173	537,776
Dubuque, IA--IL		27,129	18,324
Kankakee, IL		790,468	533,922
Springfield, IL		1,610,641	1,087,910
INDIANA		$8,713,703	$5,885,682
Anderson, IN		956,089	645,792
Bloomington, IN		1,069,676	722,514
Columbus, IN		552,082	372,904
Elkhart, IN--MI		1,334,154	901,156
Kokomo, IN		674,927	455,880
Lafayette, IN		1,506,780	1,017,757
Michigan City, IN--MI		732,170	494,545
Muncie, IN		1,038,719	701,604
Terre Haute, IN		849,106	573,530
IOWA		$6,697,140	$4,523,592
Ames, IA		736,534	497,493
Cedar Rapids, IA		1,999,100	1,350,295
Dubuque, IA--IL		729,428	492,693
Iowa City, IA		1,041,687	703,609
Sioux City, IA--NE--SD		966,613	652,900
Waterloo, IA		1,223,778	826,602
KANSAS		$2,831,670	$1,912,655
Lawrence, KS		1,221,956	825,372
St. Joseph, MO--KS		9,951	6,721
Topeka, KS		1,599,763	1,080,562
KENTUCKY		$2,701,584	$1,824,789
Bowling Green, KY		585,568	395,523
Clarksville, TN--KY		255,919	172,861
Huntington, WV--KY--OH		524,545	354,305
Owensboro, KY		708,792	478,754
Radcliff--Elizabethtown, KY		626,760	423,346
LOUISIANA		$7,441,850	$5,026,606
Alexandria, LA		732,915	495,048
Houma, LA		1,277,478	862,874
Lafayette, LA		1,703,609	1,150,705
Lake Charles, LA		1,280,264	864,756
Mandeville--Covington, LA		588,490	397,496
Monroe, LA		1,095,807	740,164
Slidell, LA		763,287	515,563

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE APPORTIONMENT
MAINE		$3,192,839	$2,156,608
Bangor, ME		579,669	391,538
Dover--Rochester, NH--ME		60,811	41,075
Lewiston, ME		627,181	423,631
Portland, ME		1,846,310	1,247,092
Portsmouth, NH--ME		78,868	53,272
MARYLAND		$6,263,110	$4,230,427
Aberdeen--Havre de Grace--Bel Air, MD		1,807,090	1,220,601
Cumberland, MD-WV-PA		500,909	338,340
Frederick, MD		1,168,267	789,108
Hagerstown, MD--WV--PA		906,857	612,538
Salisbury, MD--DE		541,633	365,847
St. Charles, MD		754,502	509,629
Westminster, MD		583,852	394,364
MASSACHUSETTS		$3,500,019	$2,364,093
Leominster--Fitchburg, MA		1,197,826	809,073
Nashua, NH--MA		236	159
New Bedford, MA		1,777,904	1,200,888
Pittsfield, MA		524,053	353,973
MICHIGAN		$11,474,130	$7,750,217
Battle Creek, MI		782,994	528,874
Bay City, MI		797,253	538,506
Benton Harbor--St. Joseph, MI		578,854	390,988
Elkhart, IN--MI		17,473	11,802
Holland, MI		1,003,987	678,144
Jackson, MI		910,095	614,725
Kalamazoo, MI		1,963,150	1,326,013
Michigan City, IN--MI		4,667	3,152
Monroe, MI		562,685	380,066
Muskegon, MI		1,533,530	1,035,825
Port Huron, MI		858,130	579,625
Saginaw, MI		1,537,919	1,038,790
South Lyon--Howell--Brighton, MI		923,393	623,707
MINNESOTA		$3,751,822	$2,534,173
Duluth, MN--WI		941,708	636,078
Fargo, ND--MN		469,292	316,984
Grand Forks, ND--MN		100,366	67,792
La Crosse, WI--MN		57,120	38,582
Rochester, MN		1,085,632	733,291
St. Cloud, MN		1,097,704	741,446
MISSISSIPPI		$1,156,084	$780,878
Hattiesburg, MS		613,282	414,242
Pascagoula, MS		542,802	366,636
MISSOURI		$3,778,859	$2,552,436
Columbia, MO		1,078,892	728,739
Jefferson City, MO		510,726	344,971
Joplin, MO		655,401	442,691
Lee's Summit, MO		683,088	461,393
St. Joseph, MO--KS		850,752	574,642
MONTANA		$2,691,721	$1,818,127
Billings, MT		1,172,329	791,851
Great Falls, MT		761,743	514,521
Missoula, MT		757,649	511,755

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE APPORTIONMENT
N. MARIANA ISLANDS		$704,872	$476,107
Saipan, MP		704,872	476,107
NEBRASKA		$188,665	$127,434
Sioux City, IA--NE--SD		188,665	127,434
NEVADA		$661,938	$447,107
Carson City, NV		661,938	447,107
NEW HAMPSHIRE		$4,542,953	$3,068,544
Dover--Rochester, NH--ME		672,670	454,356
Manchester, NH		1,608,957	1,086,772
Nashua, NH--MA		1,887,509	1,274,921
Portsmouth, NH--ME		373,817	252,495
NEW JERSEY		$2,190,011	$1,479,246
Hightstown, NJ		846,345	571,665
Vineland, NJ		851,744	575,312
Wildwood--North Wildwood--Cape May, NJ		491,922	332,269
NEW MEXICO		$2,379,654	$1,607,341
Farmington, NM		481,564	325,273
Las Cruces, NM		1,053,434	711,544
Santa Fe, NM		844,656	570,524
NEW YORK		$6,533,594	$4,413,126
Binghamton, NY--PA		1,772,182	1,197,023
Danbury, CT--NY		41,377	27,948
Elmira, NY		738,007	498,488
Glens Falls, NY		583,472	394,107
Ithaca, NY		567,547	383,350
Kingston, NY		535,024	361,383
Middletown, NY		527,416	356,244
Saratoga Springs, NY		483,571	326,629
Utica, NY		1,284,998	867,954
NORTH CAROLINA		$10,482,544	$7,080,449
Burlington, NC		908,702	613,784
Concord, NC		1,047,325	707,417
Gastonia, NC		1,258,896	850,323
Goldsboro, NC		537,156	362,823
Greenville, NC		907,374	612,887
Hickory, NC		1,515,987	1,023,976
High Point, NC		1,264,591	854,170
Jacksonville, NC		929,930	628,122
Rocky Mount, NC		604,064	408,016
Wilmington, NC		1,508,519	1,018,931
NORTH DAKOTA		$3,186,241	$2,152,151
Bismarck, ND		880,321	594,614
Fargo, ND--MN		1,559,080	1,053,083
Grand Forks, ND--MN		746,840	504,454
OHIO		$8,483,704	$5,730,329
Huntington, WV--KY--OH		348,034	235,080
Lima, OH		743,589	502,258
Lorain--Elyria, OH		2,271,973	1,534,607
Mansfield, OH		794,099	536,375
Middletown, OH		1,042,891	704,422
Newark, OH		776,238	524,311
Parkersburg, WV--OH		245,955	166,131
Sandusky, OH		527,489	356,293

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE APPORTIONMENT
Springfield, OH		1,011,444	683,182
Weirton, WV--Steubenville, OH--PA		419,089	283,074
Wheeling, WV--OH		302,903	204,596
OKLAHOMA		$2,097,592	$1,416,822
Fort Smith, AR--OK		21,498	14,521
Lawton, OK		905,011	611,291
Norman, OK		1,171,083	791,010
OREGON		$2,746,492	$1,855,122
Bend, OR		574,609	388,120
Corvallis, OR		650,876	439,635
Longview, WA--OR		15,337	10,360
Medford, OR		1,505,670	1,017,007
PENNSYLVANIA		$11,004,519	$7,433,016
Altoona, PA		965,266	651,990
Binghamton, NY--PA		34,698	23,437
Cumberland, MD-WV-PA		128	86
Erie, PA		2,428,056	1,640,033
Hagerstown, MD--WV--PA		11,754	7,939
Hazleton, PA		547,215	369,617
Johnstown, PA		802,148	541,812
Lebanon, PA		734,285	495,974
Monessen, PA		559,113	377,654
Pottstown, PA		685,672	463,138
State College, PA		1,059,049	715,336
Uniontown--Connellsville, PA		539,771	364,589
Weirton, WV--Steubenville, OH--PA		2,540	1,716
Williamsport, PA		683,292	461,530
York, PA		1,951,532	1,318,165
PUERTO RICO		$10,748,893	$7,260,354
Arecibo, PR		1,464,113	988,937
Fajardo, PR		836,603	565,084
Florida--Barceloneta--Bajadero, PR		651,405	439,992
Guayama, PR		850,774	574,656
Juana Diaz, PR		571,503	386,023
Mayaguez, PR		1,324,131	894,386
Ponce, PR		2,913,723	1,968,078
San German--Cabo Rojo--Sabana Grande, PR		1,024,594	692,064
Yauco, PR		1,112,047	751,134
RHODE ISLAND		0	0
SOUTH CAROLINA		$5,482,335	$3,703,051
Anderson, SC		594,389	401,481
Florence, SC		577,954	390,380
Mauldin--Simpsonville, SC		736,794	497,668
Myrtle Beach, SC		1,104,790	746,232
Rock Hill, SC		614,301	414,930
Spartanburg, SC		1,236,997	835,532
Sumter, SC		617,110	416,828
SOUTH DAKOTA		$2,448,223	$1,653,656
Rapid City, SD		781,520	527,879
Sioux City, IA--NE--SD		31,496	21,274
Sioux Falls, SD		1,635,207	1,104,503
TENNESSEE		$5,960,978	$4,026,351
Bristol, TN--Bristol, VA		323,122	218,253
Clarksville, TN--KY		947,957	640,299

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE APPORTIONMENT
Cleveland, TN		520,649	351,673
Jackson, TN		667,854	451,103
Johnson City, TN		894,197	603,987
Kingsport, TN--VA		781,165	527,639
Morristown, TN		485,227	327,747
Murfreesboro, TN		1,340,807	905,650
TEXAS		$31,607,601	$21,349,395
Abilene, TX		1,268,452	856,777
Amarillo, TX		2,209,557	1,492,448
Beaumont, TX		1,441,797	973,864
Brownsville, TX		2,259,672	1,526,298
College Station--Bryan, TX		1,733,945	1,171,195
Galveston, TX		995,486	672,402
Harlingen, TX		1,196,321	808,057
Killeen, TX		2,163,666	1,461,451
Lake Jackson--Angleton, TX		853,674	576,615
Laredo, TX		2,997,269	2,024,510
Longview, TX		771,589	521,171
McKinney, TX		609,624	411,772
Midland, TX		1,159,521	783,200
Odessa, TX		1,270,843	858,393
Port Arthur, TX		1,438,002	971,300
San Angelo, TX		963,755	650,969
Sherman, TX		589,297	398,041
Temple, TX		750,344	506,821
Texarkana, TX--Texarkana, AR		426,700	288,215
Texas City, TX		980,774	662,465
The Woodlands, TX		1,033,597	698,145
Tyler, TX		1,065,971	720,011
Victoria, TX		550,505	371,840
Waco, TX		1,792,437	1,210,704
Wichita Falls, TX		1,084,803	732,731
UTAH		$1,521,407	$1,027,636
Logan, UT		846,740	571,931
St. George, UT		674,667	455,705
VERMONT		$1,088,479	$735,215
Burlington, VT		1,088,479	735,215
VIRGINIA		$7,379,883	$4,984,751
Blacksburg, VA		666,171	449,966
Bristol, TN--Bristol, VA		190,123	128,419
Charlottesville, VA		947,760	640,166
Danville, VA		505,625	341,525
Fredericksburg, VA		944,311	637,836
Harrisonburg, VA		583,069	393,835
Kingsport, TN--VA		14,739	9,955
Lynchburg, VA		915,837	618,603
Roanoke, VA		2,072,047	1,399,567
Winchester, VA		540,201	364,879
WASHINGTON		$10,355,872	$6,994,887
Bellingham, WA		1,028,534	694,725
Bremerton, WA		1,750,485	1,182,367
Kennewick--Richland, WA		1,636,808	1,105,584
Lewiston, ID--WA		195,465	132,027
Longview, WA--OR		700,753	473,325
Marysville, WA		1,134,185	766,087
Mount Vernon, WA		515,719	348,343
Olympia--Lacey, WA		1,429,865	965,804

FEDERAL TRANSIT ADMINISTRATION

TABLE 3

FY 2005 SECTION 5307 URBANIZED AREA FORMULA APPORTIONMENTS

URBANIZED AREA/STATE	ONE PERCENT TRANSIT ENHANCEMENT	APPORTIONMENT	AVAILABLE APPORTIONMENT
Wenatchee, WA		630,619	425,952
Yakima, WA		1,333,439	900,673
WEST VIRGINIA		$5,161,421	$3,486,288
Charleston, WV		1,844,647	1,245,969
Cumberland, MD-WV-PA		21,269	14,366
Hagerstown, MD--WV--PA		278,963	188,426
Huntington, WV--KY--OH		941,388	635,862
Morgantown, WV		568,680	384,116
Parkersburg, WV--OH		636,728	430,078
Weirton, WV--Steubenville, OH--PA		289,463	195,518
Wheeling, WV--OH		580,283	391,953
WISCONSIN		$14,473,942	$9,776,443
Appleton, WI		2,389,874	1,614,243
Beloit, WI--IL		499,984	337,715
Duluth, MN--WI		306,648	207,126
Eau Claire, WI		915,197	618,171
Fond du Lac, WI		622,120	420,212
Green Bay, WI		2,235,333	1,509,859
Janesville, WI		782,329	528,425
Kenosha, WI		1,432,104	967,317
La Crosse, WI--MN		1,003,242	677,641
Oshkosh, WI		925,903	625,402
Racine, WI		1,741,699	1,176,433
Sheboygan, WI		891,437	602,122
Wausau, WI		728,072	491,777
WYOMING		$1,440,704	$973,126
Casper, WY		677,404	457,554
Cheyenne, WY		763,300	515,572
TOTAL		**$341,914,623**	**$230,946,691**

FEDERAL TRANSIT ADMINISTRATION

TABLE 4

FY 2005 APPORTIONMENT FORMULA FOR FORMULA PROGRAM

Percent of Formula Funds Available

Section 5310:	2.4%	States - allocated to states based on state's population of elderly and persons with disabilities
Section 5311:	6.37%	Nonurbanized Areas - allocated to states based on state's nonurbanized area population
Section 5307:	91.23%	Urbanized Areas (UZA)

UZA Population and Weighting Factors

50,000-199,999 in population :
(Apportioned to Governors)

- 9.32% of available Section 5307 funds
  - *50% apportioned based on population*
  - *50% apportioned based on population x population density*

200,000 and greater in population:
(Apportioned to UZAs)

- 90.68% of available Section 5307 funds
  - 33.29% (Fixed Guideway Tier*)
    - 95.61% (Non-incentive Portion of Tier)
      - --- at least 0.75% to each UZA with commuter rail and pop. 750,000 or greater
      - 60% - fixed guideway revenue vehicle miles
      - 40% - fixed guideway route miles
    - 4.39% ("Incentive" Portion of Tier)
      - -- at least 0.75% to each UZA with commuter rail and pop. 750,000 or greater
      - -- fixed guideway passenger miles x fixed guideway passenger miles/operating cost
  - 66.71% ("Bus" Tier)
    - 90.8% (Non-incentive Portion of Tier)
      - 73.39% for UZAs with population 1,000,000 or greater
        - 50% - bus revenue vehicle miles
        - 25% - population
        - 25% - population x population density
      - 26.61% for UZAs pop. < 1,000,000
        - 50% - bus revenue vehicle miles
        - 25% - population
        - 25% - population x density
    - 9.2% ("Incentive" Portion of Tier)
      - -- bus passenger miles x bus passenger miles/operating cost

*Includes all fixed guideway modes, such as heavy rail, commuter rail, light rail, trolleybus, aerial tramway, inclined plane, cable car, automated guideway transit, ferryboats, exclusive busways, and HOV lanes.

FEDERAL TRANSIT ADMINISTRATION

TABLE 5

FISCAL YEAR 2005 FORMULA PROGRAMS APPORTIONMENT DATA UNIT VALUES

	APPORTIONMENT UNIT VALUE	AVAILABLE APPORTIONMENT UNIT VALUE
Section 5307 Urbanized Area Formula Program - Bus Tier		
Urbanized Areas Over 1,000,000:		
Population	$3.02529684	$2.04344089
Population x Density	$0.00076761	$0.00051849
Bus Revenue Vehicle Mile	$0.40607118	$0.27428134
Urbanized Areas Under 1,000,000:		
Population	$2.77256546	$1.87273314
Population x Density	$0.00121310	$0.00081939
Bus Revenue Vehicle Mile	$0.53782054	$0.36327162
Bus Incentive (PM denotes Passenger Mile):		
Bus PM x Bus PM = / Operating Cost	$0.00727312	$0.00491264
Section 5307 Urbanized Area Formula Program - Fixed Guideway Tier		
Fixed Guideway Revenue Vehicle Mile	$0.61127338	$0.41288544
Fixed Guideway Route Mile	$34,324	$23,184
Commuter Rail Floor	$7,739,160	$5,227,427
Fixed Guideway Incentive:		
Fixed Guideway PM x Fixed Guideway PM = / Operating Cost	$0.00061923	$0.00041826
Commuter Rail Incentive Floor	$355,349	$240,021
Section 5307 Urbanized Area Formula Program - Areas Under 200,000		
Population	$5.59676779	$3.78034447
Population x Density	$0.00277804	$0.00187643
Section 5311 Nonurbanized Area Formula Program		
Areas Under 50,000		
Population	$2.78498039	$1.88111882

Section 5309 Capital Program - Fixed Guideway Modernization

Apportionment Unit Values

	Tier 2	Tier 3	Tier 4	Tier 5	Tier 6	Tier 7
Legislatively Specified Areas:						
Revenue Vehicle Mile	$0.03043443	-------	$0.13683131	$0.03549322	$0.02340212	$0.12193985
Route Mile	$2,122.43	-------	$7,832.52	$2,669.44	$1,760.07	$9,171.09
Other Urbanized Areas:						
Revenue Vehicle Mile	$0.16377360	$0.00579309	$0.13683131	$0.07842003	$0.06401635	$0.50034854
Route Mile	$4,772.78	$168.83	$7,832.52	$2,492.18	$2,034.43	$15,901.02

Available Apportionment Unit Values

	Tier 2	Tier 3	Tier 4	Tier 5	Tier 6	Tier 7
Legislatively Specified Areas:						
Revenue Vehicle Mile	$0.01980167	-------	$0.08902710	$0.02309309	$0.01522621	$0.07933821
Route Mile	$1,380.93	-------	$5,096.10	$1,736.83	$1,145.16	$5,967.02
Other Urbanized Areas:						
Revenue Vehicle Mile	$0.10655667	$0.00376918	$0.08902710	$0.05102274	$0.04165121	$0.32554376
Route Mile	$3,105.33	$109.85	$5,096.10	$1,621.50	$1,323.67	$10,345.75

FEDERAL TRANSIT ADMINISTRATION

TABLE 6

2000 CENSUS URBANIZED AREAS WITH POPULATION 200,000 OR GREATER ELIGIBLE TO USE FY 2005 SECTION 5307 FUNDS FOR OPERATING ASSISTANCE

State	Urbanized Area Description	Population	FY 2002 Apportionment	FY 2005 Apportionment Operating Limitation a/	FY 2005 Available Operating Limitation b/
AL	Huntsville, AL	213,253	$1,677,473	$1,677,473	$1,014,541
CA	Antioch, CA	217,591	$1,914,688	$1,914,688	$1,914,688
CA	Indio--Cathedral City--Palm Springs, CA (Indio-Coachella, CA -- $621,797) (Palm Springs, CA -- $1,227,811)	254,856	$1,849,608	$1,849,608	$1,849,608
CA	Lancaster--Palmdale, CA	263,532	$2,206,544	$2,206,544	$2,206,544
CA	Santa Rosa, CA	285,408	$2,636,339	$2,636,339	$2,161,560
CA	Victorville--Hesperia--Apple Valley, CA	200,436	$1,311,837	$1,311,837	$1,311,837
CA	Temecula--Murrieta, CA	229,810	----------	$1,247,633	$1,247,633
CO	Fort Collins, CO	206,757	$1,156,197	$1,156,197	$1,156,197
CT	Bridgeport--Stamford, CT--NY (Stamford, CT-NY -- $5,332,860) (Norwalk, CT -- $4,343,565)	888,890	$9,676,425	$9,676,425	$9,676,425
CT	Hartford, CT (Bristol, CT -- $983,277) (New Britain, CT -- $1,841,176)	851,535	$2,824,453	$2,824,453	$2,824,453
FL	Port St. Lucie, FL (Fort Pierce, FL -- $1,142,501) (Stuart, FL -- $839,705)	270,774	$1,982,206	$1,982,206	$1,319,685
FL	Bonita Springs--Naples, FL	221,251	$954,953	$954,953	$755,807
FL	Tallahassee, FL	204,260	$1,617,975	$1,617,975	$1,501,821
GA	Savannah, GA	208,886	$1,824,225	$1,824,225	$1,824,225
ID	Boise City, ID	272,625	$2,021,464	$2,021,464	$1,509,452
IL	Round Lake Beach--McHenry--Grayslake, IL--WI	226,848	$1,088,609	$1,088,609	$1,088,609
IL	Chicago, IL--IN (Aurora, IL -- $2,290,318) (Crystal Lake, IL -- $746,464) (Elgin, IL -- $1,652,124) (Joliet, IL -- $1,910,334)	8,307,904	$6,599,240	$6,599,240	$6,599,240
IN	Evansville, IN--KY	211,989	$2,251,898	$2,251,898	$1,222,646
MA	Barnstable Town, MA	243,667	$538,120	$538,120	$538,120
MA	Boston, MA--NH--RI (Brockton, MA -- $1,906,558) (Lowell, MA-NH -- $2,366,926) (Taunton, MA -- $487,189)	4,032,484	$4,760,673	$4,760,673	$4,760,673
MD	Baltimore, MD (Annapolis, MD -- $858,335)	2,076,354	$858,335	$858,335	$858,335
MO	Springfield, MO	215,004	$1,748,930	$1,748,930	$1,249,398
MS	Gulfport--Biloxi, MS	205,754	$1,687,127	$1,687,127	$1,115,125
NC	Winston-Salem, NC	299,290	$1,811,413	$1,811,413	$1,572,413
NC	Asheville, NC	221,570	$968,044	$968,044	$963,137
NC	Greensboro, NC	267,884	$2,211,540	$2,211,540	$1,725,459
NE	Lincoln, NE	226,582	$2,658,761	$2,658,761	$1,567,563
NJ	Atlantic City, NJ	227,180	$1,842,968	$1,842,968	$1,842,968
NY	Poughkeepsie--Newburgh, NY (Poughkeepsie, NY -- $1,507,504) (Newburgh, NY -- $717,643)	351,982	$2,225,147	$2,225,147	$2,225,147
OH	Youngstown, OH--PA (Sharon, PA-OH -- $465,043)	417,437	$465,043	$465,043	$465,043
OH	Cincinnati, OH--KY--IN (Hamilton, OH -- $1,384,842)	1,503,262	$1,384,842	$1,384,842	$1,384,842
OR	Eugene, OR	224,049	$2,559,936	$2,559,936	$2,559,936
OR	Salem, OR	207,229	$2,070,221	$2,070,221	$2,070,221
PA	Reading, PA	240,264	$2,636,837	$2,636,837	$1,639,354
PA	Lancaster, PA	323,554	$2,258,871	$2,258,871	$2,210,527
PR	Aguadilla--Isabela--San Sebastian, PR	299,086	$1,148,984	$1,148,984	$866,198

FEDERAL TRANSIT ADMINISTRATION

TABLE 6

2000 CENSUS URBANIZED AREAS WITH POPULATION 200,000 OR GREATER ELIGIBLE TO USE FY 2005 SECTION 5307 FUNDS FOR OPERATING ASSISTANCE

State	Urbanized Area Description	Population	FY 2002 Apportionment	FY 2005 Apportionment Operating Limitation a/	FY 2005 Available Operating Limitation b/
PR	San Juan, PR	2,216,616	$5,925,223	$5,925,223	$5,925,223
	(Caguas, PR -- $2,811,557)				
	(Cayey, PR -- $831,273)				
	(Humacao, PR -- $719,451)				
	(Vega Baja-Manati, PR -- $1,562,942)				
RI	Providence, RI--MA	1,174,548	$2,695,482	$2,695,482	$2,695,482
	(Newport, RI -- $644,329)				
	(Fall River, MA-RI -- $2,051,153)				
TX	Lubbock, TX	202,225	$1,939,424	$1,939,424	$1,724,873
TX	Denton--Lewisville, TX	299,823	$1,291,722	$1,291,722	$1,291,722
	(Denton, TX -- $599,570)				
	(Lewisville, TX -- $692,152)				
VA	Richmond, VA	818,836	$1,016,957	$1,016,957	$1,016,957
	(Petersburg, VA -- $1,016,957)				

a/ The amount shown represents the maximum amount allowable (in accordance with Pub.L. 107-232 and the Surface Transportation Extension Act of 2004, Part V (Pub. L. 108-310)) based on funding provided in the Consolidated Appropriations Act, 2005. In cases where an urbanized area's FY 2005 apportionment is less than the maximum, FTA will set the operating assistance budget, in TEAM-Web, at an amount not to exceed the FY 2005 apportionment. Funds are subject to the one percent set-aside required for Transit Enhancements and will be adjusted accordingly.

b/ The amount shown represents funds currently availability for obligation for operating assistance. Funds are subject to the one percent set-aside required for Transit Enhancements and will be adjusted accordingly.

Note: For informational purposes, the affected 1990 census small urbanized areas (less than 200,000 population) that were merged into an existing urbanized area of at least 200,000 population are shown in parentheses immediately below the eligible 2000 census urbanized area. FTA is unable to identify the urbanized areas which now incorporate rural areas that received Section 5311 in FY 2002 and they are not included in this table.

FEDERAL TRANSIT ADMINISTRATION
TABLE 7

FY 2005 SECTION 5309 FIXED GUIDEWAY MODERNIZATION APPORTIONMENTS

STATE	AREA	APPORTIONMENT	AVAILABLE APPORTIONMENT
AK	Anchorage, AK - Alaska Railroad	$1,952,891	$1,270,617
AZ	Phoenix--Mesa, AZ	2,293,390	1,492,157
CA	Antioch, CA	1,822,023	1,185,470
CA	Concord, CA	10,734,568	6,984,275
CA	Lancaster--Palmdale, CA	1,837,372	1,195,457
CA	Los Angeles--Long Beach--Santa Ana, CA	33,557,652	21,833,748
CA	Mission Viejo, CA	1,223,129	795,809
CA	Oxnard, CA	1,019,188	663,118
CA	Riverside--San Bernardino, CA	3,381,108	2,199,864
CA	Sacramento, CA	2,978,598	1,937,977
CA	San Diego, CA	12,500,539	8,133,275
CA	San Francisco--Oakland, CA	68,604,375	44,636,337
CA	San Jose, CA	11,803,358	7,679,666
CA	Thousand Oaks, CA	560,939	364,966
CO	Denver--Aurora, CO	3,052,746	1,986,220
CT	Hartford, CT	1,518,494	987,984
CT	Southwestern Connecticut	38,834,499	25,267,044
DC	Washington, DC--VA--MD	63,825,180	41,526,831
FL	Jacksonville, FL	101,282	65,897
FL	Miami, FL	17,883,397	11,635,545
FL	Orlando, FL	141,432	92,020
FL	Tampa--St. Petersburg, FL	116,352	75,703
GA	Atlanta, GA	24,818,558	16,147,797
HI	Honolulu, HI	1,062,033	690,995
IL	Chicago, IL--IN	139,260,042	90,607,315
IL	Round Lake Beach--McHenry--Grayslake, IL-WI	1,949,530	1,268,431
IN	South Bend, IN--MI	696,894	453,423
LA	New Orleans, LA	3,055,591	1,988,071
MA	Boston, MA-NH-RI	72,603,905	47,238,567
MA	Worcester, MA--CT	865,074	562,846
MD	Baltimore Commuter Rail	18,617,602	12,113,244
MD	Baltimore, MD	8,709,181	5,666,489
MI	Detroit, MI	309,018	201,058
MN	Minneapolis--St. Paul, MN	5,954,153	3,873,974
MO	Kansas City, MO--KS	28,270	18,394
MO	St. Louis, MO--IL	3,994,571	2,599,004
NJ	Atlantic City, NJ	1,448,141	942,210
NJ	Northeastern New Jersey	86,085,538	56,010,177
NJ	Trenton, NJ	1,345,213	875,241
NY	Buffalo, NY	1,174,138	763,934
NY	New York	361,718,362	235,346,260
NY	Poughkeepsie-Newburgh, NY	1,820,253	1,184,319
OH	Cleveland, OH	12,770,204	8,308,729
OH	Dayton, OH	4,861,672	3,163,169
OR	Portland, OR--WA	3,965,742	2,580,247
PA	Harrisburg, PA	686,211	446,472
PA	Philadelphia, PA-NJ-DE-MD	93,999,370	61,159,185
PA	Pittsburgh, PA	20,361,556	13,247,921
PR	San Juan, PR	2,033,597	1,323,127
RI	Providence, RI--MA	2,274,818	1,480,074
TN	Chattanooga, TN--GA	80,494	52,372
TN	Memphis, TN--MS--AR	201,062	130,818
TX	Dallas--Fort Worth--Arlington, TX	5,252,902	3,417,716
TX	Houston, TX	6,958,562	4,527,477
VA	Virginia Beach, VA	1,205,503	784,341
WA	Seattle, WA	21,767,955	14,162,971
WI	Madison, WI	710,111	462,022
WI	Milwaukee, WI	249,614	162,408
	TOTAL	**$1,192,637,952**	**$775,970,778**

FEDERAL TRANSIT ADMINISTRATION

TABLE 8

FY 2005 SECTION 5309 FIXED GUIDEWAY MODERNIZATION PROGRAM APPORTIONMENT FORMULA

Tier 1 First $497,700,000 to the following areas:

Baltimore	$	8,372,000
Boston	$	38,948,000
Chicago/N.W. Indiana	$	78,169,000
Cleveland	$	9,509,500
New Orleans	$	1,730,588
New York	$	176,034,461
N. E. New Jersey	$	50,604,653
Philadelphia/So. New Jersey	$	58,924,764
Pittsburgh	$	13,662,463
San Francisco	$	33,989,571
SW Connecticut	$	27,755,000

Tier 2 Next $70,000,000 as follows: Tier 2(A): 50 percent is allocated to areas identified in Tier 1; Tier 2(B): 50 percent is allocated to other urbanized areas with fixed guideway tiers in operation at least seven years. Funds are allocated by the Urbanized Area Formula Program fixed guideway tier formula factors that were used to apportion funds for the fixed guideway modernization program in FY 1997.

Tier 3 Next $5,700,000 as follows: Pittsburgh 61.76%; Cleveland 10.73%; New Orleans 5.79%; and 21.72% is allocated to all other areas in Tier 2(B) by the same fixed guideway tier formula factors used in fiscal year 1997.

Tier 4 Next $186,600,000 as follows: All eligible areas using the same year fixed guideway tier formula factors used in fiscal year 1997.

Tier 5 Next $70,000,000 as follows: 65% to the 11 areas identified in Tier 1, and 35% to all other areas using the most current Urbanized Area Formula Program fixed guideway tier formula factors. Any segment that is less than 7 years old in the year of the apportionment will be deleted from the database.

Tier 6 Next $50,000,000 as follows: 60% to the 11 areas identified in Tier 1, and 40% to all other areas using the most current Urbanized Area Formula Program fixed guideway tier formula factors. Any segment less than 7 years old in the year of the apportionment will be deleted from the database.

Tier 7 Remaining amounts as follows: 50% to the 11 areas identified in Tier 1, and 50% to all other areas using the most current Urbanized Area Formula Program fixed guideway formula factors. Any segment that is less than 7 years old in the year of the apportionment will be deleted from the database.

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
AK	Alaska Mental Health Trust bus program, Alaska	$971,779	$633,936
AK	Alaska Native Medical Center intermodal bus/parking facility, Alaska	1,943,557	1,267,871
AK	Anchorage Museum/Transit intermodal depot, Alaska	1,457,667	950,903
AK	Anchorage paratransit and disability improvements, Alaska	1,457,667	950,903
AK	Anchorage Ship Creek intermodal facility, Alaska	2,429,445	1,584,838
AK	Copper River Transit program, Alaska	1,457,667	950,903
AK	Juneau bus replacement, Alaska	971,779	633,936
AK	Kenai Central Area Rural Transit System bus replacement, Alaska	1,360,489	887,509
AK	Knik Arm intermodal facility terminal, Alaska	1,457,667	950,903
AK	Port of Anchorage intermodal facility, Alaska	2,429,445	1,584,838
AK	Skagway bus terminal development, Alaska	1,943,557	1,267,871
AK	Whittier intermodal facility, Alaska	1,457,667	950,903
AL	Alabama State Docks intermodal facility, Alabama	9,717,782	6,339,352
AL	Birmingham Intermodel Facility- Phase II, Alabama	3,401,224	2,218,773
AL	City of Orange Beach senior activity bus, Alabama	97,177	63,393
AL	Cleveland Avenue YMCA bus, Alabama	194,357	126,788
AL	Jacksonville State University buses, Alabama	1,943,557	1,267,871
AL	Montgomery buses, Alabama	680,245	443,755
AL	Oakwood College shuttle bus project, Alabama	145,767	95,090
AL	Tombigbee Regional Commission vehicle facility, Alabama	242,945	158,484
AL	University of Alabama at Huntsville Intermodal Facility, Alabama	3,887,113	2,535,741
AL	Vans, CASA of Marshall County, Alabama	97,177	63,393
AL	Vehicles for Senior Citizen Transportation in Alabama	971,779	633,936
AR	Arkansas Statewide buses and bus facilities	7,774,226	5,071,482
AR	CATA bus replacement, Arkansas	388,711	253,574
AZ	Alternative fuel replacement buses, Tucson, Arizona	971,779	633,936
AZ	Coconino County - Flagstaff bus system, Arizona	1,360,489	887,509
AZ	Coconino County - Sedona bus system, Arizona	2,526,623	1,648,231
AZ	Dial-a-Ride facility, Phoenix, Arizona	340,123	221,878
AZ	Downtown Tempe Transit Center, Arizona	777,422	507,148
AZ	East Valley bus maintenance facility, Arizona	6,753,859	4,405,850
AZ	Phoenix, Glendale, and Avondale bus replacement, Arizona	1,457,667	950,903
AZ	Phoenix/Glendale West Valley operating facility, Arizona	3,401,224	2,218,773
AZ	Sun Tran CNG replacement buses, Tucson, Arizona	2,672,390	1,743,322
CA	Anaheim Resort Transit, California	291,534	190,181
CA	Bellflower Dial-a-Ride, California	116,614	76,073
CA	Calabasas Transit, California	485,888	316,967
CA	Catalina Transit Terminal, Redondo Beach, California	971,779	633,936
CA	Cerritos Clean Air Buses, California	826,011	538,845
CA	Claremont Intermodal Transit Village Project, California	194,357	126,788
CA	Collegian Avenue Busway, California	388,711	253,574
CA	Downtown transit center ITS, California	97,177	63,393
CA	Ed Roberts Campus/City of Berkeley, California	485,888	316,967
CA	El Garces Intermodal Station, Needles, California	971,779	633,936
CA	Elk Grove Park and Ride Facilities, California	971,779	633,936
CA	Fairfield/Vacaville Intermodal Transit Station, California	485,888	316,967
CA	Fresno Area Express bus program, California	971,779	633,936
CA	Golden Empire Transit traffic signal priority, California	291,534	190,181
CA	Hemet Transit Center bus facility, California	340,123	221,878
CA	I-15 Managed Lanes/Bus Rapid Transit, San Diego, California	1,652,023	1,077,690
CA	LAVTA buses and bus facilities, California	485,888	316,967
CA	LAVTA satellite maintenance, operations and administrative facility, California	291,534	190,181
CA	Long Beach Transit bus purchase, California	485,888	316,967
CA	Los Angeles County MTA bus program, California	1,943,557	1,267,871
CA	Los Angeles Trade Tech intermodal links with bus and Metro, California	485,888	316,967
CA	Los Angeles Valley College bus station extension, California	485,888	316,967
CA	Mammoth Lakes Regional Transit operations facility, California	971,779	633,936

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
CA	Metro Red Line Wilshire Vermont Station upgrade, California	728,834	475,452
CA	Modesto bus facility, California	971,779	633,936
CA	Montrey Salinas Transit buses, California	971,779	633,936
CA	Municipal Transit Operators Coalition, California	971,779	633,936
CA	Napa Transit Center construction, California	485,888	316,967
CA	Pacific Station Multimodal-Multiuse facility, California	1,457,667	950,903
CA	Palm Springs bus station relocation, California	29,154	19,018
CA	Palo Alto Intermodal Transit Center, California	728,834	475,452
CA	Riverbank vehicle garage renovation, California	121,472	79,242
CA	Riverside Transit Authority, California	121,472	79,242
CA	Roseville Multitransit Center, California	631,655	412,057
CA	Sacramento bus replacement/facility expansion, California	485,888	316,967
CA	SamTrans Zero Emission bus project, California	728,834	475,452
CA	San Francisco Muni buses and bus facilities, California	3,887,113	2,535,741
CA	San Luis Rey Transit Center, California	388,711	253,574
CA	Santa Clara VTA bus signal priority project, California	728,834	475,452
CA	SCAT CNG Fueling Station, California	485,888	316,967
CA	Sierra Madre Villa Gold Line Light Rail Station, California	971,779	633,936
CA	Solana Beach Intermodal Facility, Solana Beach, California	631,655	412,057
CA	Sonoma County CNG buses, California	291,534	190,181
CA	South Gate Clean Air buses, California	242,945	158,484
CA	Spring Valley Multi-Modal Center, California	777,422	507,148
CA	Sunline Transit Agency CNG buses, California	485,888	316,967
CA	Temecula Park and Ride Facility, California	48,589	31,697
CA	Temecula Transit Center, California	388,711	253,574
CA	Transit First Implementation, California	728,834	475,452
CA	Transit Oriented Neighborhood Program, California	194,357	126,788
CA	Union City Intermodal Station, Phase 1, California	485,888	316,967
CA	Vallejo Baylink Ferry Intermodal Center, California	1,214,724	792,420
CA	Visalia bus operations facility, California	242,945	158,484
CA	Visalia bus replacement, California	242,945	158,484
CA	Yosemite Area Regional Transportation System, California	388,711	253,574
CO	Colorado Statewide buses and bus facilities	6,923,920	4,516,788
CT	Bridgeport Intermodal Transportation Center, Connecticut	6,802,447	4,437,546
CT	Hartford bus facility rehabilitation, Connecticut	485,888	316,967
CT	Hartford/New Britain Busway, Connecticut	3,887,113	2,535,741
CT	Pulse Point Joint Development safety improvements, Connecticut	485,888	316,967
CT	Stamford Urban Transitway Phase II, Connecticut	5,830,669	3,803,611
CT	Waterbury bus maintenance facility, Connecticut	485,888	316,967
CT	West Haven/Orange Intermodal Facility, Connecticut	971,779	633,936
DC	Georgetown University Fuel Cell Transit Bus Program (TEA-21)	4,763,088	3,107,179
DC	Union Station Intermodal Transportation Center, Washington, DC	728,834	475,452
DE	Delaware Statewide buses and bus facilities	1,943,557	1,267,871
FL	Broward/Palm Beach County buses, Florida	728,834	475,452
FL	DeBary Intermodal Transportation Facility, Florida	242,945	158,484
FL	Flagler County buses and bus facilities, Florida	145,767	95,090
FL	Gainesville Regional Airport multi-modal facility, Florida	291,534	190,181
FL	Gainesville RTS buses and bus facilities, Florida	971,779	633,936
FL	Hillsborough Area Regional Transit (HART), Florida	485,888	316,967
FL	Homestead East-West bus connector, Florida	242,945	158,484
FL	Jacksonville JTA transit rolling stock, Florida	485,888	316,967
FL	Key West bus and bus facilities, Florida	1,943,557	1,267,871
FL	Lakeland Area Citrus Connection transit system, Florida	728,834	475,452
FL	Miami Beach Intermodal Greenway Transit Facility, Florida	680,245	443,755
FL	Miami Beach Intermodal Transit Facility, Florida	680,245	443,755
FL	Miami Intermodal Center, Florida	5,830,669	3,803,611

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
FL	Miami-Dade County bus procurement, Florida	485,888	316,967
FL	Miramar Parkway transit shelter enhancements, Florida	97,177	63,393
FL	National Center for Transportation Needs, Florida	583,067	380,361
FL	North Florida and West Coast Transit Coalition Bus Acquisition	3,887,113	2,535,741
FL	NW 7th Avenue Transit Hub, Florida	971,779	633,936
FL	Pinellas Suncoast Transit Authority, Florida	9,037,537	5,895,597
FL	Putnam County RideSolutions buses and bus facilities, Florida	1,457,667	950,903
FL	Sistrunk transit & pedestrian access improvement, Florida	971,779	633,936
FL	Southwest Broward bus facility, Florida	1,166,133	760,722
FL	St Johns County Council on Aging buses and bus facilities,Florida	728,834	475,452
FL	St. Lucie County bus purchase, Florida	388,711	253,574
FL	St. Petersburg intermodal facility, Florida	485,888	316,967
FL	TalTran Bus replacement project, Florida	777,422	507,148
FL	Trolley System, Boynton Beach, Florida	242,945	158,484
FL	Winter Haven Transit Terminal, Florida	485,888	316,967
GA	Atlanta bus acquisition, Georgia	3,401,224	2,218,773
GA	Atlanta clean fuel shuttle buses, Georgia	971,779	633,936
GA	Atlantic Station, Georgia	1,068,956	697,329
GA	Hamilton clean fuels bus facility, Georgia	1,457,667	950,903
GA	Macon Terminal Station, Georgia	728,834	475,452
GA	MARTA Bus Acquisition Program, Georgia	1,457,667	950,903
GA	MARTA clean fuel technology buses, Georgia	3,887,113	2,535,741
GA	Moultrie Intermodal Facility, Georgia	485,888	316,967
HI	Honolulu bus and paratransit replacement program, Hawaii	4,858,891	3,169,676
HI	Honolulu Middle Street Intermodal Center, Hawaii	3,887,113	2,535,741
HI	Pahoa/Hilo Bus routes, Hawaii	485,888	316,967
HI	Rural Bus Program, Hawaii	4,858,891	3,169,676
HI	Wahiawa Transit Center and Parking Facility, Hawaii	2,429,445	1,584,838
IA	Ames transit/bus facility, Iowa	971,779	633,936
IA	Des Moines MTA bus replacement, Iowa	1,943,557	1,267,871
IA	Iowa Statewide buses and bus facilities	4,858,891	3,169,676
IA	UNI multimodal project, Iowa	2,915,334	1,901,805
ID	Idaho Transit Coalition Statewide buses and bus facilities	3,401,224	2,218,773
IL	Illinois Statewide buses and bus facilities	---------- a/	
IL	Downstate Illinois replacement buses	2,915,335	1,901,806
IL	Bus facilities for Bloomington, Macomb, Peoria, and Rock Island	1,457,668	950,903
IL	Champaign Day Care Center/Park-n-Ride	728,834	475,452
IL	Richton Park Metra Intermodal Transit Park and Ride Facility	485,889	316,968
IL	City of Chicago's Free Trolley System	728,833	475,451
IL	Downtown Normal Multimodal facility	485,888	316,967
IL	Northern Winnebago County, Illinois	242,945	158,484
IN	Bloomington Public Transit Corporation, Indiana	728,834	475,452
IN	Cherry Street Multi-Modal Facility, Indiana	971,779	633,936
IN	Citilink, Indiana	583,067	380,361
IN	IndyGo buses and bus facilities, Indiana	2,915,334	1,901,805
IN	Ivy Tech State College multmodal facility, Indiana	485,888	316,967
IN	Lafayette City/Bus, Indiana	485,888	316,967
IN	Muncie Indiana transit system, Indiana	971,779	633,936
IN	TRANSPO Bus Operations Center South Bend, Indiana	1,943,557	1,267,871
KS	I-35 Fixed Guideway Project, Johnson County, Kansas	291,534	190,181
KS	Johnson County Transit System Buses, Kansas	485,888	316,967
KS	Kansas City/Unified Govt. of Wyandotte Co. buses, Kansas	971,779	633,936
KS	Kansas statewide bus and bus facilities	2,915,334	1,901,805
KS	Lawrence Transit System maintenance facility, Kansas	388,711	253,574

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
KS	Regional maintenance/paratransit scheduling facility, Kansas	777,422	507,148
KS	Wichita Transit Authority buses and bus facilities, Kansas	242,945	158,484
KY	Fixed Route Transportation System, Madison County, Kentucky	291,534	190,181
KY	Fulton County Transit Authority, Kentucky	194,357	126,788
KY	Henderson Area Rapid Transit Authority, Kentucky	77,742	50,715
KY	Manchester, Clay County Intermodal Facility, Kentucky	1,943,557	1,267,871
KY	Murray/Calloway County Transit Authority, Kentucky	1,749,201	1,141,083
KY	Oakwood Intermodal Facility, Somerset, Kentucky	1,943,557	1,267,871
KY	Paducah Area Transit Authority, Kentucky	1,263,313	824,117
KY	Southern and Eastern Kentucky buses and bus facilities	2,915,334	1,901,805
KY	Transit Authority of Northern Kentucky (TANK) bus and bus facilities, Kentucky	485,888	316,967
KY	Transit Authority of River City, Louisville, Kentucky	584,524	381,312
KY	University of Louisville bus shuttle program, Kentucky	2,429,445	1,584,838
LA	Greater Ouachita Port and Intermodal Facility, Louisiana	2,915,334	1,901,805
LA	Louisiana Statewide buses and bus facilities	4,858,891	3,169,676
LA	ULM Intermodal Facility, Louisiana	728,834	475,452
MA	Amesbury bus facility, Massachusetts	971,779	633,936
MA	Attleboro Intermodal Transportation Center, Massachusetts	1,943,557	1,267,871
MA	Brockton Area Transit Bus Replacement, Brockton, Massachusetts	1,943,557	1,267,871
MA	BRTA Bus Replacement Program, Massachusetts	1,049,521	684,650
MA	BRTA Bus Shelters, Massachusetts	145,767	95,090
MA	BRTA Storage Facility Upgrade, Massachusetts	237,114	154,680
MA	Cape Cod Regional Transit Authority Center/Bus Facility, Massachusetts	2,915,334	1,901,805
MA	Essex County buses, Massachusetts	145,767	95,090
MA	Lechmere Station intermodal, Massachusetts	971,779	633,936
MA	Lowell Regional Transit Authority, Massachusetts	874,601	570,542
MA	MART maintenance facility, Massachusetts	2,332,268	1,521,445
MA	PVTA bus replacement program, Massachusetts	3,887,113	2,535,741
MA	Salem Intermodal Center improvement project, Massachusetts	971,779	633,936
MA	Springfield Union Station, Springfield, Massachusetts	6,505,083	4,243,562
MA	UMass Transit RTIC and training facility, Massachusetts	3,887,113	2,535,741
MA	Wonderland Station improvements, Revere, Massachusetts	1,943,557	1,267,871
MD	Glenmont Metrorail parking garage expansion, Maryland	485,888	316,967
MD	Howard County Transit repair facility, Maryland	485,888	316,967
MD	Maryland Statewide buses and bus facilities	3,887,113	2,535,741
MD	Rockville Town Center transit project, Maryland	971,779	633,936
MD	Southern Maryland commuter bus initiative, Maryland	4,858,891	3,169,676
MD	WMATA clean fleet buses, Maryland	1,457,667	950,903
ME	Acadia National Park intermodal facility, Maine	242,945	158,484
ME	Maine statewide bus program	2,429,445	1,584,838
ME	Millinocket Airport transfer bus project, Maine	34,012	22,188
MI	Allegan County Transportation, Michigan	1,457,667	950,903
MI	Alma Transit facility and replacement buses, Michigan	485,888	316,967
MI	Ann Arbor Transit Authority (AATA) transit center, Michigan	971,779	633,936
MI	Barry County buses and bus facilities, Michigan	38,872	25,358
MI	Bay Area Transportation Authority, Traverse City, Michigan	3,887,113	2,535,741
MI	Belding buses and bus facilities, Michigan	48,589	31,697
MI	Berrien County transit, Michigan	97,177	63,393
MI	Blue Water Area Transportation Commission Maintenance and Storage Facility, Michigan	2,915,334	1,901,805
MI	Cadillac/Wexford Transit, Michigan	97,177	63,393
MI	Capital Area Transportation Authority, Lansing, Michigan	4,130,057	2,694,224
MI	Cass County transit, Michigan	38,872	25,358
MI	Clare County Transit Corporation, Michigan	97,177	63,393
MI	Clinton Area transit system, Michigan	1,214,724	792,420
MI	Detroit DOT bus replacement and facilities, Michigan	2,915,334	1,901,805

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
MI	Flint MTA Intelligent Transportation System, Michigan	971,779	633,936
MI	Greenville Transit System, Michigan	48,589	31,697
MI	Harbor Transit, Michigan	194,357	126,788
MI	Intelligent Transportation System for The Rapid, Michigan	583,067	380,361
MI	Ionia County Dial-A-Ride, Michigan	121,472	79,242
MI	Isabella County Transportation Commission, Michigan	291,534	190,181
MI	ITP/The Rapid replacement and expansion buses, Michigan	1,214,724	792,420
MI	Kalamazoo County Care A Van, Michigan	77,742	50,715
MI	Kalamazoo Metro Transit, Michigan	2,915,334	1,901,805
MI	Kalkaska Public Transit Authority, Michigan	48,589	31,697
MI	Lake Erie Transit maintenance garage expansion, Michigan	485,888	316,967
MI	Livingston Essential Transportation, Michigan	97,177	63,393
MI	Macatawa Area Express Facility, Michigan	971,779	633,936
MI	Mass Transportation Authority, Flint, Michigan	2,915,334	1,901,805
MI	Michigan Statewide buses and bus facilities	2,915,334	1,901,805
MI	Midland Dial-A-Ride, Michigan	121,472	79,242
MI	Muskegon Area Transit System, Michigan	485,888	316,967
MI	North Oakland Transit Authority, Michigan	77,742	50,715
MI	Northern Michigan bus and bus facilities	485,888	316,967
MI	Roscommon County Transit System, Michigan	48,589	31,697
MI	Shiawassee Area Transportation Authority, Michigan	43,730	28,527
MI	SMART buses and bus facilities, Michigan	2,915,334	1,901,805
MI	Twin Cities Area Transportation Authority, Benton Harbor, Michigan	29,154	19,018
MI	Van Buren Public Transit, Michigan	29,154	19,018
MI	Yates Township Dial-A-Ride Transportation System, Michigan	194,357	126,788
MN	Como Rider program, Minnesota	1,457,667	950,903
MN	Duluth Transfer Facility, Minnesota	971,779	633,936
MN	Greater Minnesota Transit	3,133,984	2,044,440
MN	Isanti Transit garage and operational facility, Minnesota	485,888	316,967
MN	Metro Transit buses and bus facilities, Minnesota	3,887,113	2,535,741
MN	Northwest Busway and facilities, Hennepin County, Minnesota	2,915,334	1,901,805
MN	Union Depot Transportation Hub, Minnesota	971,779	633,936
MN	White Earth Tribal Nation Transit Center, Minnesota	971,779	633,936
MO	Columbia Transit, Missouri	826,011	538,845
MO	Franklin County Transportation Council, Missouri	145,767	95,090
MO	KCATA bus rapid transit, Missouri	4,373,003	2,852,709
MO	Metro St. Louis, Missouri	1,214,724	792,420
MO	Missouri statewide bus and bus facilities	7,774,226	5,071,482
MO	Southern Missouri buses and bus facilities	2,235,088	1,458,050
MS	Harrison County HOV/Bus rapid transit Canal Road intermodal connector, Mississippi	1,943,557	1,267,871
MS	Jackson State University busing project, Mississippi	291,534	190,181
MS	JATRAN fixed route vehicles, Mississippi	2,915,334	1,901,805
MS	Mississippi Valley State University mass transit program expansion, Mississippi	194,357	126,788
MS	Vicksburg public transportation, Mississippi	485,888	316,967
MT	Billings downtown bus facility, Montana	1,943,557	1,267,871
MT	Billings public bus and medical transfer facility, Montana	2,429,445	1,584,838
NC	Asheville City bus fleet replacement, North Carolina	291,534	190,181
NC	Chapel Hill replacement buses, North Carolina	1,943,557	1,267,871
NC	Charlotte Multi-modal Transportation Center, North Carolina	2,429,445	1,584,838
NC	High Point Project Terminals, North Carolina	1,943,557	1,267,871
NC	North Carolina Statewide buses and bus facilities	4,858,891	3,169,676
NC	Triangle Transit Authority replacement buses, North Carolina	971,779	633,936
ND	North Dakota Statewide buses and bus facilities	2,915,334	1,901,805
NE	Kearney RYDE Transit, Nebraska	1,020,367	665,632

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
NE	Nebraska Statewide bus and bus facilities	1,943,557	1,267,871
NE	Omaha Metro Area Transit Center Developments, Nebraska	3,887,113	2,535,741
NH	Commuter maintenance facility, New Hampshire	680,245	443,755
	Park & Ride/Bus Facility Exit 2, Salem, New Hampshire	583,067	380,361
	Park and Ride Bus Facility Exit 5, New Hampshire	194,357	126,788
NJ	Bergen Intermodal Stations and Park N'Rides, New Jersey	1,943,557	1,267,871
NJ	Englewood bus purchase, New Jersey	364,417	237,726
NJ	Howard Boulevard Intermodal Station, New Jersey	3,401,224	2,218,773
NJ	Multi County Intermodal Park & Ride, New Jersey	2,915,334	1,901,805
NJ	Newark Penn Station Intermodal Improvements, New Jersey	4,858,891	3,169,676
NJ	Park and Ride for the Edison Train Station, New Jersey	971,779	633,936
NJ	South Amboy Intermodal Station, New Jersey	1,214,724	792,420
NJ	Trenton Intermodal Center, New Jersey	1,943,557	1,267,871
NM	City of Santa Fe, Bus and Bus Facility Grant, New Mexico	1,457,667	950,903
NM	New Mexico Statewide bus and bus facilities	971,779	633,936
NM	Rio Rancho Senior Transit Program, New Mexico	242,945	158,484
NM	West Side transit facility, New Mexico	971,779	633,936
NV	Bus Rapid Transit, Virginia Street Phase 1, Nevada	971,779	633,936
NV	Intermodal terminals in Downtown Reno and Sparks, Nevada	1,457,667	950,903
NV	Las Vegas buses, Nevada	971,779	633,936
NY	BNMC replacement buses, New York	736,608	480,523
NY	Boro Park JCC bus purchase, New York	194,357	126,788
NY	Brookhaven Town Senior Citizen Jitney Bus, New York	121,472	79,242
NY	Broome County hybrid buses, New York	1,554,845	1,014,296
NY	Bus Facility, 65th Street Intermodal Station, New York	7,288,337	4,754,514
NY	Buffalo Niagra Medical Campus, New York	1,943,557	1,267,871
NY	Central New York Regional Transportation Authority, New York	3,158,279	2,060,289
NY	Fort Edward Intermodal Station, New York	291,534	190,181
NY	Irvington Intermodal Upgrades, New York	242,945	158,484
NY	Jacobi Transportation Facility, New York	971,779	633,936
NY	Jamaica Intermodal Facilities, New York	1,943,557	1,267,871
NY	JCC of Coney Island Bus Purchase, New York	97,177	63,393
NY	Nassau County Long Island Bus, New York	971,779	633,936
NY	Pelham Intermodal Improvements, New York	485,888	316,967
NY	Renaissance Square, New York	6,316,558	4,120,578
NY	Rochester Central Bus Terminal, New York	5,441,959	3,550,038
NY	Senior Bus Service Bus Replacement, North Hempstead, New York	291,534	190,181
NY	St. George's Ferry Intermodal Terminal, New York	2,235,088	1,458,050
NY	Suffolk County Transit buses and bus facilities, New York	971,779	633,936
NY	Sullivan County buses and bus facilities, New York	485,888	316,967
NY	Tompkins County Hybrid Buses, New York	242,945	158,484
NY	Tuckahoe Intermodal Improvements, New York	38,872	25,358
NY	Ulster County Hybrid Buses, New York	242,945	158,484
NY	Westchester County Bee Line Bus Replacement, New York	3,887,113	2,535,741
NY	White Plains Downtown Circulator, New York	242,945	158,484
NY	Whitehall Intermodal Ferry Terminal, New York	971,779	633,936
OH	Central Ohio Transit Authority Paratransit Facility	534,478	348,664
OH	Central Ohio Transity Authority ITS Phase III	194,357	126,788
OH	Cincinnati Local Community bus enhancements, Ohio	777,422	507,148
OH	Cleveland Clinic Pedestrian Access Tunnel, Ohio	971,779	633,936
OH	Cuyahoga County Plan for Senior Transportation, Ohio	971,779	633,936
OH	East Side Transit Center, Ohio	485,888	316,967
OH	New York Central Train Station, Elyria, Ohio	971,779	633,936
OH	Ohio statewide buses and bus facilities	5,830,669	3,803,611
OH	Paratransit District/Senior Call Center Brooklyn, Ohio	1,943,557	1,267,871

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
OH	TARTA/TARPS Intermodal Facility, Ohio	1,457,667	950,903
OK	Lawton buses and bus facilities, Oklahoma	201,158	131,225
OK	Norman buses and bus facilities, Oklahoma	2,915,334	1,901,805
OK	Northern Oklahoma regional multimodal facilities and transit system, Oklahoma	4,858,891	3,169,676
OK	Oklahoma DOT Transit Program, Oklahoma	5,344,779	3,486,643
OK	Oklahoma Transportation Center, Oklahoma	1,943,557	1,267,871
OK	Tulsa Transit Multi-use facility in Tulsa, Oklahoma	1,943,557	1,267,871
OR	Lane County bus rapid transit vehicles, Oregon	3,887,113	2,535,741
OR	Lewis and Clark explorer shuttle parking, Oregon	485,888	316,967
OR	Maintenance facility modernization project, Oregon	2,429,445	1,584,838
OR	Salem-Keizer Transit, buses and bus facilities, Oregon	340,123	221,878
OR	South Metro Area Rapid Transit park-and-ride facility and transit center, Oregon	485,888	316,967
OR	TriMet buses, Portland, Oregon	971,779	633,936
OR	Yamhill County Transit bus and bus facilities, Oregon	145,767	95,090
PA	Altoona Bus Testing (TEA-21)	2,946,240	1,921,966
PA	Amtran Bus Replacement, Altoona, Pennsylvania	291,534	190,181
PA	Ardmore transit center, Pennsylvania	5,830,669	3,803,611
PA	Area Transit Authority, Pennsylvania	1,384,784	903,358
PA	Area Transportation Authority of North Central Pennsylvania passenger terminal, Pennsylvania	1,214,724	792,420
PA	Berks Area Reading Transportation Authority (BARTA) facility, Pennsylvania	1,943,557	1,267,871
PA	Bucks County Intermodal Facility Improvements, Pennsylvania	2,057,254	1,342,040
PA	Cambria County Transit accessible buses, Pennsylvania	1,049,521	684,650
PA	Cambria County Transit Facility rehabilitation, Pennsylvania	1,263,313	824,117
PA	Capital Area Transit (CAT), Pennsylvania	971,779	633,936
PA	Centre Area Transit Authority, Pennsylvania	826,011	538,845
PA	City Bus, Williamsport Bureau of Transportation, Pennsylvania	1,457,667	950,903
PA	County of Lebanon Transit Authority (COLT), Pennsylvania	349,841	228,217
PA	Cruise Terminal Intermodal Facility, Pennsylvania	485,888	316,967
PA	Endless Mountain Transportation Authority, Pennsylvania	97,177	63,393
PA	Fayette Area Coordinated Transportation (FACT) buses and bus facilities, Pennsylvania	874,601	570,542
PA	Harrisburg Transportation Center, Pennsylvania	971,779	633,936
PA	Hazleton intermodal facility, Pennsylvania	2,915,334	1,901,805
PA	Incline Plane Cable Replacement, Johnstown, Pennsylvania	116,614	76,073
PA	Mid Mon Valley Transit Authority, Charleroi, Pennsylvania	1,360,489	887,509
PA	Mid-County Transit Authority Kittanning, Pennsylvania	213,792	139,466
PA	New Castle Area Transit, Pennsylvania	971,779	633,936
PA	Northumberland County Transportation, Pennsylvania	97,177	63,393
PA	SEPTA, Trackless Trolley Acquisition, Pennsylvania	971,779	633,936
PA	Union Station Intermodal Trade and Transit Center, Schuylkill County, Pennsylvania	1,943,557	1,267,871
PA	Union/Snyder Transportation Alliance, Union County, Pennsylvania	1,457,667	950,903
PA	Westmoreland County Transit Authority, Pennsylvania	485,888	316,967
PA	York County Transportation Authority buses, Pennsylvania	1,457,667	950,903
PR	Carolina Mini-Buses, Puerto Rico	1,846,378	1,204,476
RI	Elmwood Facility Expansion, Rhode Island	1,943,557	1,267,871
RI	Rhode Island Public Transit Authority Statewide buses and bus facilities	3,887,113	2,535,741
SC	Medical University of South Carolina	3,887,113	2,535,741
SC	South Carolina Statewide buses and bus facilities	3,887,113	2,535,741
SD	Sitting Bull College facilities, South Dakota	1,214,724	792,420
SD	South Dakota Statewide buses and bus facilities	971,779	633,936
TN	Downtown Centralized Intermodal Transfer Center, Nashville, Tennessee	971,779	633,936
TN	Knoxville Electric Transit Intermodal Center, Tennessee	1,943,557	1,267,871
TN	Memphis Airport Intermodal Facility, Tennessee	2,915,334	1,901,805
TN	Southeast Tennessee Human Resource Agency	728,834	475,452

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
TN	Tennessee Statewide buses and bus facilities	9,231,893	6,022,384
TX	Abilene bus and bus facilities, Texas	728,834	475,452
TX	Addicks Park & Ride Ramp, Texas	4,373,003	2,852,709
TX	Brazos Transit District passenger shelter program, Texas	485,888	316,967
TX	Bryan Intermodel Transit Terminal with Parking, Texas	388,711	253,574
TX	Bryan/College Station Bus Replacement Program, Texas	1,259,424	821,580
TX	Capital Metro North Operating Facility, Texas	1,166,133	760,722
TX	Capitol Metro buses and bus facilities, Texas	1,943,557	1,267,871
TX	Citibus vans and alternative fuel buses, Texas	1,749,201	1,141,083
TX	CNG bus replacement, Texas	388,711	253,574
TX	Corpus Christi buses and bus facilities, Texas	777,422	507,148
TX	Dallas bus shelters, Texas	728,834	475,452
TX	Denton Downtown multimodal transit facility, Texas	3,109,690	2,028,592
TX	El Paso buses, Texas	2,915,334	1,901,805
TX	Ft. Worth Transportation Authority Fleet Modernization, Texas	2,332,268	1,521,445
TX	Ft. Worth Transportation Authority Passenger Shelter Replacement, Texas	680,245	443,755
TX	Jefferson County Transit Facility Improvements, Texas	680,245	443,755
TX	Houston METRO, Park and Rides, Texas	9,717,782	6,339,352
TX	Hunt County Committee on Aging Transit Terminal, Texas	1,166,133	760,722
TX	Hunt County Committee on Aging Transit Vehicles, Texas	971,779	633,936
TX	Laredo Bus Hub and Maintenance Facility, Texas	1,943,557	1,267,871
TX	San Antonio VIA Metropolitan Transit Bus Fleet Modernization, Texas	2,915,334	1,901,805
TX	The Woodlands Capital Cost of Contracting Program, Texas	437,301	285,271
TX	Waco Transit Alternative Fueled Bus Purchase, Texas	3,887,113	2,535,741
UT	Transit ITS, Utah	242,945	158,484
UT	UTA intermodal facilities, Utah	1,943,557	1,267,871
UT	UTA Statewide buses and bus facilities	5,636,313	3,676,824
UT	West Valley City Intermodal Terminal, Utah	388,711	253,574
VA	Burke Centre VRE Station Parking Expansion	971,779	633,936
VA	Danville buses and bus facilities, Virginia	437,301	285,271
VA	Farmville buses and bus facilities, Virginia	194,357	126,788
VA	GRTC Bus Facility, Richmond, Virginia	5,830,669	3,803,611
VA	Hampton Roads Transit New Maintenance Facilities , Virginia	2,186,501	1,426,354
VA	I-66/Vienna Metrorail Accessibility Improvements, Virginia	583,067	380,361
VA	James City County natural gas buses, Virginia	2,915,334	1,901,805
VA	Petersburg Multi-Modal Transportation Center, Virginia	485,888	316,967
VA	Potomac Yard Transit Way, Virginia	777,422	507,148
VA	PRTC Bus Acquisitions, Virginia	777,422	507,148
VA	Richmond Highway Transit Improvements, Virginia	971,779	633,936
VA	Southside bus facility PE, Virginia	3,887,113	2,535,741
VA	WMATA bus purchase, Virginia	6,802,447	4,437,546
VT	Bellows Falls Transit Improvements, Vermont	1,943,557	1,267,871
VT	Vermont Statewide buses and bus facilities	1,943,557	1,267,871
WA	Ben Franklin Transit Facility Improvements, Washington	1,020,367	665,632
WA	Community Transit Bus and Van Replacement, Washington	971,779	633,936
WA	Edmonds Crossing Mulitmodal Transportation Project, Washington	971,779	633,936
WA	Grant Transit Authority vehicle replacement, Washington	777,422	507,148
WA	Intercity Transit Buses, Thurston County, Washington	971,779	633,936
WA	Jefferson Transit operations/maintenance facility, Washington	583,067	380,361
WA	King County Metro Clean Air Buses, Washington	4,858,891	3,169,676
WA	King County Metro Park and Ride on First Hill, Seattle, Washington	1,943,557	1,267,871
WA	King County Metro, King County Airfield Transfer Area, Washington	1,943,557	1,267,871
WA	Kitsap Transit Bus Replacement, Washington	971,779	633,936
WA	Link Transit Low Floor Coach Purchases, Washington	777,422	507,148
WA	Pierce Transit Base expansion, Washington	971,779	633,936
WA	Port Angeles International Gateway Center, Washington	971,779	633,936

FEDERAL TRANSIT ADMINISTRATION

TABLE 9

FY 2005 SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
WA	Washington Small Bus System Program of Projects, Washington	----------	
WA	Clallam Transit	388,711	253,574
WA	Columbia County Public Transportation (CCPT)	48,589	31,697
WA	Garfield County	48,589	31,697
WA	Grant Transit	388,711	253,574
WA	Grays Harbor Transportation Authority	583,067	380,361
WA	Island Transit	388,711	253,574
WA	Jefferson Transit	728,834	475,452
WA	Mason County Transportation Authority	388,711	253,574
WA	Pacific Transit	48,589	31,697
WA	Twin Transit	388,711	253,574
WA	Valley Transit	485,890	316,968
WA	Whatcom Transportation Authority, Lincoln Creek Transportation Center, Washington	1,943,557	1,267,871
WI	Wisconsin Statewide buses and bus facilities	14,576,628	9,508,925
WV	West Virginia Statewide	4,858,891	3,169,676
	TOTAL ALLOCATION	**$712,008,000**	**$464,475,232**

a/ The conferees provide $7,000,000 to the Illinois Department of Transportation (IDOT) for Section 5309 Bus and Bus Facilities grants. The conferees expect IDOT to provide at least $3,000,000 for Downstate Illinois replacement buses in Bloomington, Champaign-Urbana, Danville, Decatur, Peoria, Quincy, RIDES MTD, River Valley, Rockford, Rock Island, Springfield, and for the Bi-State Development/Metro Agency. Further, the conferees expect IDOT to provide appropriate funds for bus facilities in Bloomington, Galesburg, Macomb, Peoria, and Rock Island, including $750,000 for the Champaign Day Care Center/Park-n-Ride; $500,000 for the Richton Park Metra Intermodal Transit Park and Ride Facility; $750,000 for the City of Chicago's Free Trolley system; and $500,000 for the Downtown Normal Multimodal facility.

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
FY 2003 Unobligated Allocations			
AK	Anchorage Int'l Airport Intermodal Facility	$1,967,357	
AK	Anchorage ship creek intermodal facility (AK)	3,934,715	
AK	Fairbanks Rail/Bus Transfer	1,967,357	
AK	Port MacKenzie Intermodal Facility	1,967,357	
AK	Seward Buses & Bus Facility	196,736	
AK	Skagway Municipal and Regional Transit	344,287	
AK	Wasilla Intermodal Facility	885,311	
AL	Alabama A&M University bus & bus facilities	491,839	
AL	Alabama State Docks Intermodal Facility	7,869,429	
AL	Bevill State Community College Transit Project	295,104	
AL	Cullman County Commission (CARTS)	147,552	
AL	Hoover & Vestavia Hills Diesel Hybrid Electric Buses	983,679	a/ b/
AL	Huntsville Intermodal Center	2,951,036	
AL	Jefferson County, Diesel Hybrid Electric Buses	737,759	
AL	Troy State University Bus Shuttle Program	1,475,518	
CA	Chino, Transcenter, Omnitrans	324,614	
CA	City of Salinas - Intermodal Transportation Center	1,229,598	
CA	City of Sierra Madre Buses and Natural Gas Vehicle Fueling Station	295,104	
CA	El Garces Intermodal Station	1,524,702	
CA	Fairfield/Suisun Transit Alternative Fueled Buses	491,839	
CA	Folsom Railroad Block Project	983,679	
CA	Foothill Transit - Bus Purchase	1,475,518	
CA	Los Angeles to Pasadena Construction Authority Bus Program	2,951,036	
CA	Modesto, Bus Maintenance Facility	1,672,254	
CA	Monterey-Salinas Transit Bus Facility & Buses	875,785	
CA	Omnitrans, City of Yucaipa - the Yucaipa Transit Advancement Project	934,495	
CA	Redondo Beach, Bus Transfer Station	491,839	
CA	Riverside Transit Agency (RTA) Transit Centers - Corona, Riverside	983,679	
CA	Roseville Multitransit Center	1,475,518	
CA	San Diego Bus Rapid Transit	491,839	
CA	San Fernando Valley East and Ventura Boulevard, Park and ride facilities	491,839	
CA	Solano Transportation Authority - Fairfield/Vacaville Intermodal Station	491,839	
CA	South Pasadena Circulator Bus	147,552	
CA	Sun Line Transit Hydrogen Refueling Station	1,229,598	
CT	Bridgeport High Speed Ferry Terminal Project	983,679	
CT	Hartford Downtown Circulator	1,475,518	
CT	Hartford-New Britain Busway Project	7,377,590	
CT	Hollyhock Station/Intermodal Transportation Center, Norwich	2,606,748	
CT	New Haven, Bus Maintenance Facility	983,679	
CT	New Haven, Fuel Cell and Electric Bus Project	--------	c/
CT	West Haven Intermodal	983,679	
DC	WMATA - Buses in D.C., Maryland, and Virginia	1,967,357	
DE	Delaware Transit Corporation	2,951,036	
FL	Broward County Buses and Bus Facility	196,736	
FL	Collier Area Transit, Transit Facility	737,759	
FL	DeLand Intermodal Center (VOTRAN)	1,551,438	
FL	Ft. Lauderdale, Transit Shuttle Vehicles	1,475,518	
FL	Gainesville, Multimodal Transportation Center	923,679	
FL	Hillsborough Area Regional Transit (HART)	72,000	
FL	Jacksonville Transit Authority (JTA) - Buses	1,229,598	
FL	Key West Buses and Bus Facilities	983,679	
FL	Lakeland, Citrus Connection	491,839	

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
FL	Lee County, Bus Facility	737,759	
FL	Miami Beach Intermodal Transit Center	1,475,518	
FL	Tallahassee (TALTRAN) Intermodal Center	491,839	
FL	West Coast Florida Bus Coalition	1,809,969	
GA	Atlanta, Multimodal Terminal	1,967,357	
GA	Chatham Area Transit	2,655,932	
GA	Macon Intermodal Center	1,967,357	
HI	BRT Systems, Appurtenances & Facilities	7,869,429	d/
HI	Bus Transit Centers - Waianae, Mililani, Wahiawa	737,759	
HI	Hawaii Statewide Bus and Bus Facilities	4,918,393	
IA	Cedar Falls Multimodal Facility	1,082,046	
ID	Idaho Transit Coalition Bus and Bus Facilities	762,084	
IL	Illinois Statewide Buses and Facilities	3,160,000	
IL	Rock Island Bus and Bus Facilities	600,000	
IN	Cherry Street Multimodal Facility	491,839	
IN	Indianapolis Downtown Transit Facility	4,426,554	
IN	Wabash Landing Transit Bus and Bus Facility	145,920	
KS	City of Wichita, Mini-Transfer Station	393,471	
KS	Kansas, Buses and Bus Facilities	2,912,620	
KS	Lawrence Transit System Transfer Center	491,839	
KS	Wichita Transit Authority	1,180,414	
KY	Henderson County Facility	491,839	
KY	KY Statewide, Bus and Bus Facilities	3,000,000	
KY	KY Transportation Cabinet - Community Action groups	108,000	
KY	Laurel County intermodal facility	4,918,393	
KY	Transit Authority of Northern Kentucky (TANK)	1,475,518	
KY	Transit Authority of River City	1,967,357	
LA	LA Public Transit Association, Buses and Bus Facilities	3,052,861	
LA	LSU Health Sciences Center Shreveport Intermodal Facility	245,920	
MA	Attleboro Intermodal Mixed-Use Garage Facility	737,759	
MA	Cape Cod Intermodal Facilities (Cape & Island Transit Ctrs)	295,104	
MA	Essex County, City of Lynn, MA, buses and senior citizen vans	137,715	
MA	Essex County, City of Peabody, MA, buses	47,217	
MA	Essex County, Town of Danvers, MA, buses and senior citizen vans	64,923	
MA	Northern Tier Intermodal Center - Athol	295,104	
MA	Springfield Union Station Intermodal Redevelopment Project	5,902,072	
MA	Worcester Regional Transit Authority (WRTA) Maintenance Facility	196,736	
MD	Maryland Statewide Bus and Bus Facilities	7,149,141	
MD	Montgomery County FDA Transit Center	245,920	
ME	Oceangateway Development Project	491,839	
ME	State of Maine, statewide buses	983,679	
MI	Ann Arbor Transportation Authority Bus & Bus Facilities	245,920	
MI	Blue Water Area Transportation	983,679	
MN	Dakota County, Cedar Avenue Project	983,679	
MN	Duluth Transit Authority Bus and Bus Facilities	491,839	
MN	La Crescent - Public Transfer Hub	59,021	
MN	Minneapolis downtown circulator	1,967,357	
MN	Minneapolis, 63rd Ave N. Park and Ride	983,679	
MN	Northwest Corridor Busway	2,459,197	
MO	Missouri Statewide Bus and Bus Facility Projects	100,000	
MS	Brookhaven, Multi-modal Center	1,967,357	
MT	Billings bus and bus facilities	983,679	
MT	District IX - Bozeman Galavan	245,920	

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
MT	Mountain Line Buses Missoula	443,839	
NC	North Carolina Bus and Bus Facilities	6,697,217	
NC	Piedmont Authority for Regional Transportation (PART) - Bus Purchase	983,671	
NC	Triangle Transit Authority (TTA) Maintenance Facility	344,288	
ND	North Dakota Statewide Capital Transit	1,890,732	
NE	Metro Area Transit - Intermodal Facility	983,679	
NE	Metro Area Transit South Omaha/Stockyard Center	737,759	
NH	New Hampshire Statewide Bus Acquisition	737,759	
NJ	Central New Jersey Raritan Valley Line Park-n-Ride	983,679	
NJ	Gloucester Co Sr. Buses	196,736	
NJ	Harrison New Jersey PATH Station Rehabilitation	245,920	
NJ	Morris County, Intermodal Park-n-Rides Facilities	1,475,518	
NJ	Newark Penn Station Intermodal Access Enhancements	1,967,357	
NM	Espanola ADA van & Compressed Gas Equipment	73,776	
NM	Rio Rancho Buses and Facilities	245,920	
NV	Bus Rapid Transit Project Las Vegas Blvd	4,918,393	
NV	Las Vegas Downtown Transportation Center	2,213,277	
NV	Regional Transportation Commission (RTC) BRT - North Las Vegas CIVIS Bus Stops	319,696	
NY	Albany, NY - Capital District Transportation Authority (CDTA), Bus and Bus Facilities	2,655,932	
NY	Brooklyn, downtown intermodal transit district	491,839	
NY	Broome County, Binghamton Intermodal Terminal	983,679	
NY	Buffalo Intermodal Transportation Center	4,918,393	
NY	City of Schenectady, bus and bus facilities	491,839	
NY	Jamaica Intermodal Facilities	1,475,518	
NY	Lower Hudson Intercounty Bus Program	786,943	
NY	Mobile Health Service Buses, NYC	491,839	
NY	Rochester-Genesee Regional Transportation Authority (RGRTA) - Rochester Central Station	2,951,036	
NY	Utica Transit Authority Buses	885,311	b/ e/
OH	Lorain Renovation Train Depot in a Multi-modal Hub	983,679	
OH	Ohio Public Transportation Association - Bus and Bus Facilities for the State of Ohio	702,515	
OK	Central Oklahoma Transportation & Parking Authority (COPTA)	1,909,197	
OK	Oklahoma Transit Association - Bus and Bus Facilities	960,000	
OK	OSU Multimodal Transportation Facility	2,951,036	
OR	Eugene Lane Transit District	1,967,357	
PA	Allentown Intermodal Transportation Center	1,462,372	
PA	Altoona Metro Transit Buses	491,839	
PA	AMTRAN Bus and Transit System Improvements	737,759	
PA	Bucks County, SEPTA Intermodal facility improvement	983,679	
PA	Butler Township/City Joint Municipal Transit Multi-Modal Transfer Center	418,063	
PA	Easton Intermodal Terminal	1,967,357	
PA	Mid-County Transit Authority, Facilities and Equipment	491,839	
PA	Port Authority of Allegheny County Buses (including clean fuels)	1,746,030	
PA	Pullman Multi-modal Center	491,839	
PA	SEPTA - Paratransit Vehicles	491,839	
PA	Westmoreland County Transit Authority	154,334	
PA	Wilkes-Barre Intermodal Facility	245,920	
SC	Intermodal/Inland Port Terminal	983,679	
SC	Myrtle Beach Regional Multimodal Transit Center	1,106,638	
SC	North Charleston Regional Intermodal Transportation Center	491,839	
SC	South Carolina Vehicles and Facilities	720,000	
SD	South Dakota Statewide - Bus and Bus Facilities	10,011	
TN	Knoxville Electric Transit Intermodal Center	3,344,507	
TN	Tennessee Bus Replacements & Bus Facilities	114,865	

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION
TX	Beaumont Buses	98,368
TX	Corpus Christi Regional Transportation Authority (RTA) Bus & Bus Facilities	491,839
TX	Galveston Buses	363,233
TX	Laredo, Administrative/Operations/ Maintenance Facility	1,721,438
TX	Odessa & Midland, TX - Alternative Fuel Buses	983,679
VA	Arlington Bus Transfer Stations	491,839
VA	Potomac Yard Transitway	786,943
VT	Montpelier Multimodal Center	1,967,357
VT	St. Johnsbury Transit Center Rehabilitation	245,920
VT	Winooski Falls Downtown Multimodal Transportation Center	491,839
WA	Aurora Avenue Bus Rapid Transit	1,475,518
WA	Burien transit center transit oriented development	1,967,357
WA	Clark County, WA C-TRAN Vancouver Mall Transit Center	2,557,565
WA	Edmonds Crossing multi-modal project	3,442,875
WA	Issaquah Highlands Park & Ride	1,377,150
WA	Jefferson Transit Facilities	423,679
WA	King Street Station Multimodal Facility	245,920
WA	Mercer Island Transit Center, Park and Ride	291,839
WA	Snohomish County Community Transit park and ride	2,951,036
WA	Sound Transit regional transit hubs	136,745
WA	Spokane bus and bus facilities	2,459,197
WV	Huntington, Tri-State Transit Authority (TTA) buses and vans	1,770,622
WV	Monongalia Courthouse Annex in Morgantown - Intermodal Parking Facility	3,442,875
WY	Wyoming Department of Transportation	1,997,204
	Subtotal FY 2003 Unobligated Allocations	***$255,027,193***
FY 2004 Unobligated Allocations		
AK	Alaska Mobility Coalition Bus Replacement	$485,437
AK	Anchorage Ship Creek Intermodal Facility, Alaska	1,941,747
AK	Arctic Winter Games buses and bus facilities, Alaska	1,456,311
AK	Coffman-Cove Inner Island Ferry/Bus Terminal, Alaska	590,225
AK	Girdwood Transportation Center, Alaska	970,874
AK	Port McKenzie Intermodal Facility, Alaska	970,874
AK	Port of Anchorage Intermodal Facility, Alaska	2,912,620
AK	Sawmill Creek Intermodal Facility, Alaska	1,941,747
AL	Alabama A&M University Transit Loop, Alabama	1,456,311
AL	Alabama State Docks Intermodal Facility	9,223,299
AL	Birmingham Downtown Intermodal Facility phase II, Alabama	3,398,058
AL	Cummings Research Park Commercial Center Intermodal Facility, Alabama	1,941,747
AL	Huntsville Airport Phase III Intermodal Facility, Alabama	3,398,058
AL	Mobile Waterfront Terminal and Maritime Center of the Gulf, Alabama	4,368,931
AL	Northwest Shoals Community College Transportation Modernization, Alabama	436,894
AL	Orange Beach Senior Activity Center buses, Alabama	97,088
AL	Troy State University Bus Shuttle Program, Troy, Alabama	1,456,311
AR	Arkansas Statewide buses and bus facilities	4,611,649
AR	Southeast Arkansas Area Agencies on Aging buses and bus facilities, Arkansas	310,680
AZ	Alternative Fuel Replacement Buses for Sun Tran, Arizona	485,437
AZ	Mesa Operating Facility, Arizona	1,941,747
AZ	Phoenix/Glendale West Valley Operating Facility, Arizona	4,854,368
AZ	Phoenix/Regional Heavy Maintenance Facility, Arizona	970,874
AZ	Ronstadt Transit Center Modifications, Arizona	2,912,620
AZ	Tempe Downtown Transit Center, Arizona	485,437
AZ	Tempe/Scottsdale East Valley Facilities, Arizona	3,883,494

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
AZ	Tucson Alternative Fuel Replacement Buses, Arizona	3,495,144	
CA	AC Transit Expansion Buses, California/AC Transit Rapid Bus Improvements, California	234,374	f/
CA	Access Enhancements to Sierra Madre Villa Gold Line Station, California	582,524	
CA	Alameda Point Areil Transit Project, California	485,437	b/ g/
CA	Anaheim Resort Transit (ART), California	485,437	
CA	Antelope Valley Transit Authority Operations and Maintenance Facility, California	1,213,592	
CA	Baldwin Park Downtown/Metrolink Parking Improvements, California	242,718	
CA	Burbank Empire Area Transit Center, California	728,156	
CA	Calexico Transit System, California	291,262	
CA	Cerone Operating Complex Improvements, California	121,360	
CA	Cerritos Circulator Buses, California	291,262	
CA	Claremont Intermodal Transit Village Expansion Project, California	1,213,592	
CA	Collegian Busway Improvements, California	194,174	
CA	Corona Transit Center, California	679,612	
CA	Davis Intermodal Facility, California	194,174	
CA	Eastern Contra Costa County Park and Ride Lots, California	582,524	
CA	Ed Roberts Campus transit center, California	93,672	
CA	El Garces Intermodal Station, Needles, California	1,844,660	
CA	Escondido Bus Maintenance Facility, California	485,437	
CA	Eureka Intermodal Depot, California	242,718	
CA	Foothill Transit Transit Oriented Neighborhood Program, California	2,427,184	
CA	Fresno FAX Buses, Equipment, and Facilities, California	1,165,048	
CA	Golden Empire Transit Traffic Signal Priority, California	242,718	
CA	Hemet Transit Center/Bus Facility, California	302,912	
CA	Interstate 15 Managed Lanes BRT Capital Purchase, California	970,874	
CA	Long Beach Transit buses and bus facilities, California	970,874	
CA	South Whittier Circulator Buses, California	388,350	
CA	Los Angeles MTA buses, California	3,883,494	
CA	Mammoth Lakes Bus Purchase, California	776,699	
CA	Modesto Bus Facility, California	970,874	
CA	Monterey-Salinas Transit Buses, California	1,456,311	
CA	Omnitrans - Paratransit Vehicles, California	291,262	
CA	Orange County Transit Center Improvements, California	315,534	
CA	Orange County Bus Rapid Transit, California	2,184,466	
CA	Orange County Fare Collection System, California	970,874	
CA	Orange County Inter-County Express Bus Service, California	1,067,961	
CA	Palmdale Intermodal Facility Parking Lot Expansion, California	291,262	
CA	Palo Alto Intermodal Transit Center, California	182,039	
CA	Redondo Beach Catalina Transit Terminal, California	776,699	
CA	Reseda Boulevard Bus Rapid Transit Project Capital Improvement, California	242,718	
CA	Riverside Transit Agency, Automatic Traveler Information System (ATIS), California	72,815	
CA	Riverside Transit Agency, Bus Rapid Transit Investment, California	485,437	
CA	Riverside Transit Agency, Transit Center, California	970,874	
CA	Roseville Multitransit Center, California	485,437	
CA	Sacramento Regional Bus Expansion, Enhancement, and Coordination Program, City of Auburn, California	97,088	
CA	Sacramento Regional Bus Expansion, Enhancement, and Coordination Program, City of Lincoln, California	485,437	
CA	Sacramento Regional Transit District, Bus Maintenance Facility, California	485,437	
CA	San Fernando Local Transit System, California	291,262	
CA	San Joaquin RTD buses and bus facilities, California	242,718	
CA	San Mateo County Transit District Zero-Emission buses, California	230,582	
CA	Santa Barbara Metropolitan Transit District Electric Bus Investment, California	291,262	b/ h/
CA	Santa Clara Valley Transportation Authority Zero-Emission Buses, California	60,680	
CA	Sonoma County Transit CNG Buses, California	485,437	

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
CA	South San Fernando Valley Park and Ride facility expansion, California	291,262	
CA	South Whittier Circulator Buses, California	388,350	
CA	Spring Valley Multi-Modal Center, California	582,524	
CA	SunLine Transit Agency Clean Fuels Mall Facility and Hydrogen Infrastructure Expansion, California	436,894	
CA	Temecula Transit Center, California	776,699	
CA	Transit First Implementation, Chula Vista, California	388,350	
CA	Truckee Replacement Buses, California	72,815	
CA	Ventura County CNG Fueling Station and Facility Pavement Replacement, California	388,350	
CA	Visalia Bus Operations and Maintenance Facility, California	970,874	
CO	Colorado Transit Coalition buses and bus facilities, Colorado	9,862,062	
CT	Bridgeport Intermodal Transport Center, Connecticut	3,883,494	
CT	Connecticut Statewide buses and bus facilities	2,912,620	
CT	East Haddam Mobility Improvement Project, Connecticut	2,912,620	
CT	Greater New Haven Transit District Fuel Cell and Electric Bus Funding, Connecticut	----------	i/
CT	Hartford Downtown Circulator, Connecticut	1,334,951	
DC	Georgetown University Fuel Cell Transit Bus Program (TEA-21)	4,788,842	
DC	WMATA Bus Fleet, Washington, DC	728,156	
DE	Delaware Statewide bus and bus facilities	970,874	
DE	University of Delaware Fuel Cell Bus Project, Delaware	1,699,029	
FL	Citrus County Enhancement Project for the Transportation Disadvantaged, Florida	121,359	
FL	Flagler Senior Services Transit Coaches, Florida	121,359	
FL	Florida International University/University of Miami University Transportation Center, Florida	388,350	
FL	Fort Lauderdale Tri-County Transit Authority fare collection system, Florida	776,699	
FL	HART Bus Purchase, Florida	485,437	
FL	Jacksonville Transportation Authority, Bus and Bus Facilities, Florida	970,874	
FL	Key West bus and bus facilities, Florida	1,067,961	
FL	Lakeland Area Mass Transit District Citrus Connection, Florida	533,980	
FL	Lee County LeeTran Bus Replacement, Florida	194,174	
FL	Levy County Improvement Project for the Transportation Disadvantaged, Florida	194,174	
FL	Miami Dade County System Enhancements, Florida	970,874	
FL	Miami-Dade County buses, Florida	970,874	
FL	North Florida and West Coast Bus Procurement, Florida	3,883,494	
FL	NW 7th Avenue Transit HUB Improvements, Florida	970,874	
FL	Palm Beach County and Broward County Regional Buses, Florida	725,287	
FL	Palm Beach Gardens Mass Transit Bus Shelters, Florida	19,418	
FL	Putnam County Transit Coaches for Ride Solutions, Florida	1,165,048	
FL	St. Augustine Intermodal Transportation and Parking Facility, Florida	533,980	
FL	St. Johns County Council on Aging Administrative Facility, Florida	194,174	
FL	St. Johns County Council on Aging Passenger Amenities, Florida	38,834	
FL	St. Johns County Council on Aging Transit Coaches, Florida	339,806	
FL	TalTran buses and bus facilities, Florida	679,612	
FL	TalTran Intermodal Facility, Florida	485,437	
FL	Winter Haven Transit Terminal, Florida	339,806	
GA	Athens Clarke County Park Ride Project, Georgia	2,669,902	
GA	Chatham Area Transit Authority buses and bus facilities, Georgia	5,825,241	
GA	City of Macon Alternative Fuel Vehicle Purchase, Georgia	291,262	
GA	Dekalb County BRT Improvements, Georgia	1,456,311	
GA	Georgia Statewide buses and bus facilities, Albany & Rome	970,874	
GA	GRTA buses and bus facilities, Georgia	4,854,368	
GA	Hamilton Clean Fuels Bus Facility, Georgia	970,874	
GA	Leesburg Train Depot Renovation and Restoration, Georgia	291,262	
GA	Macon and Athens Multimodal Station, Georgia	1,553,398	
GA	Macon Multi-Modal Terminal Station, Georgia	1,456,311	

FEDERAL TRANSIT ADMINISTRATION

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PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
GA	MARTA Automated Fare Collection/Smart Card System, Georgia	3,883,494	
GA	Regional Transit Project for Quitman, Clay, Randolph and Stewart Counties, Georgia	485,437	
GA	Terminal Station Multi-Modal Roof Rehabilitation, Georgia	328,156	
HI	Hawaii Statewide Rural Bus Program	936,715	
HI	Honolulu Bus and Paratransit Replacement Program, Hawaii	9,708,736	
HI	Honolulu Middle Street Intermodal Center, Hawaii	2,912,620	
IA	Ames Maintenance Facility improvement, Iowa	396,550	
IA	Coralville Intermodal Facility, Iowa	485,437	
IA	UNI Multimodal Project, Iowa	3,398,058	
ID	Idaho Transit Coalition buses and bus facilities	2,970,213	
IL	Illinois Statewide buses and bus facilities	5,552,760	
IL	Peoria Bus Purchase, Illinois	291,262	
IL	Rock Island County Mass Transit District (Metrolink) transit facility, Illinois	485,437	
IL	Springfield Bus Purchase, Illinois	291,262	
IN	Cherry Street Multi-Modal Facility, Terre Haute, Indiana	1,844,660	
IN	Fort Wayne Citilink Bus Purchase, Indiana	159,620	
IN	Indiana University Bloomington, Indiana	5,000	
IN	Indianapolis Downtown Transit Center, Indiana	3,398,058	
IN	Muncie Transit System, Indiana	679,612	
IN	South Bend TRANSPO Bus Facilities, Indiana	970,874	
KS	City of Wichita Transit Authority System Upgrades, Kansas	242,718	
KS	Johnson County Nolte Transit Center, Kansas	58,343	
KS	Johnson County Transit Equipment and Transit Coach Improvement, Kansas	23,338	
KS	Kansas City Area Transit Authority buses and bus facilities, Kansas	674,134	
KS	Kansas Statewide buses and bus facilities	2,912,620	
KS	Topeka Transit buses and bus facilities, Kansas	179,205	
KS	Unified Government of Kansas City bus replacement, Kansas	339,806	
KY	Audubon Area Community Services, Kentucky	97,088	
KY	Danville Hub-Gilcher Transit Facility / Parking Structure, Kentucky	1,699,029	
KY	Daviess County Parking Garage and Intra-County Transit Facility, Kentucky	1,941,747	
KY	Fulton County Transit Authority, Kentucky	145,632	
KY	Henderson Area Rapid Transit Authority, Kentucky	14,564	
KY	Kentucky Transportation Cabinet/Community Action Groups	388,350	
KY	Paducah Area Transit Authority, Kentucky	38,834	
KY	Perry County Intermodal Facility, Kentucky	1,941,747	
KY	Red Cross Wheels, Kentucky	77,670	
KY	Senior Services of Northern Kentucky buses and bus facilities, Kentucky	242,718	
KY	Southern and Eastern Kentucky buses and bus facilities	1,504,854	
KY	Transit Authority of River City buses and bus facilities, Kentucky	2,427,184	
KY	Transportation Authority of the River City (TARC) bus/trolley replacement, Kentucky	583,438	
KY	Transportation Authority of the River City (TARC) expansion facility, Kentucky	776,699	
KY	Western Kentucky University Bus Shuttle System, Kentucky	2,427,184	
LA	Greater Ouachita Port and Intermodal Facility, Louisiana	1,213,592	
LA	Intermodal Transit Facility for ULM, Louisiana	970,874	
LA	Louisiana Statewide buses and bus facilities	4,607,938	
LA	Shreveport Intermodal Bus Facility, Louisiana	679,612	
LA	St. Bernard Parish Intermodal Facilities, Louisiana	485,437	
LA	St. Tammany Park and Ride, Louisiana	388,350	
MA	Berkshire Regional Transit Authority (BRTA) Buses and Fare Boxes, Massachusetts	160,194	
MA	Franklin Regional Transit Authority (FRTA) Bus, Massachusetts	145,632	
MA	Montachusett Area Regional Transit (MART) buses and bus facilities, Massachusetts	377,227	
MA	Newton Rapid Transit Handicap Access Improvements, Massachusetts	291,262	b/ j/
MA	Pioneer Valley Transit Authority (PVTA) buses, Massachusetts	2,330,096	

FEDERAL TRANSIT ADMINISTRATION

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PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
MA	Pittsfield Intermodal Transportation Center, Massachusetts	597,088	
MA	Springfield Union Station Intermodal facility redevelopment, Massachusetts	4,368,931	
MD	Maryland Statewide buses and bus facility	7,281,551	
MD	Southern Maryland Commuter Bus Initiative	4,368,931	
MD	WMATA Buses, Maryland	582,524	
ME	Cranberry Isles Intermodal Transportation Facility, Maine	242,718	
ME	Curtis Ferry, Maine	728,156	
ME	Maine Statewide buses and bus facilities	1,213,592	
ME	Portland Bayside Parking Garage / Intermodal Facility, Maine	242,718	
MI	Allegan County Transportation Services, Michigan	38,834	
MI	Ann Arbor Fuel Cell Bus Project, Michigan	1,941,747	
MI	Ann Arbor Transit Authority Transit Center, Michigan	728,156	
MI	Barry County Transit replacement maintenance equipment, Michigan	19,418	b/ k/
MI	Bay Area Metropolitan Transportation Authority New and Replacement Buses, Michigan	242,718	
MI	Bay Area Transportation Authority Downtown Transfer Center Construction and Bus Purchase, Grand Traverse	400,134	
MI	Belding bus replacement and communication equipment, Michigan	38,834	
MI	Berrien County Public Transportation, Michigan	97,088	
MI	Cadillac/Wexford Transit Authority buses, Michigan	72,815	
MI	Cadillac/Wexford Transit Authority Intermodal Facility, Michigan	582,524	
MI	Clare County Transit Corporation Replacement Buses, Michigan	97,088	
MI	Clinton Transit Bus Purchase, Michigan	38,834	b/ l/
MI	County Connection L.L.C., Midland County, Michigan	72,815	
MI	Detroit Timed Transfer Center Phase II, Michigan	970,874	
MI	Harbor Transit Bus Replacement, Michigan	194,174	
MI	Holland Macatawa Area Express (MAX), Michigan	582,524	
MI	Intelligent Transportation System for ITP The Rapid, Michigan	582,524	
MI	Isabella County Transportation Commission Vehicle Replacement, Michigan	242,718	
MI	LETS Bus Replacement, Michigan	87,378	
MI	Ludinton Mass Transportation Authority Bus Facility, Michigan	242,718	
MI	Manistee County Transportation, Inc. Replacement Buses, Michigan	29,126	b/ m/
MI	Marquette County, Phase II - Transit Administrative, Operations, Maintenance & Storage Facility, Michigan	970,874	
MI	Mecosta Osceola County Area Transit Vehicle Replacement, Michigan	194,174	
MI	Michigan Statewide buses and bus facilities	970,874	
MI	Northern Michigan buses and bus facilities	485,437	
MI	Sanilac County bus facility, Michigan	97,088	
MI	Shiawassee Transportation Center and replacement buses, Michigan	38,834	
MI	St. Joseph County Transit, Michigan	33,980	
MI	VanBuren Public Transit, Michigan	17,476	
MN	Metro Transit buses and bus facilities, Minnesota	4,271,844	
MN	Minnesota District 8 Transit Vehicles and Transit Bus Facilities	776,699	
MN	Minnesota Transit buses and bus facilities, Minnesota	982,263	
MN	Northwest Corridor Busway, Minnesota	2,912,620	
MN	Southern Minnesota Transit Facilities	29,126	
MN	St. Cloud Buses, Minnesota	97,088	
MN	Union Depot Multi-modal Transportation Hub, Minnesota	728,156	
MO	Clinton Transit Office, Missouri	242,718	
MO	KCATA buses and bus facilities, Missouri	1,189,648	
MO	Missouri Statewide buses and bus facilities	3,571,342	
MO	Southeast Missouri Bus Service Capital Improvements	97,068	
MS	Harrison County multi-modal facilities and shuttle service, Mississippi	430,874	
MS	Hattiesburg Intermodal Facility, Mississippi	1,180,448	
MS	Intermodal Facility, JIA, Mississippi	1,941,747	
MS	JATRAN vehicles for disabled and elderly, Mississippi	242,718	

FEDERAL TRANSIT ADMINISTRATION

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PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION
MT	Billings Downtown Bus Transfer Facility, Montana	1,456,311
MT	Great Falls Transit Authority Bus Replacement and Facility Improvement, Montana	291,262
MT	Helena Transit Facility, Montana	485,437
MT	Liberty County COA Bus Facility, Montana	48,544
MT	Mountain Line Bus Replacement and Facility Improvements, Montana	194,174
NC	Asheville Transit System Fleet Replacement, North Carolina	291,262
NC	Chapel Hill Bus Maintenance Facility, North Carolina	970,874
NC	Charlotte Area Transit System Transit Maintenance and Operations Center, North Carolina	4,854,368
NC	Durham Multimodal Transportation Facility, North Carolina	1,456,311
NC	High Point Project Terminals, North Carolina	776,699
NC	Intermodal Transportation Hub Project, North Carolina	145,632
NC	North Carolina Statewide buses and bus facilities	6,067,961
NC	Piedmont Authority for Regional Transportation (PART) multimodal transportation center, North Carolina	1,067,961
NC	Winston-Salem Union Station, North Carolina	1,262,136
ND	North Dakota Statewide buses and bus facilities	2,912,620
ND	Small Urban and Rural Transit Center, North Dakota	388,350
NE	Kearney RYDE Transit, Nebraska	970,874
NE	Metro Area Transit (MAT) buses and bus facilities, Omaha, Nebraska	1,941,747
NE	Nebraska Statewide Rural Automatic Vehicle Locating & Comms. System	728,156
NH	New Hampshire Statewide buses and bus facilities	4,368,931
NJ	Harrison Intermodal Project, New Jersey	728,156
NJ	Howard Boulevard Intermodal Park & Ride, New Jersey	2,135,923
NJ	Hunterdon County Intermodel Stations and Park & Rides, New Jersey	388,350
NJ	Montclair State University Campus and Community Bus System, New Jersey	679,612
NJ	Morris County Intermodal Facilities and Park & Rides, New Jersey	2,912,620
NJ	Newark Penn Station Intermodal Improvements, New Jersey	2,912,620
NJ	Old Bridge Intermodal Stations and Park & Rides, New Jersey	485,437
NJ	South Amboy Regional Intermodal Transportation Initiative, New Jersey	970,874
NJ	Trenton Intermodal Station, New Jersey	728,156
NM	Farmington buses and bus facilities, New Mexico	97,088
NM	Las Cruces buses and bus facilities, New Mexico	364,077
NV	Bus Rapid Transit Project, Virginia Street, Reno, Nevada	396,550
NV	Construction of new Intermodal Terminals in Downtown Reno and Sparks, Nevada	2,381,449
NV	Nevada Rural Transit Vehicles and Facilities	485,437
NV	RTC Central City Intermodal Transportation Terminal, Las Vegas, Nevada	485,437
NV	Sparks and Reno Bus and Bus Facilities, Nevada	57,330
NY	Broome County Hybrid Buses, New York	582,524
NY	Central New York Regional Transportation Authority	2,233,009
NY	Fort Edward Intermodal Station Interior Restoration/Rehabilitation Project, New York	291,262
NY	Jacobi Transportation Facility, New York	776,699
NY	Jamaica Intermodal Facilities, Queens, New York	388,350
NY	Livingston County Transportation Center, New York	388,350
NY	Main Street project for downtown Buffalo, New York	631,068
NY	Montgomery Buses, New York	38,834
NY	MTA/Long Island Bus clean fuel cell bus purchase, New York	970,874
NY	Myrtle Avenue Business Improvement District's Myrtle/Wyckoff/Palmetto Transit Hub Enhancement, New York	485,437
NY	Nassau County, Hub Enhancements, New York	1,165,048
NY	Oneont Bus Replacement, New York	46,675
NY	Orange County Bus Replacement, New York	1,213,592
NY	Over the Road Bus Accessibility, Intercity Bus Accessibility Consortium, New York	2,912,620
NY	Rochester Central Bus Terminal, New York	5,339,805
NY	Rome Intermodal Station Restoration, New York	1,213,592
NY	Smithtown Senior Citizen Center Bus Replacement, New York	194,174

FEDERAL TRANSIT ADMINISTRATION

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PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION
NY	Suffolk County Transit Buses, New York	1,844,660
NY	Tompkins County Bus Facilities, New York	388,350
NY	Union Station Renovations, Utica, New York	728,156
NY	Village of Pleasantville, Handicapped Ramp, New York	46,601
NY	Village of Pleasantville, Memorial Plaza, New York	194,174
NY	Western Gateway Transportation Center Intermodal Facility, Schenectady, New York	388,350
NY	Wyandanch Intermodal Transit Facility, New York	388,351
OH	Central Ohio Transit Authority Facility	436,894
OH	Greater Dayton Regional Transit Authority, Ohio	728,156
OH	Kent State University Intermodal Facility, Ohio	364,077
OH	Lorain Port Authority Lighthouse Shuttle and Black River Water Taxi Project, Ohio	194,174
OH	Ohio Statewide buses and bus facilities	3,750,650
OH	The Banks Intermodal Facility, Cincinnati, Ohio	1,456,311
OH	Wright Stop Plaza, Dayton, Ohio	1,456,311
OH	Zanesville Bus System Improvements, Ohio	19,418
OK	Central Oklahoma Transportation and Parking Authority	1,766,990
OK	Kibios Area Transit System (KATS) maintenance facility and vehicles, Oklahoma	631,068
OK	Multi-Modal Transportation Facility and Transit System at Oklahoma State University, Oklahoma	2,184,466
OK	Norman buses and bus facilities, Oklahoma	2,912,620
OK	Northern Oklahoma Regional Multimodal Transportation System	2,427,184
OK	Oklahoma City Buses, Oklahoma	2,184,466
OK	Oklahoma Department of Transportation Transit Programs Division	6,067,961
OK	Tulsa Transit Bus Replacement Program, Oklahoma	4,368,931
OK	Tulsa Transit Paratransit Buses, Oklahoma	728,156
OR	City of Canby Transit Center, Oregon	145,632
OR	Lane Transit District, BRT Phase II, Coburg Road Phase III, Oregon	1,941,747
OR	Lincoln County Transportation, Bus Garage Facility, Oregon	194,174
OR	Salem Area Transit, Bus Replacement, Oregon	582,524
OR	South Clackamas Transit, Molalla, Oregon	97,088
OR	Springfield Station, Oregon	1,586,197
OR	Tillamook County Transit, Maintenance Facility, Oregon	194,174
OR	Wilsonville Park and Ride, Oregon	118,965
OR	Yamill County buses and bus facilities, Oregon	97,088
PA	Adams County Transit Authority (ACTA) buses and bus facilities, Pennsylvania	19,418
PA	Allentown Intermodal Facility, Pennsylvania	2,427,184
PA	Altoona Bus Testing (TEA-21)	2,962,170
PA	AMTRAN Buses and Transit System Improvements, Pennsylvania	194,174
PA	Area Transit Authority buses and bus equipment, Pennsylvania	2,427,184
PA	Butler Multi-Modal Transit Center, Pennsylvania	970,874
PA	Capital Area Transit Buses, Pennsylvania	373,400
PA	Centre Area Transit Authority, Advanced Public Transportation Systems Initiative, Pennsylvania	582,524
PA	Church Street Transportation Center, Williamsport, Lycoming County, Pennsylvania	242,718
PA	City Bus, Williamsport Bureau of Transportation, Lycoming County, Pennsylvania	970,874
PA	Endless Mountain Transportation Authority, Bradford County, Pennsylvania	9,709
PA	Erie Metropolitan Transit Authority Bus Acquisition, Pennsylvania	97,088
PA	Fayette County Intermodal Transit Facility, Pennsylvania	388,350
PA	Harrisburg Intermodal Airport Multi-Modal Transportation Facility, Pennsylvania	970,874
PA	Hazleton Intermodal Public Transit Center, Pennsylvania	1,699,029
PA	Lebanon County Transit Authority, buses and bus related facilities, Pennsylvania	436,894
PA	Mid County Transit Authority Kittanning, Pennsylvania	388,350
PA	Mid Mon Valley Transit Authority, Charleroi, Pennsylvania	582,524
PA	New Castle Transit Authority replacement buses, Pennsylvania	97,088
PA	Paoli Transportation Center, Pennsylvania	485,437

FEDERAL TRANSIT ADMINISTRATION

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PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION
PA	Pittsburgh Water Taxi, Pennsylvania	970,874
PA	Port Authority of Allegheny County Buses, Pennsylvania	2,669,902
PA	Port Authority of Allegheny County Clean Fuel Buses, Pennsylvania	2,213,592
PA	SEPTA Bucks County Intermodal Facility Improvements, Pennsylvania	3,398,058
PA	Transit Authority of Warren County Intermodal Bus Facility, Pennsylvania	1,456,311
PA	Union County Union/Snyder Transportation Alliance (USTA), Pennsylvania	485,437
PA	Westmoreland County Transit Authority (WCTA) Bus Replacement, Pennsylvania	873,786
PR	Puerto Rico Metropolitan Bus Authority Replacement	116,688
RI	RIPTA Buses and Vans, Rhode Island	3,883,494
RI	RIPTA Facilities Upgrade, Rhode Island	388,350
SC	City of Greenville Multimodal Transportation Center Improvements, South Carolina	194,174
SC	Medical University of South Carolina Intermodal Facility, South Carolina	3,883,494
SC	Myrtle Beach Regional Multimodal Transit Center, South Carolina	194,174
SC	North Charleston Regional Intermodal Transportation Center, South Carolina	1,213,592
SC	South Carolina Statewide Transit Facilities Construction Project	970,874
SC	South Carolina Statewide Transit Vehicles	3,883,494
SD	Cheyenne River Sioux Tribe public buses and bus facilities, South Dakota	2,184,466
SD	South Dakota Statewide buses and bus facilities	1,532,407
TN	Downtown Transit Center, Nashville, Tennessee	1,941,747
TN	Knoxville Electric Transit Intermodal Center, Tennessee	1,941,747
TN	Memphis International Airport Intermodal Facility, Tennessee	641,782
TN	Nashville replacement of aged buses, Tennessee	485,437
TN	Tennessee Statewide buses and bus facilities	5,631,640
TX	Austin Capital Metro buses and bus facilities, Texas	2,912,620
TX	Brazos County Bus Replacement Program, Texas	194,174
TX	Capital Metro Hybrid Electric Buses, Texas	485,437
TX	Corpus Christi buses and bus facilities, Texas	1,941,747
TX	El Paso Sun Metro Bus Replacement, Texas	970,874
TX	Ft. Worth Transportation Authority Fleet Modernization and Bus Transfer Centers, Texas	1,456,311
TX	Galveston Maintenance Facility Renovations, Texas	776,699
TX	Grapevine Bus Purchase, Texas	155,340
TX	Hunt County Committee on Aging Transportation Facility, Texas	388,350
TX	Laredo Bus Facility, Texas	825,243
TX	Lubbock/Citibus Buses, Texas	1,456,311
TX	Nacogdoches Vehicle Replacement, Texas	776,699
TX	Public Transportation Management, Tyler/Longview, Texas	339,806
TX	San Antonio VIA Metropolitan Transit buses and bus facilities, Texas	1,982,747
TX	South East Texas Transit Facility Improvements and Bus Replacements	242,718
TX	The District-Bryan Intermodal Transit Terminal/Parking Facility & Pedestrian Improvements, Texas	388,350
TX	The Woodlands Capital Costs, Texas	339,806
TX	The Woodlands Park and Ride Expansion, Texas	266,990
UT	Utah Statewide buses and bus facilities	565,889
VA	Alexandria After School Bus program, Virginia	72,815
VA	Clean Fleet Bus Purchase and Facilities, Virginia	970,874
VA	Fairfax County, Richmond Highway Transit.Improvements, Virginia	679,612
VA	Hampton Roads Transit Southside Bus Facility, Virginia	1,941,747
VA	Main Street Station Multimodal Transportation Center, Virginia	1,456,311
VA	Potomac and Rappahannock Transportation Commission, Virginia	485,437
VA	Richmond Highway Public Transportation Initiative, Virginia	2,912,620
VT	Brattleboro Multimodal, Vermont	1,941,747
VT	Burlington Transit Facilities, Vermont	2,427,184
VT	Vermont Alternative Fuel Station and Buses, Vermont	485,437
VT	Vermont, Bus Upgrades	776,699

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
WA	Clallam Transit Buses, Washington	242,718	
WA	Clark County Transit, Bus Replacement Project, Washington	700,125	
WA	Community Transit Bus and Van Replacement, Washington	970,874	
WA	Edmonds Crossing Multimodal Transportation Terminal, Washington	1,941,747	
WA	Everett Transit, Bus Replacement, Washington	970,874	
WA	Grant Transit Authority, Bus Facility, Washington	485,437	
WA	Grays Harbor Transportation Authority Capital Improvement, Washington	72,815	
WA	Intercity Transit Bus Expansion and Replacement, Washington	396,550	
WA	Jefferson Transit bus purchase, Washington	194,174	
WA	Jefferson Transit Facilities, Washington	970,874	
WA	King County Metro Clean Air Buses, Washington	1,166,876	
WA	Mason County Transportation Authority Capital Improvements, Washington	46,674	
WA	Metro Transit Turn Around at Taylor Landing Park, Washington	38,834	
WA	Mukilteo Lane Park and Ride, Washington	970,874	
WA	North Bend Park and Ride, Washington	582,524	
WA	Pierce Transit Maintenance and Operations facility, Washington	970,874	
WA	Snohomish County Community Transit Park and Ride Lot Expansion Program, Washington	1,941,747	
WA	Sound Transit Regional Express Transit Hubs, Washington	941,747	
WA	Washington State Small Bus System Program of Projects		
WA	Clallam Transit	270,689	
WA	Columbia County Public Transportation (CCPT)	40,525	
WA	Grays Harbor Transportation Authority	56,655	
WA	Island Transit	426,813	
WA	Jefferson Transit	163,672	
WA	Mason County Transportation Authority	188,852	
WA	Pullman Transit	34,622	
WA	Twin Transit	42,491	
WA	Valley Transit	278,557	
WI	Wisconsin, Statewide buses and bus facilities	4,362,677	
WV	Washington County	54,700	
WV	West Virginia Statewide buses and bus facilities	3,883,494	
WY	Wyoming Statewide buses and bus facilities	1,941,747	
	Subtotal FY 2004 Unobligated Allocations	***$503,495,675***	
	TOTAL UNOBLIGATED ALLOCATION	**$758,522,868**	
FY 2004 Transferred Funds			
NY	North Country Bus and Bus Related Equipment	$4,500,000	n/
Fiscal Years 1998, 1999, 2000, 2001 and 2002 Extended Allocations			
AK	Homer Alaska Maritime Wildlife Intermodal and welcome center, 2001	841,768	
AL	Alabama State Dock intermodal passenger and freight terminal bus and bus related facilties, 2002	4,950,145	
CA	City of Monrovia natural gas vehicle fueling facility, 2002	267,308	o/
CA	Costa Mesa CNG facility, 2002	247,507	
CA	North County Transit District, initial design and planning for new intermodal center, 2002	297,009	
CA	San Bernardino CNG/LNG buses, 2002	371,261	
CA	Sierra Madre Villa & Chinatown intermodal transportation centers/Los Angeles County Metropolitan Transportation Authority bus and bus related facilities in LACMTA's service area, 2002	1,485,043	
CT	Norwich bus terminal and pedestrian access, 2001	990,315	
CT	East Haddam trasportation vehicles and transit facilities, 2002	415,812	
CT	Greater New Haven District CNG vehicle project (ConnDOT), 2002	0	p/
GA	Macon terminal intermodal station, 2002	885,044	
IN	Indianapolis downtown transit facility, 2002	2,943,342	

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION	
MA	Springfield Union Station intermodal facility, 2002	2,440,118	
MI	Blue Water Ara Transportation Commission bus facilities, 2002	1,485,044	
MN	Greater Minnesota Transit Authority bus, paratransit and transit hub (MNDOT), 2002	135,520	
MO	Cab Care paratransit facility, 2002	495,015	q/
MO	Missouri Pacific Depot, 2002	495,015	
MT	Area VII agency on aging bus facility/Statewide bus and bus facilities, 2002	0	b/ r/
MT	Ravalii Conty Council on aging bus facility/Statewide bus and bus facilities, 2002	0	b/ r/
MT	Statewide bus and bus facilities, MT, 2002	889,595	b/ r/
NM	Las Cruces intermodal transit facility, 2002	1,980,058	
NY	Binghamton Intermodal Transportation Center, 2000	1,103,732	
NY	Bronx Zoo intermodal transportation facility, 2001	247,579	
NY	Binghamton intermodal terminal, 2002	1,980,058	
NY	Tompkins Consolidated Area transit center, 2002	57,778	
PA	Wilkes Barre intermodal facility, 1998	969,794	
PA	Wilkes Barre intermodal facility, 1999	1,240,625	
PA	Wilkes Barre intermodal facility, 2000	1,226,369	
PA	Wilkes Barre intermodal transportation center, 2001	990,315	
PA	Wilkes Barre intermodal facility, 2002	990,029	
SD	Oglala Siux Tribe buses and bus facilities, 2002	2,227,565	
	Total Extended Allocation	**$32,648,763**	

In addition, the FY 2005 Consolidated Appropriations Act; House, Senate, and Coference Committees Reports; and a May 20, 2004 letter from Chairman Istook and Chairman Shelby have provided instructions to FTA regarding the following prior year obligated Bus and Bus-Related Facilities projects:

AK	Port MacKenzie Intermodal Facility project	s/
IN	South Street Station Project/South Bend Bus Operations Center Project	t/
PA	Philadelphia, Regional Transportation System for Elderly and Disabled	u/
MI	Detroit bus and bus facilities	v/ w/
MO	Bus acquisition for Houston, Missouri/Houston buses and bus facilities	x/
NM	Santa Fe Bus facility renovation	y/
VA	Virginia Beach intermodal facility, Virginia/Virginia Beach intermodal facility and bus rapid transit project	z/

a/ S. Rept. 108-342. Funds provided in fiscal year 2003 to the cities of Hoover and Vestavia Hills for diesel hybrid buses shall instead be available to procure alternative fuel buses.

b/ SEC. 161. Funds shall be available until September 30, 2007.

c/ SEC. 169. Notwithstanding any other provision of law, any unobligated funds made available under the bus category of the Capital Investment Account in prior year Appropriations Acts for the Greater New Haven Transit District Fuel Cell and Electric Bus project or CNT/alternative fuel vehicle project shall be transferred to and administered under the Transit Planning and Research account, subject to such terms and conditions as the Secretary deems appropriate. [Amount transferred is $983,679]

d/ Sec. 171. . . . Provided further, that funds made available in Public Law 108-10 for Hawaii: BRT Systems, Appurtenances and Facilities shall be generally available for bus and bus facilities by the City and County of Honolulu. [Note: The reference should be to funds designated in H. Rept. 108-10.]

e/ H. Rept. 108-192. Amounts made available in fiscal year 2003 for Utica Transit Authority Buses, New York shall be made available for Oniedia County buses and transit items.

f/ The Conference report (H.Rpt. 108-01) accompanying the FY2004 DOT Appropriations Act (Pub.L. 108-199) designates $1,000,000 for "AC Transit Expansion Buses, California." It is the intent of the conferees that this language should read "AC Transit Rapid Bus Improvements, California."

g/ H. Rept. 108-792. Amounts made available in fiscal year 2004 for Alameda Point Areil Transit Project, California shall be available for the Fairfield/Vacaville Intermodal Transit Station, California.

h/ S. Rept. 108-342. Amounts made available in fiscal year 2004 for the Santa Barbara Metropolitan Transit District electric bus investment in California shall be made available to the Venture County Transportation Commission to fulfill the intent of this project.

FEDERAL TRANSIT ADMINISTRATION

TABLE 10

PRIOR YEAR UNOBLIGATED SECTION 5309 BUS AND BUS-RELATED ALLOCATIONS

STATE	PROJECT	ALLOCATION

i/ SEC. 169. Notwithstanding any other provision of law, any unobligated funds made available under the bus category of the Capital Investment Account in prior year Appropriations Acts for the Greater New Haven Transit District Fuel Cell and Electric Bus project or CNT/alternative fuel vehicle project shall be transferred to and administered under the Transit Planning and Research account, subject to such terms and conditions as the Secretary deems appropriate. [Amount transferred is $1,456,311]

j/ H. Rept. 108-792. Amounts made available in fiscal year 2004 for Newton Rapid Transit Handicap Access Improvements, Massachusetts shall be available for making handicap accessibility improvements to the Auburndale Station in Newton, MA.

k/ H. Rept. 108-671. Amounts made available in fiscal year 2004 to Barry County Transit for replacement maintenance equipment shall be available for bus diagnostic equipment, service equipment, and computer hardware, software, and related equipment.

l/ H. Rept. 108-671. Amounts made available in fiscal year 2004 to Clinton County Transit, Michigan for a bus purchase shall be available for the purchase of scheduling software.

m/ H. Rept. 108-671. Amounts made available in fiscal year 2004 to Manistee County Transportation, Inc. for replacement buses shall be made available for a replacement service truck and facility renovations.

n/ SEC 531. Unobligated funds in an amount not to exceed $4,500,000 that were designated to the North Country County Consortium, New York project in the conference report accompanying Public Law 108-99 under the Job Access and Revere Commute Account shall be transferred to and administered under the bus category of the Capital Investment Grants Account and available for North County Country Bus and Bus Related Equipment.

o/ H. Rept. 108-671. Amounts made available to the City of Monrovia, California for a natural gas vehicle fueling facility in fiscal year 2002 shall be made available for the construction of a bus transit facility along the Gold Line Foothill Extension. Funds shall be extended for obligation for one year.

p/ SEC. 169. Notwithstanding any other provision of law, any unobligated funds made available under the bus category of the Capital Investment Account in prior year Appropriations Acts for the Greater New Haven Transit District Fuel Cell and Electric Bus project or CNT/alternative fuel vehicle project shall be transferred to and administered under the Transit Planning and Research account, subject to such terms and conditions as the Secretary deems appropriate. [Amount transferred is $990,029]

q/ H. Rept. 108-671. Funds made available in fiscal year 2002 for Cab Care, St. Louis, Missouri shall be made available for St. Louis Metro Transit Agency, St. Louis, Missouri. The availability for such funds for obligation shall be extended through fiscal year 2005.

r/ H. Rept. 108-792. Unobligated balances from amounts made available in fiscal year 2002 to Area VII Agency on Aging Bus and Bus Facility and Ravalli County Council on Aging Bus an Bus Facility shall be combined with and made available for Statewide Buses and Bus Facilities.

s/ SEC. 170. Notwithstanding any other provision of law, any unobligated funds made available to the Matanuska Susitna Borough under "Federal Transit Administration, Buses and Bus Facilities" shall be available for expenditure on ferry boat and ferry facilities and related expenses as part of the Port MacKenzie Intermodal Facility project

t/ H. Rept. 108-792. Amounts previously obligated for the South Street Station Project in fiscal year 1996 and 1997 shall be made available for the South Bend Bus Operations Center Project in South Bend, Indiana

u/ H. Rept. 108-671. The Department of Transportation and Related Agencies Appropriations Act, 1999, provided $750,000 for the Philadelphia, Regional Transportation System for Elderly and Disabled. The Committee understands that the original grant recipient has been unable to use the funds provided. Therefore, the Committee directs the Southeastern Pennsylvania Transportation Authority (SEPTA) shall serve as grant recipient and administering agency for the purpose of carrying out the original intent of this project.

v/ H. Rept. 108-792. House retained language regarding Detroit bus and bus facilities should read "Public Law 106-69" instead of "Public Law 106-109."

w/ H. Rept. 108-671. Funds provided to Detroit, Michigan for transfer terminal facilities under buses and bus facilities in Public Law 106-109 [see note v/] and Public Law 108-199 may be available to Detroit for the replacement, rehabilitation, or construction of bus-related facilities. [Note: Because the earmark in Public Law 106-69 was in law, not report language, this clarification is limited by the intent of the original earmark, which is for transfer terminal facilities.]

x/ The conference report (H. Rpt. 108-10) accompanying the FY 2003 DOT Appropriations Act (Pub. L. 108-7) designated $100,000 for bus acquisition for Houston, Missouri. It is the intent of the conferees that these funds be available to "'Houston buses and bus facilities' to allow for the purchase and renovation or purchase of a building to house transit vehicles."

y/ The conference Report (H. Rpt. 108-10) accompanying the FY 2003 DOT Appropriations Act (Pub. L. 108-7) designated $200,000 for the Santa Fe Bus facility renovation in New Mexico. It is the intent of the conferees that these funds be available to the "Santa Fe Bus facility."

z/ The conference Report (H.R. Rpt. 104-785) accompanying the FY 1997 DOT Appropriations Act (Pub. L. 104-205) provided $1,000,000 to the Virginia Beach intermodal facility, Virginia. It is the intent of the conferees that these funds be available for the "Virginia Beach intermodal facility and bus rapid transit project."

FEDERAL TRANSIT ADMINISTRATION

TABLE 11

FY 2005 SECTION 5309 NEW STARTS ALLOCATIONS

STATE	PROJECT LOCATION AND DESCRIPTION	ALLOCATION	AVAILABLE ALLOCATION
AK/HI	Hawaii and Alaska Ferry Boats	$10,213,632	$6,709,696
AL	Birmingham, Alabama, Transit Corridor	992,000	651,680
AR	Little Rock, Arkansas, River Rail Streetcar Project	3,472,000	2,280,879
AZ	Phoenix, Arizona, Central Phoenix/East Valley Corridor	74,400,000	48,875,989
CA	San Francisco, California, BART Extension to San Francisco Airport	99,200,000	65,167,985
CA	Los Angeles, California, East Side Light Light Rail Transit System	59,520,000	39,100,791
CA	Los Angeles Gold Line Foothill Extension	496,000	325,840
CA	Los Angeles, California, MOS3 Metro Rail (North Hollywood)	669,702	439,951
CA	San Diego, California, Mid-Coast Light Rail Extension	992,000	651,680
CA	San Diego, California, Mission Valley East Light Rail Extension	80,986,880	53,203,143
CA	San Diego, California, Oceanside - Escondido Rail Corridor	54,560,000	35,842,392
CA	San Francisco, California, Muni Third Street Light Rail Project	9,920,000 a/	6,516,798
CA	Santa Clara County, California, Silicon Valley Rapid Transit Corridor	2,480,000	1,629,200
CO	Denver, Colorado, Southeast Corridor LRT	79,360,000	52,134,388
CT	Stamford, Connecticut, Urban Transitway, Phase 2	2,976,000	1,955,040
FL	Fort Lauderdale, Florida, South Florida Commuter Rail Upgrades	11,318,230	7,435,345
GA	Atlanta, Georgia, North Springs (North Line Extension)	263,287	172,963
IL	Chicago, Illinois, Metra Commuter Rail Expansions and Extensions	51,584,000	33,887,352
IL	Chicago, Illinois, Douglas Branch Reconstruction	84,320,000	55,392,787
IL	Chicago, Illinois, Ravenswood Line Extension	39,680,000	26,067,194
IN	South Shore Commuter Rail Service, Indiana	2,480,000	1,629,200
LA	New Orleans, Louisiana, Canal Street Streetcar Project	16,613,047	10,913,698
MA	Boston, Massachusetts, Silver Line III	2,976,000	1,955,040
MD	Baltimore, Maryland, Central Light Rail Double Track	28,777,920	18,905,232
MD	Washington, DC/Metropolitan Area, Largo Extension	76,156,450	50,029,863
MN	Minneapolis, Minnesota, Hiawatha Light Rail Project	33,428,865	21,960,602
MN	Minneapolis, Minnesota, Northstar Commuter Rail Project	4,960,000	3,258,399
MO	St. Louis, Missouri, Metro Link St. Clair Extension	59,953	39,385
NC	Charlotte, North Carolina, South Corridor Light Rail Project	29,760,000	19,550,395
NC	Raleigh, North Carolina, Triangle Transit Authority Regional Rail Project	19,840,000	13,033,597
NJ	New Jersey Trans-Hudson Midtown Corridor	1,190,400	782,016
NJ	Northern New Jersey, Newark-Elizabeth Rail Line MOS-1	316,907	208,187
NJ	Northern, New Jersey Hudson - Bergen MOS-1	1,354,949	890,114
NJ	Northern, New Jersey Hudson - Bergen MOS-2	99,200,000	65,167,985
NV	CATRAIL RTC Rail Project, Nevada	992,000	651,680
NV	Las Vegas, Nevada, Resort Corridor Fixed Guideway Project	29,760,000	19,550,395
NY	New York, New York, Long Island Rail Road Eastside Access	99,200,000	65,167,979
OH	Cleveland, Ohio, Euclid Corridor Transportation Project	24,800,000	16,291,996
OR	Portland, Oregon, Interstate MAX Light Rail Extension	23,292,160	15,301,443
OR	I-5/I-205/SR250, Transit Loop, Washington and Oregon	1,488,000	977,520
OR	Washington County, Oregon, Wilsonville to Beaverton Commuter Rail Project	8,928,000	5,865,119
PA	Philadelphia, Pennsylvania, Schuylkill Valley MetroRail	9,920,000	6,516,798
PA	Pittsburgh, Pennsylvania, North Shore Light Rail Connector	54,560,000	35,842,392
PA	Pittsburgh, Pennsylvania, Stage II Light Rail Transit Reconstruction	1,131,666	743,431
PA	Harrisburg, Pennsylvania, Corridor One	1,984,000	1,303,360
PR	San Juan, Puerto Rico, Tren Urbano Rapid Transit System	44,263,040	29,077,955
RI	Rhode Island, Integrated Intermodal Project	5,952,000	3,910,079
TN	Nashville, Tennesse, East Corridor Commuter Rail	1,984,000	1,303,360
TX	Capital Metro-Bus Rapid Transit Texas	992,000	651,680
TX	Dallas, Texas, NW/SE Extension	8,432,000	5,539,279
TX	Houston Advanced Metro Transit Plan, Texas	8,432,000	5,539,279
UT	Regional Commuter Rail (Weber County to Salt Lake City), Utah	7,936,000	5,213,439
UT	Salt Lake City, Utah, CBD to University LRT	1,138,219	747,736
UT	Salt Lake City, Utah, Medical Center Extension	8,765,421	5,758,315
VA	Dulles Corridor Rapid Transit Project, Virginia	24,800,000	16,291,996
VA	Norfolk, Virginia, Light Rail Transit Project	1,984,000	1,303,360
WA	Seattle, Washington, Central Link Initial Segment	79,360,000	52,134,388
WA	Sound Transit Sounder Commuter Rail, Lakewood to Nisqually, Washington	3,968,000	2,606,719
---	Unallocated amount to be distributed	11,016,268	7,236,976
	TOTAL ALLOCATION	**$1,449,596,996**	**$952,291,480**

a/ SEC. 174. Hereafter, notwithstanding any other provision of law, for the purpose of calculating the non-New Starts share of the total project cost of both phases of San Francisco Muni's Third Street Light Rail Transit project, the Secretary of Transportation shall include all non-New Starts contributions made towards Phase 1 of the two-phase project for engineering, final design and construction, and also shall allow non-New Starts funds expended on one element or phase of the project to be used to meet the non-New Starts share requirement of any element or phase of the project: Provided further, That none of the funds provided in this Act for the San Francisco Muni Third Street Light Rail Transit Project shall be obligated if the Federal Transit Administration determines that the project is found to be 'not recommended' after evaluation and computation of revised transportation system user benefit data.

FEDERAL TRANSIT ADMINISTRATION

TABLE 12

PRIOR YEAR UNOBLIGATED SECTION 5309 NEW START ALLOCATIONS

STATE	PROJECT LOCATION AND DESCRIPTION	FY 2003 UNOBLIGATED ALLOCATIONS	FY 2004 UNOBLIGATED ALLOCATIONS	TOTAL UNOBLIGATED ALLOCATIONS	
AK/HI	Alaska/Hawaii Ferry Project	$7,706,298	$10,133,105	$17,839,403	a/ c/
AL	Birmingham- Transit Corridor Project	1,967,165	3,444,626	5,411,791	
AR	Little Rock River Rail Streetcar Project	744,187	2,952,537	3,696,724	
CA	Phase II, LA to Pasadena Metro Gold Line Light Rail Project	0	3,936,715	3,936,715	
CA	San Diego, California, Mission Valley East Light Rail Transit Extension	0	26,563,707	26,563,707	
CA	San Diego, California, Oceanside - Escondido Rail Project	0	47,240,585	47,240,585	
CA	San Jose, California, Silicon Valley Rapid Transit Corridor	0	1,968,358	1,968,358	
CO	Denver, Colorado, Southeast Corridor LRT (T-REX)	0	19,616,283	19,616,283	
CT	Bridgeport Intermodal Transportation Center	2,458,956	0	2,458,956	
CT	Metro North Rolling Stock	3,934,330	0	3,934,330	
CT	Stamford Urban Transitway Project	0	3,936,715	3,936,715	
DE	Wilmington-Downtown Transit Connector Project (Commuter Rail Improvements)	4,953,216	0	4,953,216	
DE	Wilmington Train Station Improvements	1,967,165	1,476,268	3,443,433	
FL	Fort Lauderdale Tri-County Commuter Rail Upgrades	0	4,514,198	4,514,198	
GA	Atlanta, Georgia, Northwest Corridor BRT	0	2,115,407	2,115,407	
LA	New Orleans Canal Street Car Line Project	0	11,175,644	11,175,644	
MA	Boston-North Shore Corridor Project	332,450	0	332,450	
MA	Boston Silver Line Phase III	0	1,968,358	1,968,358	
MA	Boston-South Boston Piers Transitway Project	669,820	0	669,820	
MA/NH	Lowell, MA - Nashua, NH Commuter Rail Project	2,950,747	0	2,950,747	
MD	Baltimore, Maryland, Central Light Rail Double Track Project	0	16,346,896	16,346,896	
MD	MARC Commuter Rail Improvements Project	11,557,093	0	11,557,093	
ME	Maine Marine Highway	0	1,525,477	1,525,477	
ME	Yarmouth to Auburn Line, Maine	0	984,179	984,179	
MN	Minneapolis Rice, Northstar Corridor Commuter Rail Project	4,917,912	5,659,028	10,576,940	
NC	Charlotte South Corridor Transitway Project	0	2,942,442	2,942,442	
NC	Raleigh-Durham-Chapel Hill-Triangle Transit Project	0	2,247,984	2,247,984	
NC	Western North Carolina Rail Passenger Service	0	984,179	984,179	
NV	Las Vegas Resort Corridor Fixed Guideway Project	6,885,077	19,683,577	26,568,654	
OH	Cleveland-Euclid Corridor Improvement Project	400,000	10,825,967	11,225,967	
OK	Northern Oklahoma Regional Multimodal Transportation System	0	2,952,537	2,952,537	
PA	Philadelphia-Reading SEPTA Schuylkill Valley Metro Project	8,852,242	13,778,504	22,630,746	
PA	Scranton to New York City, New York Passenger Rail Service	1,967,165	2,460,447	4,427,612	e/
RI	Integrated Intermodal Project, Rhode Island	0	2,952,537	2,952,537	
TN	Memphis, Tennessee, Medical Center Rail Extension	0	9,101,281	9,101,281	
TX	Houston-Advanced Transit Program	0	1,961,629	1,961,629	
TX	Dallas, Texas, North Central Light Rail Extension	0	9,259,540	9,259,540	
UT	Regional Commuter Rail (Weber County to Salt Lake City), Utah	0	3,678,052	3,678,052	
UT	Salt Lake City, Utah, Medical Center LRT Extension	0	30,178,231	30,178,231	
VA	Dulles Corridor Project	26,064,934	19,683,577	45,748,511	
VA	Virginia Railway Express	0	2,952,537	2,952,537	
VT	Burlington-Middlebury Commuter Rail Project	----------	----------	----------	d/
VT	Vermont Transportation Authority Rolling Stock	----------	----------	----------	d/
WA	Puget Sound RTA Sounder Commuter Rail Project	15,397,954	0	15,397,954	
WI	Kenosha-Racine-Milwaukee Commuter Rail Project	0	3,198,581	3,198,581	
	TOTAL UNOBLIGATED ALLOCATION	**$103,726,711**	**$304,399,688**	**$408,126,399**	

FEDERAL TRANSIT ADMINISTRATION

TABLE 12

PRIOR YEAR UNOBLIGATED SECTION 5309 NEW START ALLOCATIONS

STATE	PROJECT LOCATION AND DESCRIPTION	FY 2003 UNOBLIGATED ALLOCATIONS	FY 2004 UNOBLIGATED ALLOCATIONS	TOTAL UNOBLIGATED ALLOCATIONS
Fiscal Years 2000, 2001 and 2002 Allocations Extended in FY 2005 Conference Report (House Rpt. 108-792)				
AL	Birmingham, Alabama, Transit Corridor			$6,933,242
DC	Dulles Corridor Project			24,750,327
HI	Honolulu, Hawaii, Bus Rapid Transit Project			8,900,000 b/
IN	Northeast Indianapolis, Indiana, Downtown Corridor Project			5,228,042
MD	Maryland (MARC) Commuter Rail Improvements Projects			5,880,157
NM	Albuquerque, NM-Light Rail Project			4,811,650
PA	Philadelphia, Pennsylvania-Schuylkill Valley Metro Project			8,910,118
PA	Philadelphia SEPTA Cross County Metro Project			1,981,286
WI	Kenosha-Racine-Milwaukee Rail Extension Project			3,723,677
	Total Extended Allocations			**$71,118,499**

a/ SEC. 165. Funds made available for Alaska or Hawaii ferry boats or ferry terminal facilities pursuant to 49 U.S.C. 5309(m)(2)(B) may be used to construct new vessels and facilities, or to improve existing vessels and facilities, including both the passenger and vehicle-related elements of such vessels and facilities, and for repair facilities: Provided, That not more than $3,000,000 of the funds made available pursuant to 49 U.S.C. 5309(m)(2)(B) may be used by the State of Hawaii to initiate and operate a passenger ferryboat services demonstration project to test the viability of different intra-island and inter-island ferry boat routes and technology: Provided further, That notwithstanding 49 U.S.C. 5302(a)(7), funds made available for Alaska or Hawaii ferry boats may be used to acquire passenger ferry boats and to provide passenger ferry transportation services within areas of the State of Hawaii under the control or use of the National Park Service.

b/ SEC. 171. Notwithstanding any other provision of law, $8,900,000 of the funds made available under the new fixed guideway systems category of the Capital Investment Grants account in Public Law 107-87 for the `Honolulu, Hawaii, bus rapid transit project' shall be made available to the City and County of Honolulu for replacement, rehabilitation, and purchase of buses and related equipment and the construction of bus-related facilities under 49 U.S.C. 5309 and shall remain available to the City and County of Honolulu for those purposes until expended: Provided, that any remaining unobligated balance from said project in Public Law 107-87 shall be transferred for any eligible activity under Title 23 of the United States Code, and administered under that Title, for use on improvements to the Kapolei Interchange Complex and shall remain available until expended: Provided further, That funds made available in Public Law 108-10 for `Hawaii: BRT Systems, Appurtenances and Facilities' shall be generally available for bus and bus facilities by the City and County of Honolulu [Amount transferred $2,980,157].

c/ SEC. 172. Notwithstanding any other provision of law, the Navy may receive funds from the State of Hawaii for the procurement of passenger ferry boats to provide passenger ferry transportation services for the Arizona War Memorial.

d/ SEC. 175. Funds made available for the Burlington-Bennington, Vermont Commuter Rail project in Public Law 106-346, the Burlington-Middlebury, Vermont Commuter Rail project and Vermont Transportation Authority Rolling Stock in Public Law 108-7 that remain unobligated, and funds made available for the Burlington-Essex, Vermont commuter rail project in Public Laws 105-277 and 105-66 that remain unexpended shall be transferred to the Federal Railroad Administration and made available to upgrade and improve the publicly-owned Vermont Rail Infrastructure from Bennington to Burlington with a northern terminus in Essex Junction: Provided, That the Federal share shall be 80 percent of the total cost of the project and funds shall remain available until expended [Amount transferred (FY 2003 - Burlington - Middlebury $1,475,374) and (FY 2003 - Vermont Transportation Authority Rolling Stock $491,791)].

e/ SEC. 179. Of the funds made available under the heading `Federal Transit Administration--Discretionary Grants' in Public Laws 102-388 and 103-122 for the Hawthorne-Warwick Commuter Rail Project, $4,000,000 shall be available for the Scranton, Pennsylvania, NY City Rail Service Fixed Guideway Project to be carried out in accordance with 49 U.S.C. 5309, $1,100,000 shall be made available to study the feasibility of utilizing diesel multiple unit rolling stock on MOS-3 of the Hudson Bergen Light Rail Transit System to be carried out in accordance with 49 U.S.C. 5309, and $6,000,000 shall be transferred to the Federal Railroad Administration and made available for the New York and Susquehanna and Western Rail Road Diesel Multiple Unit Compliance and Demonstration Project to be carried out under terms and conditions as determined by the Secretary: Provided, That the Federal share shall be 80 percent of the net project cost of that demonstration project and funds for that project shall remain available until expended.

FEDERAL TRANSIT ADMINISTRATION

TABLE 13

FY 2005 SECTION 5310 ELDERLY AND PERSONS WITH DISABILITIES APPORTIONMENTS

STATE	APPORTIONMENT	AVAILABLE APPORTIONMENT
Alabama	$1,650,319	$1,116,602
Alaska	245,633	203,423
American Samoa	60,555	56,862
Arizona	1,723,473	1,164,160
Arkansas	1,071,700	740,445
California	9,921,776	6,493,838
Colorado	1,207,854	828,958
Connecticut	1,175,039	807,625
Delaware	363,533	280,069
District of Columbia	317,549	250,175
Florida	6,339,460	4,164,990
Georgia	2,395,977	1,601,351
Guam	158,717	146,919
Hawaii	492,379	363,832
Idaho	471,058	349,971
Illinois	3,683,483	2,438,352
Indiana	1,952,252	1,312,887
Iowa	1,020,426	707,112
Kansas	917,676	640,315
Kentucky	1,523,636	1,034,246
Louisiana	1,517,060	1,029,971
Maine	551,948	402,557
Maryland	1,611,142	1,091,133
Massachusetts	2,130,002	1,428,442
Michigan	3,068,922	2,038,829
Minnesota	1,423,374	969,066
Mississippi	1,074,681	742,383
Missouri	1,865,720	1,256,633
Montana	396,480	301,488
N. Mariana Islands	61,506	57,480
Nebraska	618,306	445,696
Nevada	749,534	531,007
New Hampshire	473,239	351,388
New Jersey	2,701,617	1,800,046
New Mexico	679,716	485,618
New York	6,366,911	4,182,835
North Carolina	2,676,455	1,783,688
North Dakota	319,310	251,320
Ohio	3,584,027	2,373,697
Oklahoma	1,258,480	861,869
Oregon	1,168,623	803,454
Pennsylvania	4,225,614	2,790,789
Puerto Rico	1,458,633	991,988
Rhode Island	478,628	354,892
South Carolina	1,441,426	980,802
South Dakota	349,212	270,759
Tennessee	1,997,567	1,342,346
Texas	5,899,696	3,879,101
Utah	613,923	442,847
Vermont	302,258	240,235
Virgin Islands	151,963	142,528
Virginia	2,105,191	1,412,312
Washington	1,794,704	1,210,466
West Virginia	814,808	573,441
Wisconsin	1,641,405	1,110,808
Wyoming	262,113	214,136
TOTAL	**$94,526,689**	**$63,848,182**

FEDERAL TRANSIT ADMINISTRATION

TABLE 14

FY 2005 SECTION 5311 NONURBANIZED AREA FORMULA APPORTIONMENTS, AND SECTION 5311(b)(2) RURAL TRANSIT ASSISTANCE PROGRAM (RTAP) APPORTIONMENTS

STATE	SECTION 5311 APPORTIONMENT	SECTION 5311(b)(2) APPORTIONMENT	AVAILABLE SECTION 5311 APPORTIONMENT	AVAILABLE SECTION 5311(b)(2) APPORTIONMENT
Alabama	$6,978,860	$116,803	$4,713,881	$75,114
Alaska	972,688	72,220	657,003	46,443
American Samoa	159,554	11,184	107,771	7,193
Arizona	3,404,552	90,271	2,299,609	58,052
Arkansas	5,048,203	102,472	3,409,816	65,898
California	10,727,747	144,630	7,246,072	93,010
Colorado	3,030,855	87,498	2,047,195	56,268
Connecticut	1,551,423	76,516	1,047,911	49,206
Delaware	703,397	70,221	475,110	45,158
Florida	6,996,634	116,935	4,725,886	75,199
Georgia	8,846,033	130,663	5,975,065	84,027
Guam	431,129	13,200	291,207	8,489
Hawaii	1,046,108	72,765	706,595	46,794
Idaho	1,922,040	79,267	1,298,245	50,975
Illinois	7,468,816	120,440	5,044,822	77,453
Indiana	7,434,653	120,186	5,021,746	77,290
Iowa	5,045,087	102,449	3,407,711	65,883
Kansas	4,123,403	95,607	2,785,158	61,483
Kentucky	6,892,852	116,164	4,655,786	74,704
Louisiana	5,384,375	104,967	3,636,884	67,503
Maine	2,676,285	84,866	1,807,701	54,576
Maryland	2,782,268	85,652	1,879,287	55,081
Massachusetts	1,988,387	79,759	1,343,059	51,292
Michigan	9,357,164	134,457	6,320,309	86,467
Minnesota	6,148,482	110,639	4,153,001	71,150
Mississippi	6,028,731	109,750	4,072,114	70,579
Missouri	6,975,170	116,776	4,711,388	75,097
Montana	1,860,367	78,809	1,256,587	50,681
N. Mariana Islands	20,960	10,156	14,157	6,531
Nebraska	2,523,616	83,732	1,704,580	53,847
Nevada	896,619	71,655	605,622	46,080
New Hampshire	1,904,810	79,139	1,286,606	50,893
New Jersey	1,839,641	78,655	1,242,588	50,582
New Mexico	2,664,396	84,777	1,799,670	54,519
New York	9,669,001	136,771	6,530,940	87,956
North Carolina	11,943,227	153,653	8,067,069	98,812
North Dakota	1,145,749	73,505	773,898	47,269
Ohio	11,256,465	148,555	7,603,194	95,534
Oklahoma	5,478,101	105,663	3,700,191	67,950
Oregon	4,025,063	94,877	2,718,734	61,014
Pennsylvania	11,335,018	149,138	7,656,253	95,909
Puerto Rico	924,388	71,862	624,379	46,213
Rhode Island	334,755	67,485	226,110	43,398
South Carolina	5,954,820	109,202	4,022,191	70,226
South Dakota	1,560,313	76,582	1,053,916	49,248
Tennessee	7,587,849	121,323	5,125,223	78,021
Texas	16,865,722	190,193	11,391,978	122,311
Utah	1,350,963	75,028	912,510	48,249
Vermont	1,402,132	75,408	947,072	48,493
Virgin Islands	302,482	12,245	204,312	7,875
Virginia	6,587,072	113,895	4,449,247	73,244
Washington	4,429,004	97,876	2,991,577	62,942
West Virginia	3,601,785	91,735	2,432,830	58,993
Wisconsin	7,021,440	117,119	4,742,641	75,318
Wyoming	1,024,486	72,605	691,990	46,690
TOTAL	**$249,635,140**	**$5,208,000**	**$168,616,397**	**$3,349,182**

FEDERAL TRANSIT ADMINISTRATION

Table 15

FY 2005 NATIONAL PLANNING AND RESEARCH PROGRAM ALLOCATIONS

STATE	PROJECT	ALLOCATION	AVAILABLE ALLOCATION
AL	Center for composite manufacturing	$917,898 a/	$590,291
AL	Nanostructured catalysts for hydrogen fueled cells (CAVT UA)	917,898 a/	590,291
CA	CALSTART/WestStart Advanced Transit Technology	1,932,416 a/	1,242,716
DC	CTAA Nationwide Joblinks	496,000	318,972
DC	Project ACTION	2,976,000	1,913,835
GA	Southern Fuel Cell Coalition -- Center for Transportation & the Environment	446,400	287,075
IL	Transit access CUMTD initiative	496,000	318,972
KS	Transportation Research Program, Wichita State University	992,000	637,945
MA	PVTA Electric Bus	618,373 a/	397,669
MD	Transit technology career ladder partnership training program	496,000	318,972
MI	Automation Alley BuSolutions	545,600	350,870
MN	Hennepin County Community Works	1,190,400	765,534
MN	hOurCar	74,400	47,846
ND	NDSU Transit Center for Small Urban Areas	396,800	255,178
NJ	Phillipsburg to Northeastern NJ/NYC commuter rail study	396,800	255,178
OK	Fischer-Tropsch clean diesel technology demonstration	845,432 a/	543,688
OK	Oklahoma Transportation Center	1,984,000	1,275,889
PA	Chester County transit security training facility	124,000	79,743
PA	Lehigh Carbon Community College transit first responder training facility	74,400	47,846
PA	National Bio-Terrorism Civilian Medical Response Center	719,200	462,510
RI	Pawtucket train depot rehabilitation initiative	233,120	149,917
SD	Sitting Bull College bus facility planning	64,480	41,466
TN	Advanced Transportation Technology Institute	124,000	79,743
TN	Low cost carbon fiber production technology, Univ of Tennessee	434,794 a/	279,611
WI	Northern Wisconsin Rural Transportation Study	59,520	38,277
WV	WVU exhaust emissions testing initiative	1,352,691 a/	869,901
---	National Technical Assistance Center for Senior Transportation	1,984,000	1,275,889
	TOTAL ALLOCATION	**$20,892,622**	**$13,435,824**

a/ A 2.6 percent reduction for the Small Business and Innovative Research Program Research (SBIR) was applied to all research and development projects. The total SBIR deduction is $187,378.

FEDERAL TRANSIT ADMINISTRATION

TABLE 16

FY 2005 JOB ACCESS AND REVERSE COMMUTE PROGRAM ALLOCATIONS

STATE	PROJECT AND DESCRIPTION	ALLOCATION	AVAILABLE ALLOCATION
AK	Craig Transit JARC, Alaska	$49,559	$38,168
AK	Kenai Peninsula JARC, Alaska	594,709	458,022
AK	MASCOT Mat-su Valley, Alaska	198,236	152,674
AK	Mobility Coalition, Alaska	495,590	381,684
AK	North Star Borough Transit JARC, Alaska	74,338	57,252
AK	Seward Transit JARC, Alaska	198,236	152,674
AK	Veterans Wheelchair Olympic Games, Alaska	99,118	76,337
AL	ARC of Madison County, Alabama	346,913	267,179
AL	Easter Seals Central Alabama JARC	495,590	381,684
AL	Gees Bend Ferry, Alabama	1,982,362	1,526,738
AL	Jefferson County JARC, Alabama	2,973,544	2,290,108
AL	Mobile Association for Retarded Citizens, Alabama	247,796	190,843
CA	AC Transit - CalWorks Job Center (Bay Area), California	4,955,906	3,816,847
CA	Guaranteed Ride Program, California	594,709	458,022
CA	Job Access Transit, Hayward, California	495,590	381,684
CA	Platform Additions and Extensions on San Bernardino Line, California	1,982,362	1,526,738
CA	Sacramento Region JARC, California	1,982,362	1,526,738
CO	Colorado Transit Coalition JARC	3,221,339	2,480,951
CT	Connecticut Statewide JARC	2,477,954	1,908,424
DC	Georgetown, Washington, D.C. Metro Connection	1,238,976	954,211
DC	Washington Metro Job Access Initiative	2,477,954 a/	1,908,424
DE	Delaware Statewide Welfare to Work	743,386	572,527
FL	Family Service Centers of Clearwater Ways to Work, FL	495,590	381,684
FL	Hillsborough Area Regional Transit JARC, Florida	99,118	76,337
GA	Chatham JARC, Georgia	1,982,362	1,526,738
GA	Dooly-Crisp Unified Transportation System, Georgia	198,236	152,674
IA	Iowa Statewide JARC	1,982,362	1,526,738
IL	Illinois Statewide JARC	495,590	381,684
IL	Operation Ride DuPage, DuPage County, Illinois	495,590	381,684
IL	Ray Graham Association for People With Disabilities, Illinois	128,854	99,238
IN	IndyFlex, Indiana	1,238,976	954,211
IN	Muncie Indiana Transit System JobConnection, Indiana	138,765	106,871
KS	MARC, Kansas	495,590	381,684
KS	Wichita Transit Authority JARC, Kansas	396,473	305,348
KS	Wyandotte Co/KCK JARC, Kansas	495,590	381,684
KY	Louisville JARC, Kentucky	1,139,859	877,875
LA	Louisiana Statewide JARC	2,477,954	1,908,424
MA	Brockton Area Transit Authority JARC, Massachusetts	594,709	458,022
MA	SRTA Elderly Van Service, Massachusetts	396,473	305,348
MD	Maryland Statewide JARC	2,676,190	2,061,098
ME	Maine Statewide JARC Program	1,486,772	1,145,054
MI	DCC Community Health & Safety Transport Project, Michigan	297,354	229,011
MI	Detroit JARC, Michigan	1,734,568	1,335,897
MI	Flint MTA JARC, Michigan	1,982,362	1,526,738
MI	North Oakland Transportation Authority, Michigan	148,677	114,505
MN	hOurCar Car-Sharing Program, Minnesota	198,236	152,674
MN	Metropolitan Council Job Access, Minneapolis, Minnesota	991,182	763,370
MN	Ways to Work, Minnesota	1,957,583	1,507,655
MO	Metro St. Louis Downtown Shuttle Trolley, Missouri	941,622	725,201
MO	Missouri Statewide JARC	5,451,497	4,198,532
ND	Metropolitan Access to Jobs Initiative, Fargo, North Dakota	99,118	76,337

FEDERAL TRANSIT ADMINISTRATION

TABLE 16

FY 2005 JOB ACCESS AND REVERSE COMMUTE PROGRAM ALLOCATIONS

STATE	PROJECT AND DESCRIPTION	ALLOCATION	AVAILABLE ALLOCATION
ND	Metropolitan Access to Jobs Initiative, North Dakota	99,118	76,337
NJ	New Jersey Statewide JARC	5,203,702	4,007,690
NM	City of Santa Fe, New Mexico	396,473	305,348
NM	New Mexico Statewide JARC	2,131,040	1,641,245
NV	Statewide Small Urban and Rural Public/Specialized Transportation Services (JARC), Nevada	1,982,362	1,526,738
NY	Broome County Transit, Binghamton, New York	247,796	190,843
NY	Central New York Job Access Reverse Commute, New York	495,590	381,684
NY	Poughkeepsie JARC, New York	49,559	38,168
NY	Rochester-Genesee Regional Transportation Authority, New York	743,386	572,527
NY	Suffolk County United Veterans, New York	198,236	152,674
NY	Tompkins Consolidated Area Transit JARC, New York	99,118	76,337
OH	Cleveland JARC, Ohio	743,386	572,527
OH	Akron METRO Job Access and Reverse Commute, Ohio	297,354	229,011
OH	Toledo JARC, Ohio	346,913	267,179
OH	Western Reserve Transit Job Access Program, Ohio	743,386	572,527
OK	Oklahoma Statewide JARC	7,929,461	6,106,970
OR	Portland Regional JARC, Oregon	2,279,717	1,755,750
OR	Rogue Valley Transit District JARC, Oregon	198,236	152,674
OR	Salem Keizer Transit JARC, Oregon	198,236	152,674
PA	Philadelphia Unemployment Project (PUP), Pennsylvania	1,486,772	1,145,054
PA	Pittsburgh JARC, Pennsylvania	2,775,307	2,137,434
PA	Port Authority of Allegheny County JARC, Pennsylvania	6,194,883	4,771,059
PA	Red Rose Transit Authority, Lancaster, Pennsylvania	627,418	483,213
PA	SEPTA JARC, Pennsylvania	3,469,134	2,671,793
RI	Rhode Island Statewide JARC	1,635,449	1,259,560
TN	Children's Health Fund JARC, Tennessee	495,590	381,684
TN	Knox County CAC Transportation Program, Tennessee	495,590	381,684
TN	Knoxville Area Transit Job Access Service, Tennessee	743,386	572,527
TN	Tennessee Statewide JARC	5,947,088	4,580,217
TX	Abilene JARC, Texas	148,677	114,505
TX	El Paso JARC, Texas	495,590	381,684
TX	Island Transit JARC, Texas	594,709	458,022
TX	Lubbock, Citibus JARC, Texas	346,913	267,179
TX	VIA Metropolitan JARC, Texas	743,386	572,527
VA	Bedford Ride, Virginia	59,470	45,801
VA	Patrick Henry Community College, Virginia	24,779	19,084
VT	Vermont Statewide JARC	991,182	763,370
WA	North Central Puget Sound Vehicle Trip Reduction Incentives, Washington	991,182	763,370
WA	Okanogan County Senior Citizens JARC, Washington	224,433	172,850
WA	Washington State Transit Car Sharing Job Access, Washington	1,982,362	1,526,738
WA	WorkFirst Transportation Initiative, Washington	1,584,473	1,220,300
WI	Jumpstart, Wisconsin	287,443	221,377
WI	Ways to Work, Wisconsin	991,182	763,370
WI	Wisconsin Statewide JARC	2,577,071	1,984,760
WV	West Virginia Statewide JARC	991,182	763,370
----	Community Transportation JOBLINKS Demonstration	3,270,899	2,519,120
DC	Technical Assistance Support & Performance Reviews of the JARC Grants Program	297,600	229,200
	TOTAL ALLOCATIONS	**$124,000,000**	**$95,500,000**

a/ The conferees direct FTA to permit WMATA to reprogram funds currently and previously appropriated for WMATA's JARC program to be used to provide ADA paratransit service to persons who are eligible for such service under the Americans with Disabilities Act of 1990.

FEDERAL TRANSIT ADMINISTRATION

TABLE 17

PRIOR YEAR UNOBLIGATED SECTION 3037 JARC CONGRESSIONAL ALLOCATIONS

STATE	PROJECT AND DESCRIPTION	UNOBLIGATED ALLOCATIONS
FY 2002 Unobligated Congressional Allocations		
AR	Central Arkansas Transit Authority	$500,000
CA	Del Norte County, California	73,400
IL	Bloomington to Normal, Illinois, Wheels to Work	304,250
IL	DuPage County, Illinois	130,048
NY	Columbia County, New York	100,000
ND	Oglala Sioux Tribe, North Dakota	150,000
TX	Austin, Texas	500,000
VA	Winchester, Virginia	1,000,000
	Subtotal FY 2002 Unobligated Allocations	*$2,757,698*
FY 2003 Unobligated Congressional Allocations		
AK	Alaska Mobility Coalition	$495,335
AK	Kenai Peninsula Transit Planning	495,335
CA	East Palo Alto Shuttle Service	693,470
CA	LA County UTRANS	495,335
CA	Los Angeles County; MTA Ride Share program	866,837
CA	Low-Income LIFT Program SF MTC	990,671
CA	Southern California Regional Rail Authority, Metrolink double tracking	990,671
CO	City of Colorado Springs, CO	100,284
CO	Roaring Fork Transportation Authority, CO	103,989
DC	WMATA (DC, Maryland, and Virginia)	2,105,176 a/
DE	Delaware Welfare to Work Initiative	743,003
FL	Jacksonville Trans. Authority Choice Ride Program	1,609,840
FL	Key West	990,671
GA	Chatham	433,914
IL	DuPage County Coordinated Paratransit Program	495,335
IL	Ways-to-Work -- IL - MO	341,783
IN	Fort Wayne's Hanna Creighton Transit Center	743,003
IN	IndyGo Service	990,671
KS	KS Paratransit Vehicle	29,720
MD	Maryland Statewide (Montgomery County, $600,000)	86,063
MO	Metrolink Corridor Access to Jobs	2,972,013
NC	Community Transportation Association of America's Joblinks Employment Transportation Initiative	990,671
NC	Wake County Coordinated Transportation System	767,770
NH	Lancaster - Littleton Transit Project	49,534
NY	Chemung County transit	74,300
NY	Columbia County	99,067
NY	Ithaca Service	74,300
NY	MTA - Long Island Bus	247,668
NY	Orange County	99,067
NY	Tompkins Consolidated Area Transit, Tompkins County	297,201
OH	STEP-UP Job Access Project Dayton	123,834
OR	Salem Area Transit	495,335
PA	SEPTA	1,584,402
TN	State of Tennessee	48,859
TX	Austin Capital Metros Access	2,476,677
TX	Corpus Christi	1,213,572

FEDERAL TRANSIT ADMINISTRATION

TABLE 17

PRIOR YEAR UNOBLIGATED SECTION 3037 JARC CONGRESSIONAL ALLOCATIONS

STATE	PROJECT AND DESCRIPTION	UNOBLIGATED ALLOCATIONS
TX	East Texas Just Transportation Alliance (ETJTA): Tyler Transit	198,134
VA	Fairfax County, Short-Term Transit Imporvements	1,585,073
VA	Technical Assistance Support & Performance Reviews of the JARC Grants Program	206,876
WA	WA WorkFirst Initiative	3,606,115
WI	Wisconsin Statewide	5,151,488
WV	West Virginia Statewide	531,871
	Subtotal FY 2003 Unobligated Allocations	*$36,694,933*
FY 2004 Unobligated Congressional Allocations		
AK	Craig Transit Service JARC Program	$49,563
AK	North Pole Transit System JARC Program	74,344
AK	Sitka Community RIDE	148,689
AK	Seward Transit Service JARC Program	198,252
AK	Mobility Coalition	495,630
AL	Alabama Disabilities Advocacy Program [ADA] Rural Transportation Services	495,630
AL	Easter Seals West Alabama JARC Program	991,260
AL	Jefferson County Job Access Reverse Commute Projects	2,973,779
CA	City of Irwindale Senior Transportation Services	64,432
CA	Mendocino Transit Authority Job Access Reverse Commute	99,126
CA	Guaranteed Ride Home, Santa Clarita	396,504
CA	Metro Link San Bernadino Platform Extension	991,260
CA	Ways to Work	991,260
CA	Sacramento Region Job Access Reverse Commute Project	1,486,890
CT	Connecticut Statewide	3,221,594
DC	Washington Metropolitan Area Transit Authority	991,260 a/
DC	Georgetown, Washington DC - Metro Connection	526,260
DC	Community Transportation Association of America's National Joblinks program	2,478,149
DE	Delaware Statewide Welfare to Work	743,445
FL	Key West, Florida Job Access Reverse Commute	495,630
FL	Jacksonville, FL Transportation Authority, Community Transportation Coordinator Program	2,973,779
GA	Chatham Area Transit Job Access Reverse Commute (JARC)	991,260
IA	Iowa Statewide JARC	991,260
IL	Ray Graham Association for People With Disabilities	123,907
IL	Illinois Statewide JARC	198,252
IL	Operation Ride DuPage	495,630
IN	IndyGo IndyFlex Job Access Reverse Commute Program	743,445
KS	ADA Mobility Planning	361,810
KS	JARC Program, MidAmerica Regional Council Kansas City	495,630
KS	Topeka Metropolitan Transit Authority JARC	693,882
KS	Unified Government of Wyandotte County JARC	1,362,982
KY	Bowling Green KY Housing Authority Reverse Access Commute	297,378
MA	Holyoke Community Access to Employment and Adult Education	74,344
MA	Worcester Regional Transit Authority JARC Projects	148,689
MD	VoxLinx Voice-Enabled Transit Trip Planner	1,288,638
MD	Maryland Statewide JARC	3,965,039
MI	Flint Transit Job Access Reverse Commute Program	185,861
MN	Metropolitan Council Job Access	495,630
MO	Kansas City Job Access Partnership	495,630

FEDERAL TRANSIT ADMINISTRATION

TABLE 17

PRIOR YEAR UNOBLIGATED SECTION 3037 JARC CONGRESSIONAL ALLOCATIONS

STATE	PROJECT AND DESCRIPTION	UNOBLIGATED ALLOCATIONS
MO	Missouri Statewide JARC	3,300,039
ND-MN	Metropolitan Access to Jobs Initiative Fargo, North Dakota & Moorehead Minnesota	99,126
NJ	New Jersey Community Development Corporation Transportation Opportunity Center	297,378
NJ	New Jersey Statewide JARC	4,708,484
NV	Lake Tahoe Public Transit Services JARC Project	99,126
NV	Nevada Statewide small urban and rural Job Access Reverse Commute	99,126
NY	Ulster County Area Transit Rural Feeder Service	49,563
NY	Tompkins Consolidated Area Transit	74,344
NY	Broome County Transit JARC	99,126
NY	Chautauqua County Job Access/Reverse Commute Project	99,126
NY	City of Hornell Job Access Reverse Commute Program	99,126
NY	City of Poughkeepsie Underserved Population Bus Service	99,126
NY	Essex County Job Access Reverse Commute Project	99,126
NY	Oneida/Herkimer County JARC Project	99,126
NY	Orange County JARC Project	99,126
NY	Rochester-Genesee Regional Transportation Authority JARC	185,861
NY	Franklin County Job Access Reverse Commute Project	198,252
NY	MTA Long Island Bus Job Access Reverse Commute Project	247,815
NY	Central New York Regional Transportation Authority JARC	396,504
NY	Capital District Transportation Authority JARC	495,630
NY	New York Statewide JARC	991,260
NY	North Country County Consortium	456,299 b/
OH	Nile/Trumbull Transit	198,252
OH	Akron Metro Regional Transit Authority Job Access and Reverse Commute Program	123,907
OH	Central Ohio Transit Authority's [COTA] Job Access & Mobility Management Program	495,630
OH	Toledo Job Access Reverse Commute	144,559
OH	Greater Cleveland Regional Transit Authority JARC Program	743,445
OK	Oklahoma Statewide JARC	666,279
OR	Jackson-Josephine County JARC	198,252
OR	Salem Area Transit Reverse Commute Project	396,504
PA	Port Authority of Allegheny County JARC Program	3,612,150
PA	SEPTA JARC Program	4,460,669
SD	Cheyenne River Sioux Tribe Public Bus System	247,815
TN	Monroe County TN Job Access Reverse Commute Program	99,126
TN	Access to Healthcare for Children-Children's Health Fund	371,722
TN	Knox County Community Action Committee Transportation Program	396,504
TN	Knoxville Area Transit Job Access	545,193
TN	Tennessee Statewide JARC	5,334,243
TX	Lubbock Citibus Job Access Reverse Commute Program	227,990
TX	South East Texas Transit Facility Improvements and Bus Replacements	297,378
TX	Ways to Work, Tarrant County	297,378
TX	Corpus Christi Welfare to Work Project	372,714
TX	Galveston Job Access Reverse Commute Program	470,848
TX	San Antonio VIA Metropolitan Transit JARC Program	545,193
TX	El Paso Sun Metro Job Access Program	768,226
TX	Texas Colonias JARC Initiative	2,379,023
VA	Bedford Ride	59,476

FEDERAL TRANSIT ADMINISTRATION

TABLE 17

PRIOR YEAR UNOBLIGATED SECTION 3037 JARC CONGRESSIONAL ALLOCATIONS

STATE	PROJECT AND DESCRIPTION	UNOBLIGATED ALLOCATIONS
VA	Bay Area Transit	198,252
VA	Virginia Beach Paratransit Services	198,252
VA	Virginia Regional Transportation Association	198,252
VA	Technical Assistance Support & Performance Reviews of the JARC Grants Program	226,163
VA	Statewide Ways to Work	991,260
VA	Technical Assistance Support & Performance Reviews of the JARC Grants Program	226,163
VT	Chittenden County Transportation Authority JARC Program	103,256
WA	Link Transit JARC Program	232,151
WA	Washington State Transit car-sharing Job Access	495,630
WA	Vanpooling Enhancement and Expansion Project	743,445
WA	Vehicle Trip Reduction Incentives	991,260
WA	I-405 Congestion Relief Project	1,982,519
WI	Wisconsin Statewide JARC	2,577,275
WV	West Virginia Statewide JARC	991,260
	Subtotal FY 2004 Unobligated Allocations	*$80,296,306*
	TOTAL UNOBLIGATED ALLOCATIONS	**$119,748,937**

a/ The conferees direct FTA to permit WMATA to reprogram funds currently and previously appropriated for WMATA's JARC program to be used to provide ADA paratransit service to persons who are eligible for such service under the Americans with Disabliities Act of 1990.

b/ $4,500,000 of North Country County Consortium was transferred to the bus program by General Provision Sec. 531 of PL 108- 447.

[FR Doc. 04–28408 Filed 12–28–04; 8:45 am]
BILLING CODE 4910–57–C



Federal Register

Wednesday,
December 29, 2004

Part V

Department of Health and Human Services

Food and Drug Administration

26 CFR Parts 201 and 610

Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review; Withdrawl; Final Rule and Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201 and 610

[Docket No. 1980N–0208]

Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review; Withdrawal

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule and final order; withdrawal.

SUMMARY: The Food and Drug Administration (FDA) published in the **Federal Register** of January 5, 2004 (69 FR 255), a final rule and final order (January 2004 final rule and final order) amending the biologics regulations in response to the report and recommendations of the Panel on Review of Bacterial Vaccines and Toxoids with Standards of Potency. On January 8, 2004 (69 FR 1320), a correction document was published to correct the effective date from ''January 4, 2003'', to ''January 4, 2005.'' On February 13, 2004 (69 FR 7114), FDA issued a correction document to correct typographical errors in the reference section of the January 2004 final rule and final order.

On October 27, 2004, the United States District Court for the District of Columbia (the Court) issued a memorandum opinion vacating and remanding the January 2004 final rule and final order to FDA for reconsideration, following an appropriate notice and comment period. Because the January 2004 final rule and final order were vacated by the Court, FDA is withdrawing the January 2004 final rule and final order.

In a proposed rule and proposed order published concurrently with this document, FDA is providing notice and an opportunity to comment on the Bacterial Vaccine and Toxoids efficacy review.

DATES: The final rule and final order published at 69 FR 255 (January 5, 2004), is withdrawn as of December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Astrid Szeto, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

AUTHORITY: Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, the final rule and final order published on January 5, 2004 (69 FR 255) is withdrawn.

Dated: December 22, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28459 Filed 12–23–04; 11:16 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201 and 610

[Docket No. 1980N–0208]

Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule and proposed order.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the biologics regulations in response to the report and recommendations of the Panel on Review of Bacterial Vaccines and Toxoids (the Panel). The Panel reviewed the safety, efficacy, and labeling of bacterial vaccines and toxoids with standards of potency, bacterial antitoxins, and immune globulins. On the basis of the Panel's findings and recommendations, FDA is proposing to classify these products as Category I (safe, effective, and not misbranded), Category II (unsafe, ineffective, or misbranded), or Category IIIB (off the market pending completion of studies permitting a determination of effectiveness). On December 13, 1985, FDA proposed to amend the biologics regulations and proposed to classify the bacterial vaccines and toxoids. After reviewing the Panel's report and comments on the proposal, FDA published a final rule and final order on January 5, 2004. The court vacated the January 5, 2004 (69 FR 255) final rule. Therefore, elsewhere in this issue of the **Federal Register**, FDA is withdrawing the January 5, 2004, final rule. FDA is issuing this proposed rule and proposed order again to provide notice and to give interested persons an opportunity to comment.

DATES: Submit written or electronic comments on the proposed rule and proposed order by March 29, 2005.

ADDRESSES: You may submit comments, identified by Docket No. 1980N–0208, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.
- E-mail: *fdadockets@oc.fda.gov*. Include Docket No. in the subject line of your e-mail message.
- FAX: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD-ROM submissions]: Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the agency name and Docket No. for this proposal. All comments received will be posted without change to *http://www.fda.gov/ohrms/dockets/default.htm*, including any personal information provided. For detailed instructions on submitting comments and additional information on the process, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.fda.gov/ohrms/dockets/default.htm* and insert the docket number found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Astrid Szeto, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Introduction

In this document, FDA is issuing a proposed rule and proposed order to:

1. Categorize those bacterial vaccines and toxoids licensed before July 1972 according to the evidence of their safety and effectiveness, thereby determining whether they may remain licensed and on the market;

2. Issue a proposed response to recommendations made in the Panel's report.[1] These recommendations concern conditions relating to active components, labeling, tests required before release of product lots, product standards, or other conditions considered by the Panel to be necessary or appropriate for assuring the safety and effectiveness of the reviewed products;

3. Revise the standard for potency of Tetanus Immune Globulin in § 610.21 (21 CFR 610.21); and

4. Apply the labeling requirements in §§ 201.56 and 201.57 (21 CFR 201.56 and 201.57) to bacterial vaccines and toxoids by amending the implementation dates in § 201.59 (21 CFR 201.59).

[1] The Panel was convened on July 12, 1973, in an organizational meeting, followed by multiple working meetings until February 2, 1979. The Final Report of the Panel was completed in August 1979.

II. Background

A. History of the Review

In the **Federal Register** of February 13, 1973 (38 FR 4319), FDA issued procedures for the review by independent advisory review panels of the safety, effectiveness, and labeling of biological products licensed before July 1, 1972. This process was eventually codified in § 601.25 (21 CFR 601.25) (38 FR 32048 at 32052, November 20, 1973). Under the panel assignments published in the **Federal Register** of June 19, 1974 (39 FR 21176), FDA assigned the biological product review to one of the following groups: (1) Bacterial vaccines and bacterial antigens with ''no U.S. standard of potency,'' (2) bacterial vaccines and toxoids with standards of potency, (3) viral vaccines and rickettsial vaccines, (4) allergenic extracts, (5) skin test antigens, and (6) blood and blood derivatives.

Under § 601.25, FDA assigned responsibility for the initial review of each of the biological product categories to a separate independent advisory panel consisting of qualified experts to ensure objectivity of the review and public confidence in the use of these products. Each panel was charged with preparing an advisory report to the Commissioner of Food and Drugs which was to: (1) Evaluate the safety and effectiveness of the biological products for which a license had been issued, (2) review their labeling, and (3) identify the biological products that are safe, effective, and not misbranded. Each advisory panel report was also to include recommendations classifying the products reviewed into one of three categories.

- Category I designating those biological products determined by the panel to be safe, effective, and not misbranded.
- Category II designating those biological products determined by the panel to be unsafe, ineffective, or misbranded.
- Category III designating those biological products determined by the panel not to fall within either Category I or Category II on the basis of the panel's conclusion that the available data were insufficient to classify such biological products, and for which further testing was therefore required. Category III products were assigned to one of two subcategories. Category IIIA products were those that would be permitted to remain on the market pending the completion of further studies. Category IIIB products were those for which the panel recommended license revocation on the basis of the

panel's assessment of potential risks and benefits.

In its report, the panel could also include recommendations concerning any condition relating to active components, labeling, tests appropriate before release of products, product standards, or other conditions necessary or appropriate for a biological product's safety and effectiveness.

In accordance with § 601.25, after reviewing the conclusions and recommendations of the review panels, FDA would publish in the **Federal Register** a proposed order containing: (1) A statement designating the biological products reviewed into Categories I, II, IIIA, or IIIB, (2) a description of the testing necessary for Category IIIA biological products, and (3) the complete panel report. Under the proposed order, FDA would propose to revoke the licenses of those products designated into Category II and Category IIIB. After reviewing public comments, FDA would publish a final order on the matters covered in the proposed order.

In the **Federal Register** of November 21, 1980 (45 FR 77135), FDA issued a notice of availability of the Panel's final report. In the **Federal Register** of December 13, 1985 (50 FR 51002), FDA issued a proposed rule that contained the full Panel report[2] and FDA's response to the recommendations of the Panel (the December 1985 proposal) (Ref. 1). In the December 1985 proposal, FDA proposed regulatory categories (Category I, Category II, or Category IIIB as defined previously in this document) for each bacterial vaccine and toxoid reviewed by the Panel, and responded to other recommendations made by the Panel. The public was offered 90 days to submit comments in response to the December 1985 proposal.

The definition of Category IIIA as described previously in this document, was applied at the time of the Panel's review and served as the basis for the Panel's recommendations. In the **Federal Register** of October 5, 1982 (47 FR 44062), FDA revised § 601.25 and codified § 601.26, which established procedures to reclassify those products in Category IIIA into either Category I or Category II based on available evidence of effectiveness. The Panel recommended that a number of biological products be placed into Category IIIA. FDA assigned the review of those products previously classified into Category IIIA to the Vaccines and Related Biological Products Advisory Committee. FDA has addressed the review and reclassification of bacterial vaccines and toxoids classified into Category IIIA through a separate administrative procedure (see the **Federal Register** of May 15, 2000 (65 FR 31003), and May 29, 2001 (66 FR 29148)). Therefore, FDA does not further identify or discuss in this document any bacterial vaccines and toxoids classified into Category IIIA.

B. Comments on the December 1985 Proposal

FDA received four letters of comments in response to the December 1985 proposal. One letter from a licensed manufacturer of bacterial vaccine and toxoid products concerned the confidentiality of information it had submitted for the Panel's review. As provided in § 601.25(b)(2), FDA considered the extent to which the information fell within the confidentiality provisions of 18 U.S.C. 1905, 5 U.S.C. 552(b), or 21 U.S.C. 331(j), before placing the information in the public docket for the December 1985 proposal. Another comment from a member of the Panel provided an update of important scientific information related to bacterial vaccines and toxoids that had accrued since the time of the Panel's review. The letter did not comment on the December 1985 proposal nor did it contend that the newly available information should result in modification of the Panel's recommendations or FDA's proposed actions. FDA's responses to the comments contained in the remaining two letters follow.

(Comment 1) One comment from a licensed manufacturer of bacterial vaccines and toxoids objected to the proposed classification into Category IIIA of several of its products for use in primary immunization.

As described previously in this document, FDA is considering those products proposed for Category IIIA in a separate rulemaking process.[3] This proposal does not propose any action regarding the further classification of those products proposed for Category IIIA, including those proposed for Category IIIA for primary immunization. All manufacturers and others in the general public have been offered additional opportunity to comment on the final categorization of specific Category IIIA products in the above-noted process.

(Comment 2) In response to FDA's proposal that Pertussis Immune Globulin (Human) be placed into Category IIIA because of insufficient evidence of efficacy, one comment stated that FDA should permit manufacture of Pertussis Immune Globulin (Human) for export only. The comment noted that medical practices in other countries may differ from those in the United States and that in some countries Pertussis Immune Globulin (Human) plays an important role in the augmentation of therapy with antibiotics in young, very ill infants with pertussis.

Since that time, FDA has revoked all licenses for Pertussis Immune Globulin (Human) at the requests of the individual manufacturers. The FDA Export Reform and Enhancement Act of 1996 (Public Law 104–134, as amended by Public Law 104–180) amended provisions of the Federal Food, Drug, and Cosmetic Act (the act) pertaining to the export of certain unapproved products. Section 802 of the act contains requirements for the export of products not approved in the United States. Under these provisions, products such as Pertussis Immune Globulin (Human) can be exported to other countries, if the requirements of section 802 are met.

(Comment 3) One comment concerned the generic order and wording for product labeling recommended by the Panel and which FDA proposed to adopt in its response to the Panel recommendation. The comment recommended that a labeling section concerning ''Overdose'' be included only when circumstances dictate. The comment stated that because all biological products are prescription products administered by health care providers, the risk of overdose should be greatly reduced.

FDA agrees that, in many cases, a labeling section in part 201 (21 CFR part 201) entitled ''Overdosage'' is not necessary. Section 201.56(d)(3) (21 CFR 201.56(d)(3)) of the labeling regulations provides that the labeling may omit any section or subsection of the labeling format (outlined in § 201.56) if clearly inapplicable. The ''Overdosage'' section, provided for in § 201.57(i) of the regulations, is omitted for many bacterial vaccine and toxoid products.

(Comment 4) One letter of comment objected to several statements made by the Panel and provided in the written report, but did not object to or comment on FDA's proposed responses to the Panel's recommendations.

FDA is not considering comments on the Panel's report in this proposed rule

[2] In addition to publication in the **Federal Register** of December 13, 1985 (50 FR 51002), FDA is making the full Panel report available on FDA's Website at *http://www.fda.gov/ohrms/dockets/default.htm*. A copy of the Panel report is also available at the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

[3] *See* the **Federal Register** of May 15, 2000 (65 FR 31003), containing the proposed order to reclassify Category IIIA products into Category I and Category II based on the review and recommendation of the Vaccines and Related Biological Products Advisory Committee.

and proposed order. The Panel's recommendations are not binding but represent the scientific opinions of a panel of experts. FDA believes that the agency should not modify the statements and recommendations of the Panel as provided in its report, including through public comment. The purpose of the opportunity for comment is to allow comment on FDA's responses to the Panel's report and not on the Panel's report directly.

In this proposal, FDA is again providing the opportunity for comment on FDA's proposals.

III. Proposed Categorization of Products—Proposed Order

Category I. Licensed biological products determined to be safe and effective and not misbranded. Table 1 of this document is a list of those products proposed in December 1985 by FDA for Category I. Under the ''Comments'' column, FDA notes those products for which FDA's proposed category differs from that recommended by the Panel. Products for which the licenses were revoked before the December 1985 proposal and that were already identified in the December 1985 proposal are not listed in the tables below. Products for which the licenses were revoked after the December 1985 proposal are identified in the ''Comments'' column. FDA proposes to adopt Category I as the final category for the following products.

TABLE 1.—CATEGORY I

Manufacturer/License No.	Products	Comments
Alpha Therapeutic Corp., License No. 744	Tetanus Immune Globulin (Human)	Although the Panel recommended that Tetanus Immune Globulin (Human), manufactured by Alpha Therapeutic Corp., be placed in Category IIIB, FDA proposed that it be placed in Category I[1]
Advance Biofactures Corp., License No. 383	Collagenase	
Armour Pharmaceutical Co., License No. 149	Tetanus Immune Globulin (Human)	Manufacturer's licensed name is now Centeon L. L. C. On July 26, 1999, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer
Connaught Laboratories, Inc., License No. 711	Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, and Diphtheria Antitoxin	On December 9, 1999, a name change to Aventis Pasteur, Inc. with an accompanying license number change to 1277 was granted to Connaught Laboratories, Inc. FDA revoked the licenses for these products at the request of the manufacturer on July 6, 2001, and August 2, 2001, respectively
Connaught Laboratories, Ltd., License No. 73	BCG Vaccine, Botulism Antitoxin (Types A, B, and E), Botulism Antitoxin (Type E), Tetanus Toxoid	On February 24, 2000, a name change to Aventis Pasteur, Ltd. with an accompanying license number change to 1280 was granted. On December 21, 2000, FDA revoked the license for Tetanus Toxoid at the request of the manufacturer
Cutter Laboratories, Inc., License No. 8	Plague Vaccine, Tetanus Immune Globulin (Human)	On October 5, 1994, the manufacturing facilities and process for Plague Vaccine were transferred to Greer Laboratories, Inc., License No. 308. On May 24, 1995, FDA revoked Cutter's license for Plague Vaccine at the request of Cutter, the previous manufacturer; the license for Greer Labs, Inc. remains in effect. Bayer Corporation now holds the license for Tetanus Immune Globulin (Human) under License No. 8
Eli Lilly & Co., License No. 56	Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed	On December 2, 1985, FDA revoked the license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed at the request of the manufacturer
Glaxo Laboratories, Ltd., License No. 337	BCG Vaccine	On July 17, 1990, FDA revoked the license for BCG Vaccine at the request of the manufacturer
Istituto Sieroterapico Vaccinogeno Toscano Sclavo, License No. 238	Diphtheria Antitoxin, Diphtheria Toxoid Adsorbed, Tetanus Toxoid Adsorbed	On July 17, 1990, FDA revoked the license for Diphtheria Antitoxin at the request of the manufacturer. On July 27, 1993, FDA revoked the licenses for Diphtheria Toxoid Adsorbed and Tetanus Toxoid Adsorbed at the request of the manufacturer
Lederle Laboratories, Division American Cyanamid Co., License No. 17	Cholera Vaccine, Tetanus Immune Globulin (Human)	On December 23, 1992, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer. On October 23, 1996, FDA revoked the license for Cholera Vaccine at the request of the manufacturer

TABLE 1.—CATEGORY I—Continued

Manufacturer/License No.	Products	Comments
Massachusetts Public Health Biologic Laboratories, License No. 64	Diphtheria and Tetanus Toxoids Adsorbed, Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Tetanus and Diphtheria Toxoids Adsorbed (For Adult Use), Tetanus Antitoxin, Tetanus Immune Globulin (Human), Tetanus Toxoid Adsorbed, Typhoid Vaccine	Although the Panel recommended that Tetanus Antitoxin be placed in Category IIIB, FDA proposed in the December 1985 proposal that it be placed in Category I. On October 26, 1988, FDA revoked the license for Typhoid Vaccine at the request of the manufacturer. On January 10, 1994, FDA revoked the license for Tetanus Antitoxin at the request of the manufacturer. On December 22, 1998, FDA revoked the license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed at the request of the manufacturer. On August 3, 2000, FDA revoked the license for Diphtheria and Tetanus Toxoids Adsorbed at the request of the manufacturer
Merck Sharp & Dohme, Division of Merck & Co., Inc, License No. 2	Tetanus Immune Globulin (Human)	The manufacturer is now known as Merck & Co., Inc. On January 31, 1986, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer
Michigan Department of Public Health, License No. 99	Anthrax Vaccine Adsorbed, Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Pertussis Vaccine Adsorbed, Typhoid Vaccine	On November 11, 1998, a name change to BioPort Corporation (BioPort) with an accompanying license number change to 1260 was granted. The license for Typhoid Vaccine was revoked on June 25, 1985, at the request of the manufacturer. The license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed was revoked at the request of the manufacturer (BioPort) on November 20, 2000. The license for Pertussis Vaccine Adsorbed was revoked at the request of the manufacturer (BioPort) on April 22, 2003
Parke-Davis, Division of Warner-Lambert Co., License No. 1	Tetanus Immune Globulin (Human)	On November 19, 1983, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer
Swiss Serum and Vaccine Institute Berne, License No. 21	Tetanus Antitoxin	Although the Panel recommended that Tetanus Antitoxin be placed in Category IIIB, FDA proposes that it be placed in Category I. On March 13, 1980, FDA revoked the license for Tetanus Antitoxin at the request of the manufacturer
Travenol Laboratories, Inc., Hyland Therapeutics Division, License No. 140	Tetanus Immune Globulin (Human)	The manufacturer is now known as Baxter Healthcare Corporation. On July 27, 1995, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer
University of Illinois, License No. 188	BCG Vaccine	On May 29, 1987, FDA revoked the license for BCG Vaccine at the request of the manufacturer
Wyeth Laboratories, Inc, License No. 3	Cholera Vaccine, Tetanus Immune Globulin (Human), Typhoid Vaccine (acetone inactivated), Typhoid Vaccine (heat-phenol inactivated)	On December 23, 1992, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer. On September 11, 2001, FDA revoked the licenses for Cholera Vaccine and Typhoid Vaccine (both forms) at the request of the manufacturer

[1] The Panel recommended that Tetanus Immune Globulin (Human) manufactured by Alpha Therapeutic Corporation be placed in Category IIIB, products for which available data are insufficient to classify their safety and effectiveness and which should not continue in interstate commerce. In the December 1985 proposal, the agency disagreed with the Panel's recommendation as the product was manufactured only as a partially processed biological product and was intended for export and further manufacture (50 FR 51002 at 51007). The agency continues to agree with this approach inasmuch as the manufacturer continues to export the product as a partially processed biological. The product is not available as a finished product in the United States.

Category II. Licensed biological products determined to be unsafe or ineffective or to be misbranded and which should not continue in interstate commerce. FDA does not propose that any products be placed in Category II.

Category IIIB. Biological products for which available data are insufficient to classify their safety and effectiveness and should not continue in interstate commerce. Table 2 of this document is a list of those products proposed by FDA for Category IIIB. We have not listed products for which FDA revoked the licenses before the December 1985 proposal but we identified them in the proposal. Products for which FDA revoked the licenses after the December 1985 proposal are identified in the ''Comments'' column.

FDA has revoked the licenses of all products proposed by FDA for Category IIIB. FDA proposes Category IIIB as the final category for the listed products.

TABLE 2.—CATEGORY IIIB

Manufacturer/License No.	Products	Comments
Istituto Sieroterapico Vaccinogeno Toscano Sclavo, License No. 238	Diphtheria Toxoid	On July 27, 1993, FDA revoked the license for Diphtheria Toxoid at the request of the manufacturer
Connaught Laboratories, Inc., License No. 711	Diphtheria Toxoid, Pertussis Vaccine	On June 21, 1994, FDA revoked the license for Diphtheria Toxoid and on December 19, 1997, FDA revoked the license for Pertussis Vaccine, in both cases at the request of the manufacturer
Massachusetts Public Health Biologic Laboratories, License No. 64	Tetanus Toxoid	On October 11, 1989, FDA revoked the license for Tetanus Toxoid at the request of the manufacturer
Merck Sharpe & Dohme, Division of Merke & Co., Inc., License No. 2	Cholera Vaccine, Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Tetanus and Diphtheria Toxoids Adsorbed (For Adult Use), Tetanus Toxoid, Typhoid Vaccine	The manufacturer is now known as Merck & Co., Inc. On January 31, 1986, FDA revoked the licenses for all the listed products at the request of the manufacturer
Michigan Department of Public Health, License No. 99	Diphtheria Toxoid Adsorbed	On November 12, 1998, the name of the manufacturer was changed to BioPort, and the license number was changed to 1260. On November 20, 2000, FDA revoked the license for Diphtheria Toxoid Adsorbed at the request of the manufacturer
Wyeth Laboratories, Inc., License No.3	Diphtheria Toxoid, Diphtheria Toxoid Adsorbed, Pertussis Vaccine	On May 19, 1987, FDA revoked the licenses for all listed products at the request of the manufacturer

IV. Anthrax Vaccine Adsorbed—Proposed Order

A. The Panel Recommendation that Anthrax Vaccine Adsorbed be Placed in Category I (Safe, Effective, and Not Misbranded)

In its report, the Panel found that Anthrax Vaccine Adsorbed (AVA), manufactured by Michigan Department of Public Health (MDPH, now BioPort) was safe and effective for its intended use and recommended that the vaccine be placed in Category I. In the December 1985 proposal, FDA agreed with the Panel's recommendation. During the comment period for the December 1985 proposal, FDA received no comments opposing the placement of AVA into Category I.

The Panel based its evaluation of the safety and efficacy of AVA on two studies: A well-controlled field study conducted in the 1950s, ''the Brachman study'' (Ref. 1a) and an open-label safety study conducted by the National Center for Disease Control (CDC, now the Centers for Disease Control and Prevention) (50 FR 51002 at 51058). The Panel also considered surveillance data on the occurrence of anthrax disease in the United States in at-risk industrial settings as supportive of the effectiveness of the vaccine (50 FR 51002 at 51059). In its proposed determination that the data support the safety and efficacy of AVA, FDA has identified points of disagreement with statements in the Panel report. However, FDA proposes that the data do support the safety and efficacy of the vaccine and, thus, FDA continues to accept the Panel's recommendation and proposes to place AVA in Category I.[4]

On October 12, 2001, a group of individuals filed a citizen petition requesting that FDA find AVA, as currently manufactured by BioPort, ineffective for its intended use, classify the product as Category II, and revoke the license for the vaccine. The petitioners complained that the December 1985 proposal that placed AVA in Category I had not been finalized. FDA responded separately in a written response to the petitioners on August 28, 2002 (Docket No. 2001P–0471), and FDA will not further address those issues in this proposal.

In March 2003, six plaintiffs, known as John and Jane Doe ı1 through ı6, filed suit in the United States District Court for the District of Columbia (the Court) seeking the Court to enjoin the Anthrax Vaccination Immunization Program (AVIP) of the Department of Defense (DoD), and to declare AVA an investigational drug when used for protection against inhalation anthrax. On December 22, 2003, the Court issued a preliminary injunction enjoining inoculations under the AVIP in the absence of informed consent or a Presidential waiver.

In the **Federal Register** of January 5, 2004 (69 FR 255), FDA published a final rule and final order amending the biologics regulations in response to the report and recommendations of the Panel. The final order placed AVA into Category I. Following FDA's issuance of the final rule and final order, the Court lifted the preliminary injunction on January 7, 2004, except as it applied to the six Doe plaintiffs.

On October 27, 2004, the Court issued a memorandum opinion vacating and remanding the January 2004 final rule and final order to FDA for reconsideration, following an appropriate notice and comment period. FDA is reopening the comment period on the entire Bacterial Vaccine and Toxoids efficacy review document for 90 days.

B. Efficacy of Anthrax Vaccine Adsorbed

The Brachman study included 1,249 workers in four textile mills in the northeastern United States that processed imported goat hair. Of these 1,249 workers, 379 received anthrax vaccine, 414 received placebo, 116 received incomplete inoculations of

[4] In October 2000, the Institute of Medicine (IOM) convened the Committee to Assess the Safety and Efficacy of the Anthrax Vaccine. In March 2002, the Committee issued its report: The Anthrax Vaccine: Is It Safe? Does It Work? (Ref. 2). The report concluded that the vaccine is acceptably safe and effective in protecting humans against anthrax.

either vaccine or placebo, and 340 received no treatment but were monitored for the occurrence of anthrax disease as an observational group. The Brachman study used an earlier version of the protective antigen-based anthrax vaccine administered subcutaneously at 0, 2, and 4 weeks and 6, 12, and 18 months. During the trial, 26 cases of anthrax were reported across the four mills: 5 inhalation and 21 cutaneous anthrax cases. Prior to vaccination, the yearly average number of human anthrax cases was 1.2 cases per 100 employees in these mills. Of the five inhalation anthrax cases (four of which were fatal), two received placebo and three were in the observational group. Of the 21 cutaneous anthrax cases, 15 received placebo, 3 were in the observational group, and 3 received anthrax vaccine. Of the three cases in the vaccine group, one case occurred just prior to administration of the third dose, one case occurred 13 months after the individual received the third of the six doses (but no subsequent doses), and one case occurred prior to receiving the fourth dose of vaccine.

In its report, the Panel stated that the Brachman study results demonstrate ''a 93 percent (lower 95 percent confidence limit = 65 percent) protection against cutaneous anthrax'' and that ''inhalation anthrax occurred too infrequently to assess the protective effect of vaccine against this form of the disease.'' (50 FR 51002 at 51058). On the latter point, FDA does not agree with the Panel report. Because the Brachman comparison of anthrax cases between the placebo and vaccine groups included both inhalation and cutaneous cases, FDA has determined that the calculated efficacy of the vaccine to prevent all types of anthrax disease combined was, in fact, 92.5 percent (lower 95 percent confidence interval = 65 percent). The efficacy analysis in the Brachman study includes all cases of anthrax disease regardless of the route of exposure or manifestation of disease. FDA agrees that the five cases of inhalation anthrax reported in the course of the Brachman study are too few to support an independent statistical analysis. However, of these cases, two occurred in the placebo group, three occurred in the observational group, and no cases occurred in the vaccine group. Therefore, we propose the indication section of the labeling for AVA not specify the route of exposure, and the vaccine be indicated for active immunization against *Bacillus anthracis*, independent of the route of exposure.[5]

As stated previously in this document, the Panel also considered epidemiological data—sometimes called surveillance data—on the occurrence of anthrax disease in at-risk industrial settings collected by the CDC and summarized for the years 1962-1974 as supportive of the effectiveness of AVA. In that time period, individuals received either vaccine produced by MDPH, now BioPort, or an earlier version of anthrax vaccine. Twenty-seven cases of anthrax disease were identified. Three cases were not mill employees but people who worked in or near mills; none of these cases had been vaccinated. Twenty-four cases were mill employees; three were partially immunized (one with one dose, two with two doses); the remainder (89 percent) were unvaccinated (50 FR 51002 at 51058). These data provide confirmation that the risk of disease still existed for those persons who were not vaccinated and that those persons who had not received the full vaccination series (six doses) were susceptible to anthrax infection, while no cases occurred in those who had received the full vaccination series.

In 1998, the DoD initiated the Anthrax Vaccination Program, calling for mandatory vaccination of service members. Thereafter, concerns about the vaccine caused the U.S. Congress to direct DoD to support an independent examination of AVA by the IOM. The IOM committee reviewed all available data, both published and unpublished, heard from Federal agencies, the manufacturer, and researchers. The committee in its published report concluded that AVA, as licensed, is an effective vaccine to protect humans against anthrax, including inhalation anthrax (Ref. 2). FDA agrees with the report's finding that certain studies in humans and animal models support the conclusion that AVA is effective against *B. anthracis* strains that are dependent upon the anthrax toxin as a mechanism of virulence, regardless of the route of exposure.[6]

C. Safety of Anthrax Vaccine Adsorbed

CDC conducted an open-label study under an investigational new drug application (IND) between 1967 and 1971 in which approximately 7,000 persons, including textile employees, laboratory workers, and other at-risk individuals, were vaccinated with anthrax vaccine and monitored for adverse reactions to vaccination. The vaccine was administered in 0.5-mL doses according to a 0-, 2-, and 4-week initial dose schedule followed by additional doses at 6, 12, and 18 months with annual boosters thereafter. Several lots, approximately 15,000 doses, of AVA manufactured by MDPH were used in this study period. In its report, the Panel found that the CDC data ''suggests that this product is fairly well tolerated with the majority of reactions consisting of local erythema and edema. Severe local reactions and systemic reactions are relatively rare'' (50 FR 51002 at 51059).

Subsequent to the publication of the Panel's recommendations, DoD conducted a small, randomized clinical study of the safety and immunogenicity of AVA. (See summary in product label. (Ref. 6)) These more recent DoD data as well as post licensure adverse event surveillance data available from the Vaccine Adverse Event Reporting System (VAERS) further support the safety of AVA (Ref. 7). These data are regularly reviewed by FDA, and provided the basis for a description of the types and severities of adverse events associated with administration of AVA included in labeling revisions approved by FDA in January 2002 (Ref. 6).

D. The Panel's General Statement: Anthrax Vaccine, Adsorbed, Description of Product

The Panel report states:

''Anthrax vaccine is an aluminum hydroxide adsorbed, protective, proteinaceous, antigenic fraction prepared from a nonproteolytic, nonencapsulated mutant of the Vollum strain of *Bacillus anthracis*'' (50 FR 51002 at 51058).

FDA would like to clarify that while the *B. anthracis* strain used in the manufacture of BioPort's AVA is the nonproteolytic, nonencapsulated strain identified in the Panel report, it is not a mutant of the Vollum strain but was derived from a B. anthracis culture originally isolated from a case of bovine anthrax in Florida.

E. The Panel's Specific Product Review: Anthrax Vaccine Adsorbed: Efficacy

The Panel report states:

3. *Analysis—a. Efficacy*—(2) *Human.* The vaccine manufactured by the Michigan Department of Public Health has not been employed in a controlled field trial. A similar vaccine prepared by Merck Sharp & Dohme for Fort Detrick was employed by Brachman * * * in a placebo-controlled field trial in

[5] The Panel noted that it would be very difficult, if not impossible, to clinically study the efficacy of any anthrax vaccine (50 FR 51058). Further study raises ethical considerations, and the low incidence and sporadic occurrence of anthrax disease also makes further adequate and well-controlled clinical studies of effectiveness not possible.

[6] For example: The Brachman study (Ref. 1a); the CDC epidemiological data described in the December 1985 proposal; Fellows (2001) (Ref. 3); Ivins (1996) (Ref. 4); Ivins (1998) (Ref. 5).

mills processing imported goat hair * * *. The Michigan Department of Public Health vaccine is patterned after that of Merck Sharp & Dohme with various minor production changes.
(50 FR 51002 at 51059).

FDA has found that contrary to the Panel's statement, the vaccine used in the Brachman study was not manufactured by Merck Sharp & Dohme, but instead this initial version was provided to Dr. Brachman by Dr. G. Wright of Fort Detrick, U.S. Army, DoD (Ref. 1a). The DoD version of the anthrax vaccine used in the Brachman study was manufactured using an aerobic culture method (Ref. 8). Subsequent to the Brachman trial, DoD modified the vaccine's manufacturing process to, among other things, optimize production of a stable and immunogenic formulation of vaccine antigen and to increase the scale of manufacture. In the early 1960s, DoD entered into a contract with Merck Sharp & Dohme to standardize the manufacturing process for large-scale production of the anthrax vaccine and to produce anthrax vaccine using an anaerobic method. Thereafter, in the 1960s, DoD entered into a similar contract with MDPH to further standardize the manufacturing process and to scale up production for further clinical testing and immunization of persons at risk of exposure to anthrax spores. This DoD-MDPH contract resulted in the production of the anthrax vaccine that CDC used in the open-label safety study and that was licensed in 1970.

While the Panel attributes the manufacture of the vaccine used in the Brachman study to Merck Sharp & Dohme, FDA has reviewed the historical development of AVA and concluded that DoD's continuous involvement with, and intimate knowledge of, the formulation and manufacturing processes of all of these versions of the anthrax vaccine provide a foundation for a determination that the MDPH anthrax vaccine is comparable to the original DoD vaccine. See *Berlex Laboratories, Inc. v. FDA*, 942 F. Supp. 19 (D.D.C. 1996). The comparability of the MDPH anthrax vaccine to the DoD vaccine has been verified through potency data that demonstrate the ability of all three versions of the vaccine to protect guinea pigs and rabbits against challenge with virulent *B. anthracis*. In addition, there are data comparing the safety and immunogenicity of the MDPH vaccine with the DoD vaccine. These data, while limited in the number of vaccines and samples evaluated, reveal that the serological responses to the MDPH vaccine and the DoD vaccine were similar with respect to peak antibody response and seroconversion.

F. The Panel's Specific Product Review: Anthrax Vaccine Adsorbed: Labeling

The Panel report states:

3. *Analysis*—d. *Labeling*: The labeling seems generally adequate. There is a conflict, however, with additional standards for anthrax vaccine. Section 620.24 (a) (21 CFR 620.24(a)) defines a total primary immunizing dose as 3 single doses of 0.5 mL. The labeling defines primary immunization as 6 doses (0, 2, and 4 weeks plus 6, 12, and 18 months).

(50 FR 51002 at 51059).

The dosing schedule for AVA has always consisted of six doses, a 0.5-mL dose at 0, 2, and 4 weeks, and then at 6, 12, and 18 months, followed by a subsequent 0.5-mL dose at 1 year intervals to maintain immunity. Prelicensure labels described the vaccination schedule as three initial doses, followed by three additional doses, and yearly subsequent doses, which is consistent with the additional standards of AVA that were originally published in October 1970, immediately before the licensure of AVA. The 1979 labeling referred to ''primary immunization'' as consisting of six injections, with recommended yearly subsequent injections. The 1987 labeling of AVA, subsequent to the Panel's report, described the vaccination schedule as ''primary immunization'' consisting of three doses followed by three additional doses for a total of six doses followed by annual injections. The labeling is not inconsistent with § 620.24(a) (21 CFR 620.24(a)) before it was revoked by FDA in 1996 as part of a final rule that revoked 21 CFR part 620 and other biologics regulations because they were obsolete or no longer necessary (Ref. 9). Thus while use of the term ''primary'' has varied over time in reference to the AVA vaccination schedule, the licensed schedule itself has always consisted of six doses of 0.5 mL administered at 0, 2, and 4 weeks and 6, 12, and 18 months, followed by additional doses on an annual basis to maintain immunity.

V. FDA's Responses to Additional Panel Recommendations

In the December 1985 proposal, FDA responded to the Panel's general recommendations regarding the products under review and to the procedures involved in their manufacture and regulation. Below, FDA responds again with its proposal to the general recommendations.

A. Generic Order and Wording of Labeling; Amendment of § 201.59

The Panel recommended changes to the labeling of the biological products under review. The Panel also recommended a generic order and wording for information in the labeling of bacterial vaccines. In the December 1985 proposal, FDA agreed with the labeling changes recommended by the Panel.

In the December 1985 proposal, FDA proposed that 6 months after publication of a final rule, manufacturers of products subject to this Panel review submit, for FDA's review and approval, draft labeling revised in conformance with the Panel's report and with the regulations. FDA proposed to require that the revised labeling accompany all products initially introduced or initially delivered for introduction into interstate commerce 30 months after the date of publication of the final rule. The proposed labeling review schedule was consistent with the scheduling provided in § 201.59 of the regulations.

Since the time of the Panel's recommendation, FDA has made a number of changes to the labeling regulations and related regulatory policies. FDA has added or revised the requirements in § 201.57 for including in the labeling, in standardized language, the information concerning use during pregnancy, pediatric use, and geriatric use. Section 201.57 requires a specific order and content for drug product labeling. A number of labeling sections included in § 201.57 were not included in the Panel's recommended ordering and wording of the labeling but are now required to help ensure clarity in the labeling. FDA has also provided guidance regarding the wording of sections in which the agency believes complete and consistent language is important. Because FDA regularly monitors labeling for the products subject to this Panel review to determine if the labeling is consistent with applicable labeling requirements, FDA does not believe that a labeling review is necessary at this time. Accordingly, FDA proposes to amend the table in § 201.59 by providing that the labeling requirements in §§ 201.56, 201.57, and 201.100(d)(3) (21 CFR 201.100(d)(3)) become effective on the date 30 months after the date of publication of the final rule. Because FDA regularly monitors the labeling of all products on an ad hoc basis, FDA also proposes to explain in a footnote to the table in § 201.59(a)(3) that specification of a date for submission of

revised product labeling under § 201.59 is unnecessary.

Section 314 of the National Childhood Vaccine Injury Act (NCVIA) of 1986 required FDA to review the warnings, use instructions, and precautionary information that are distributed with each vaccine listed in section 2114 of the Public Health Service Act and to determine whether this information was adequate to warn health care providers of the nature and extent of the dangers posed by such vaccine. Since the December 1985 proposal, FDA has completed this review and labeling has been revised accordingly. FDA is also taking this opportunity to propose updating the table in § 201.59(a)(3) to include the current mail codes for the review of labeling for various biological products.

B. Periodic Review of Product Labeling

In its report, the Panel noted a number of labeling deficiencies. To improve the labeling, the Panel recommended that labeling be reviewed and revised as necessary at intervals of no more than every 2 years.

As discussed in the December 1985 proposal, FDA believes the current system of labeling review will adequately assure accurate labeling. Periodic review of labeling on a set schedule is unnecessary. Section 601.12(f) prescribes when revised labeling must be submitted, either as a supplement for FDA's review or, if changes are minor, in an annual report. In addition, the agency may request revision of labeling when indicated by current scientific knowledge. FDA believes that, by these mechanisms, product labeling is kept up to date, and proposes that a scheduled, routine review of labeling is unnecessary and burdensome for both the agency and manufacturers.

C. Improvement in the Reporting of Adverse Reactions

The Panel recommended that actions be taken to improve the reporting and documentation of adverse reactions to biological products. The Panel particularly noted the need to improve the surveillance systems to identify adverse reactions to pertussis vaccine.

Since publication of the Panel's report, the Vaccine Adverse Event Reporting System (VAERS) was created as an outgrowth of the National Childhood Vaccine Injury Act (NCVIA) and is administered by FDA and Centers for Disease Control and Prevention (CDC). VAERS accepts from health care providers, manufacturers, and the public, reports of adverse events that may be associated with U.S.-licensed vaccines. Health care providers must report certain adverse events included in a Reportable Events Table (Ref. 10) and any event listed in the vaccine's package insert as a contraindication to subsequent doses of the vaccine. Health care providers also may report other clinically significant adverse events. FDA and CDC receive an average of 800 to 1,000 reports each month under the VAERS program. A guidance document is available which explains how to complete the VAERS form (Ref. 11).

D. Periodic Review of Product Licenses

The Panel recommended that all licensed vaccines be periodically reviewed to assure that data concerning the safety and effectiveness of these products are kept current and that licenses be revoked for products which have not been marketed for years or which have never been marketed in the licensed form. The Panel noted that, by limiting the period for which specific vaccines may be licensed, older products would be assured periodic review, and new products for which additional efficacy data are required could be provisionally licensed for a limited time period during which additional data can be generated.

In its proposed response, FDA noted that licensing policies in effect at the time of the review resulted in licenses being held for some products which were never intended to be marketed as individual products or which were no longer being marketed as individual products. FDA had required that manufacturers licensed for a combination vaccine also hold a license for each individual vaccine contained in the combination. For example, a manufacturer of diphtheria, tetanus, and pertussis (DTP) vaccine would also be required to have a license for Diphtheria Toxoid, Tetanus Toxoid, and Pertussis Vaccines. Because this policy is no longer in effect, most licenses are for currently marketed products. In a few cases, there may be no current demand for a product but, for public health reasons, a license continues to be held for the product. There are some vaccines for which there is little current demand but continued licensure could expedite the manufacture and availability of the product in the event an outbreak of the targeted disease should occur. FDA believes that the routine inspection of licensed facilities adequately assures that the information held in product licenses is current and that a routine review of safety and efficacy data is unnecessary and burdensome. The Panel's recommendation that some new vaccines be provisionally licensed for only limited periods of time while additional data are generated is inconsistent with the law that requires a determination that a biologic product is safe, pure, and potent before it is licensed.

E. Compensation for Individuals Suffering Injury From Vaccination

The Panel recommended that compensation from public funds be provided to individuals suffering injury from vaccinations that were recommended by competent authorities, carried out with approved vaccines, and where the injury was not a consequence of defective or inappropriate manufacture or administration of the vaccines.

A compensation program has been implemented consistent with the Panel's recommendation. The NCVIA established the National Vaccine Injury Compensation Program (NVICP) designed to compensate individuals, or families of individuals, who have been injured by childhood vaccines, whether administered in the private or public sector. The NVICP, administered by the Health Resources and Services Administration, Department of Health and Human Services (HHS), is a no-fault alternative to the tort system for resolving claims resulting from adverse reactions to routinely recommended childhood vaccines. The specific vaccines and injuries covered by NVICP are identified in a Vaccine Injury Table that may periodically be revised as new vaccines come into use or new types of potential injuries are identified. The NVICP has resulted in a reduction in the amount of litigation related to injury from childhood vaccines while assuring adequate liability coverage and protection. The NVICP applies only to vaccines routinely recommended for infants and children. Vaccines recommended for adults are not covered unless they are routinely recommended for children as well, e.g., Hepatitis B Vaccine.

F. Public Support for Immunization Programs

The Panel recommended that both FDA and the public support widespread immunization programs for tetanus, diphtheria, and pertussis.

The National Immunization Program is part of CDC and was established to provide leadership to health agencies in planning and implementing immunization programs, to identify unvaccinated populations in the United States, to assess vaccination levels in state and local areas, and to generally promote immunization programs for children, including vaccination against diphtheria, tetanus, and pertussis. A

recent survey shows that nearly 95 percent of children 19 to 35 months of age have received three or more doses of any vaccine that contained diphtheria and tetanus toxoids (i.e., diphtheria and tetanus toxoids and pertussis vaccines (DTP), diphtheria and tetanus toxoids and acellular pertussis vaccines (DTaP) or diphtheria and tetanus toxoids vaccines (DT)) (Ref. 12).

G. Assuring Adequate Supplies of Bacterial Vaccines and Toxoids; Establishment of a National Vaccine Commission

The Panel recommended that FDA work closely with CDC and other groups to assure that adequate supplies of vaccines and passive immunization products continue to be available. The Panel recommended establishment of a national vaccine commission to address such issues.

Since the publication of the December 1985 proposal, the National Vaccine Program was created by Congress (Public Law 99–660) with the National Vaccine Program Office (NVPO) within HHS designated to provide leadership and coordination among Federal agencies as they work together to carry out the goals of the National Vaccine Plan. The National Vaccine Plan provides a framework, including goals, objectives, and strategies, for pursuing the prevention of infectious diseases through immunizations. The National Vaccine Program brings together all of the groups that have key roles in immunizations, and coordinates the vaccine-related activities, including addressing adequate production and supply issues. Despite efforts to assure vaccine availability, shortages may occur (Ref. 13) for a variety of reasons. FDA proposes to continue to work with the NVPO, the National Institutes of Health, CDC, and vaccine manufacturers to help facilitate continued vaccine availability making the establishment of a national vaccine commission unnecessary.

H. Consistency of Efficacy Protocols

The Panel recommended that the protocols for efficacy studies be reasonably consistent throughout the industry for any generic product. To achieve this goal, the Panel recommended the development of industry guidelines that provide standardized methodology for adducing required information.

FDA believes that the standardization of clinical testing methodology for a group of vaccines is often not practical or useful. Because of the variety of possible vaccine types, e.g., live vaccines, killed vaccines, toxoids, bioengineered vaccines, acellular vaccines, and the diversity of populations in which the vaccine may be studied, it is difficult to develop guidance that would apply to more than one or two studies. FDA routinely meets with manufacturers before the initiation of clinical studies to discuss the study and will comment on proposed protocols for efficacy studies. FDA proposes to continue to allow flexibility in selecting appropriate tests, procedures, and study populations for a clinical study while assuring that the necessary data are generated to fulfill the intended objectives of the study.

I. The Effect of Regulations Protecting and Informing Human Study Subjects on the Ability to Conduct Clinical Trials

The Panel expressed concern that the regulations governing informed consent and the protection of human subjects involved in clinical investigations should not establish unnecessary impediments to the goal of obtaining adequate evidence for the safety and effectiveness of a product.

FDA believes that the regulations and policies applying to informed consent and the protection of human subjects do not inhibit the adequate clinical study of a product. FDA notes that whenever the regulations or guidance documents related to these subjects are modified or amended, FDA offers an opportunity for public comment on the revisions. FDA particularly welcomes comments on how appropriate informed consent and protection of human subjects can be maintained while assuring that the development and study of useful products is not inhibited.

J. Standards for Determining the Purity of Diphtheria and Tetanus Toxoids (DTs)

The Panel recommended that standards should be established for purity of both DTs in terms of limits of flocculation (Lf) content per milligram (mg) of nitrogen.

In the December 1985 proposal, FDA agreed that standards should be set. FDA has since determined that this approach is overly restrictive; does not allow FDA to keep pace with advances in manufacturing and technology; and, proposes that standards for determining the purity of DTs not be established. The Center for Biologics Evaluation and Research (CBER) establishes the release specifications for the purity of DTs during the review of a Biologics License Application (BLA). The purity of diphtheria toxoids in currently licensed vaccines is usually at least 1,500 Lf/mg nondialyzable nitrogen. While there are no general standards for tetanus toxoid purity in the United States, CBER has generally required a purity specification of at least 1,000 Lf/mg of nondialyzable nitrogen for tetanus toxoids.

K. Immunogenic Superiority of Adsorbed Toxoids Over Fluid Toxoids

The Panel recommended that the immunogenic superiority of the adsorbed DTs over the fluid (plain) preparations be strongly emphasized in product labeling, especially with regard to the duration of protection.

Tetanus Toxoid fluid, manufactured by Aventis Pasteur, Inc., is the only fluid toxoid product that remains licensed in the United States in 2004. This product is licensed for booster use only in persons over 7 years of age. The current package insert for this product states that, although the rates of seroconversion are essentially equivalent with either type of tetanus toxoid, the adsorbed toxoids induce more persistent antitoxin titers than fluid products.

L. Laboratory Testing Systems for Determining Potency of Tetanus and Diphtheria Toxoids

The Panel noted a need for further studies with tetanus toxoids in a World Health Organization (WHO) sponsored quantitative potency test in animals to establish the conditions under which the test results are reproducible, and to relate these results more closely to those obtained in the immunization of humans. The Panel also recommended the development of an animal or laboratory testing system for diphtheria toxoid that correlates consistently, and with acceptable precision, with primary immunogenicity in humans.

DT-containing vaccines are tested during the licensing process for their ability to induce acceptable levels of protective antibodies in clinical trials in the target populations. Properties of vaccines used in these clinical trials, including potency, also are determined during licensing. The acceptance criteria for commercial lots of these vaccines are set at licensing on the basis of the properties of the vaccines that induced acceptable quantitative/qualitative levels of antibodies. The establishment of a correlation between a specific antibody response and a given assay would require an efficacy trial designed specifically to establish this correlation. This may call for vaccination of humans with sub-optimal doses of vaccine. Such an efficacy study is not feasible for ethical reasons.

The animal potency tests currently required by the WHO, the European Pharmacopoeia (EP), and FDA differ. Despite these differences, the potency

tests have been adequate to ensure sufficient immunogenic activity of the vaccines to induce protective immunity in target populations. However, international efforts to harmonize the diphtheria and tetanus potency tests under development are based on immunogenicity in animals. CBER is currently participating in these international harmonization efforts.

M. Potency Testing of DTs for Pediatric Use

The Panel recommended that the agency require potency testing after combination of the individual toxoid components in DTs for pediatric use.

FDA agrees with the recommendation. All manufacturers and the FDA testing laboratory follow this procedure on products submitted to the agency for release.

N. Potency Requirements for Pertussis Vaccine

The Panel recommended that the regulations concerning the maximum pertussis vaccine dose should be updated to reflect current recommendations and practices. At the time of the Panel review, whole cell pertussis vaccines were in use. Specifically, the Panel recommended that pertussis vaccine have a potency of four protective units per single human dose with the upper estimate of a single human dose not to exceed eight protective units. The Panel also recommended that the total immunizing dose be defined as four doses of four units each, compared to the three doses of four units each defined at the time of the recommendation in the regulations.

FDA has removed the additional standard regulations applicable to pertussis vaccine (Ref. 9). As whole cell pertussis vaccines are no longer licensed for human use in the United States, this recommendation no longer applies to products available in the United States.

O. Weight-Gain Test in Mice for Pertussis Vaccine

The Panel recommended that the weight-gain test in mice used to determine toxicity of pertussis vaccines be revised to include a reference standard and specifications regarding mouse strains to be used.

At the time of the Panel's deliberations, only DTP vaccines containing a whole-cell pertussis component were licensed in the United States. The mouse weight-gain test was a toxicity test used for whole-cell pertussis vaccines. Whole-cell pertussis vaccines are no longer licensed in the United States for human use, thus the mouse weight-gain test is no longer in use. Currently, only DTP vaccines containing an acellular pertussis component (DTaP) are licensed in the United States. These vaccines are tested specifically for residual pertussis toxin activity.

Although not currently licensed in the United States, vaccines containing a whole-cell pertussis component are still in use in other countries. CBER continues to participate in international efforts to improve the tests used to assess toxicity of whole-cell pertussis vaccines, including the mouse weight-gain test. CBER is represented on WHO committees and working groups with the goal of improving regulation and testing of whole-cell pertussis vaccines.

P. Agglutination Test to Determine Pertussis Vaccine Response in Humans

The Panel recommended that the agglutination test used to determine pertussis vaccine response in humans be standardized and that a reference serum be used for comparison. It also recommended that a reference laboratory be available at FDA.

As stated previously in this document, at the time of the Panel's deliberations, only whole-cell pertussis vaccines were licensed in the United States. The agglutination test was used for the clinical evaluation of DTP vaccines. Under the Panel's recommendations, FDA (CBER) developed and distributed reference materials for the agglutination assay and served as a reference laboratory. Currently, only DTaP vaccines are licensed in the United States. For the clinical evaluation of DTaP vaccines, the agglutination test was replaced by antigen-specific immunoassays, specifically enzyme-linked immunosorbent assays (ELISAs). As had been done with the agglutination assay, CBER took an active role in standardization of the ELISAs used to measure the specific antibody to the pertussis components of DTaP vaccines. Specifically, CBER distributes reference and control materials for the antigen-specific pertussis ELISA and has served as a reference laboratory.

Q. Warnings in Labeling for Pertussis Vaccine

The Panel recommended that the pertussis vaccine label warn that if shock, encephalopathic symptoms, convulsions, or thrombocytopenia follow a vaccine injection, no additional injections with pertussis vaccine should be given. The Panel also recommended that the label include a cautionary statement about fever, excessive screaming, and somnolence.

FDA agrees with the recommendation except that such information should be included in product labeling, i.e., the package insert, rather than the product label. Labeling applicable to the whole-cell pertussis vaccine conformed to this recommendation. Because the acellular form of pertussis vaccine has a different profile of potential adverse events and contraindications, the product labeling is worded consistent with available data.

R. Field Testing of Fractionated Pertussis Vaccines

The Panel recommended that any fractionated pertussis vaccine that differs from the original whole cell vaccine be field tested until better laboratory methods for evaluating immunogenicity are developed. The Panel recommended that the field-testing include agglutination testing and, if possible, evaluation of clinical effectiveness.

The currently approved vaccines containing an acellular pertussis component were studied in the United States and abroad in human populations with the antibody response being measured and clinical effectiveness evaluated.

S. Use of Same Seed Lot Strain in Manufacturing Bacillus Calmette-Guerin (BCG) Vaccine

The Panel recommended that all BCG vaccines be prepared from the same seed lot strain with demonstrated efficacy, if available data justify such action.

BCG vaccines are not recommended for routine immunization in the United States. The two currently U.S.-licensed BCG vaccines are produced using different seed strains. Most BCG vaccines produced globally are manufactured using seed strains with a unique history. Recent evidence suggests that these different BCG strains do differ genetically and have slightly varying phenotypes. However, a meta analysis of the current human BCG vaccination data performed in 1994 by Harvard University concluded that no strain-to-strain differences in protection could be detected. Although there have been differences in immunogencity among strains demonstrated in animal models, no significant differences have been seen in human clinical trials (Ref. 14). Thus, FDA does not find that available human data justify requirement of a single BCG vaccine strain.

T. Development of an Improved Cholera Vaccine

The Panel recommended public support for development of an improved cholera vaccine because unsatisfactory sanitary conditions in many countries make it clear that control of the disease by sanitation alone cannot be realized in the foreseeable future.

Cholera is not an endemic disease in the United States. However, there is risk to U.S. travelers to certain countries where the disease is endemic. FDA continues to cooperate with international health agencies in efforts to evaluate new types of vaccines and to study the pathogenesis of the disease. CBER personnel have chaired and participated in the WHO Cholera Vaccine Standardization Committee and have participated in drafting new WHO guidelines for immune measurement of protection from cholera.

U. Plague Vaccine Immunization Schedule

The Panel recommended that the following plague vaccine immunization schedule be considered:

1. A primary series of 3 intramuscular (IM) injections (1 mL, 0.2 mL, and 0.2 mL), 1 and 6 months apart, respectively;
2. Booster IM injections of 0.2 mL at 12, 18, and 24 months; and,
3. For persons achieving a titer of 1:128 after the third and fifth inoculations, booster doses when the passive agglutination titer falls below 1:32 and empirically every 2 years when the patient cannot be tested serologically.

FDA agrees with the recommendation, and the currently licensed vaccine is labeled consistent with the recommendation.

VI. FDA's Response to General Research Recommendations

In its report, the Panel identified many areas in which there should be further investigation to improve existing products, develop new products, develop new testing methodologies, and monitor the population for its immune status against bacterial disease. In the December 1985 proposal, FDA responded to these recommendations in the responses identified as items 11, 17 (in part), 21, 25, and 27. As discussed in the December 1985 proposal, FDA considered the Panel's recommendations in defining its research priorities at the time the recommendations were made. Because a considerable amount of time has elapsed since these recommendations were made and FDA initially responded to the recommendations, FDA is not providing specific responses to each recommendation. As in any area of scientific research, new discoveries and new concerns require a continual reevaluation of research priorities and objectives to assure their relevance to current concerns.

FDA recognizes the Panel's desire to have FDA's research program evolve with the significant issues and findings of medical science. In order to assure the continued relevance of its research program, CBER's research program for vaccines, including bacterial vaccines and related biological products, is subject to peer review by the Panel's successor, the Vaccines and Related Biological Products Advisory Committee (see, for example, the transcripts from the meetings of June 11 (Ref. 15) and November 29, 2001 (Refs. 16 and 17), and March 6, 2002 (Ref. 18)). In addition, CBER has defined as part of its mission statement a strategic goal of assuring a high quality research program that contributes directly to its regulatory mission. This goal includes a plan to assure that CBER's research program continues to support the regulatory review of products and timely development of regulatory policy, and to have a significant impact on the evaluation of biological products for safety and efficacy.

Because of limited resources, FDA also supports the leveraging of resources to create effective collaborations in the advancement of science. FDA has issued a ''Guidance for FDA Staff: The Leveraging Handbook, an Agency Resource for Effective Collaborations.'' (Ref. 19). Through cooperation with international, other Federal, and State health care agencies and the industry and academia, the agency intends that its research resources will reap the benefits of a wide range of experience, expertise, and energy from the greater scientific community while the agency maintains its legal and regulatory obligations. FDA invites comment at any time on ways it may improve its research program and set its objectives.

VII. Proposed Amendment to the Regulations

In the December 1985 proposal, FDA proposed to amend § 610.21 (21 CFR 610.21), limits of potency, by revising the potency requirements for Tetanus Immune Globulin (Human) (TIG). FDA proposed to amend the regulations to require a minimum potency of 250 units of tetanus antitoxin per container for TIG. FDA advises that in this discussion and in the proposed regulation, ''per container'' means that amount of the contents of the container deliverable to the patient in normal use. The current regulation provides for a minimum potency of 50 units of tetanus antitoxin per milliliter of fluid. FDA proposes the change because the concentration of antitoxin per milliliter has varied widely in the past without any apparent effect on the performance of the product. TIG is routinely manufactured consistently at a concentration of 170 units per milliliter. However, there was no evidence upon which to establish a revised minimum potency on a per milliliter basis. Because the evidence of efficacy for TIG was based on use of product administered consistently at doses of 250 units or larger and the varying concentration of the product without any apparent adverse effect, FDA proposes that it is more appropriate to regulate the potency on a per vial basis, rather than by units per milliliter. The current licensed product continues to be marketed at a potency no less than the minimum dose (250 units), which historically has been shown to be clinically effective.

FDA received no comments opposing the proposed revision to § 610.21 and therefore proposes to amend the regulations to require a minimum potency of 250 units of tetanus antitoxin per container for TIG.

VIII. Analysis of Impacts

A. Review Under Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Act of 1995

FDA has examined the impacts of this proposed rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety and other advantages; distributive impacts; and equity). The Regulatory Flexibility Act requires agencies to analyze whether a rule may have a significant economic impact on a substantial number of small entities and, if it does, to analyze regulatory options that would minimize the impact on small entities. The Unfunded Mandates Reform Act requires that agencies prepare a written statement under section 202(a) of anticipated costs and benefits before proposing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation) in any one year.

The agency believes that this proposed rule is consistent with the

regulatory philosophy and principles identified in the Executive Order. In addition, this proposed rule is not a significant regulatory action as defined by the Executive Order and so is not subject to review under the Executive Order. Because this proposed rule does not impose new requirements on any entity it has no associated compliance costs, and the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required. Because this proposed rule does not impose mandates on State, local, or tribal governments, in the aggregate, or the private sector, that will result in an expenditure in any one year of $100 million or more, FDA is not required to perform a cost benefit analysis under the Unfunded Mandates Reform Act. The current inflation adjusted statutory threshold is approximately $110 million.

B. Environmental Impact

The agency has determined, under 21 CFR 25.31(h), that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

C. Paperwork Reduction Act of 1995

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

D. Federalism

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

IX. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

X. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm.1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. The full Panel Report was incorporated into the ''Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review,'' proposed rule, published in the **Federal Register** of December 13, 1985 (50 FR 51002).

1a. Brachman, P. S.; H. Gold; S. Plotkin; F. R. Fekety; M. Werrin; and N. R. Ingraham, ''Field Evaluation of a Human Anthrax Vaccine,'' *American Journal of Public Health*, 52:632–645, 1962.

2. Joellenbeck, Lois M.; Lee L. Zwanziger; Zane S. Durch; and Brian L. Strom; Editors, Committee to Assess the Safety and Efficacy of the Anthrax Vaccine, Medical Follow-Up Agency, The National Academies Press, Washington, DC, April 2002, *http://www.nap.edu/catalog/10310.html* (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

3. Fellows, P. F.; M. K. Linscott; B. E. Ivins; M. L. M. Pitt; C. A. Rossi; P. H. Gibbs and A. M. Friedlander, ''Efficacy of a Human Anthrax Vaccine in Guinea Pigs, Rabbits, and Rhesus Macaques Against Challenge by Bacillus Anthracis Isolates of Diverse Geographical Origin,'' *Vaccine* 19(23/24):3241–3247, 2001.

4. Ivins, B. E.; P. F. Fellows; M. L. M. Pitt; J. E. Estep; S. L. Welkos; P. L.Worsham and A. M. Friedlander, ''Efficacy of a Standard Human Anthrax Vaccine Against Bacillus Anthracis Aerosol Spore Challenge in Rhesus Monkeys,'' *Salisbury Medical Bulletin* 87(Suppl.):125–126, 1996.

5. Ivins, B. E.; M. L. M. Pitt; P. F. Fellows; J. W. Farchaus; G. E. Benner; D. M. Waag; S. F. Little; G. W. Anderson, Jr.; P. H. Gibbs; and A. M. Friedlander, ''Comparative Efficacy of Experimental Anthrax Vaccine Candidates Against Inhalation Anthrax in Rhesus Macaques,'' *Vaccine*, 16(11/12):1141–1148, 1998.

6. Anthrax Vaccine Adsorbed (BIOTHRAX) Package Insert (January 31, 2002).

7. Reports and evaluation of reports of adverse events following administration of anthrax vaccine received by the Federal Vaccine Adverse Event Reporting System (VAERS) through November 2004.

8. Wright, G. G.; T. W. Green; and R. G. Kanode, Jr., ''Studies on Immunity in Anthrax: V. Immunizing Activity of Alum-Precipitated Protective Antigen,'' *Journal of Immunology*, 73:387–391, 1954.

9. 61 FR 40153, August 1, 1996.

10. ''Table of Reportable Events Following Vaccination,'' *http://www.vaers.org/reportable.htm*. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

11. ''Guidance for Industry: How to Complete the Vaccine Adverse Event Reporting System Form (VAERS–1),'' September 1998, *http://www.fda.gov/cber/gdlns/vaers–1.pdf*. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

12. ''Estimated Vaccination Coverage With 3+DTP Among Children 19–35 Months of Age by Race/Ethnicity, and by State and Immunization Action Plan Area—U.S., National Immunization Survey, Q3/2000 - Q2/2001'', *http://www.cdc.gov/nip/coverage/NIS/00–01/tab19–3dpt__race__iap.htm*. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

13. Protecting Our Kids: What Is Causing the Current Shortage in Childhood Vaccines?—Testimony Before the Committee on Governmental Affairs, United States Senate, June 12, 2002, *http://www.cdc.gov/nip/news/testimonies/vac-shortages-walt–6–12–2002.htm*. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

14. Colditz, et al., ''Efficacy of BCG Vaccine in the Prevention of Tuberculosis: Meta Analysis of the Published Literature'', *Journal of the American Medical Association*, 271:698–702, 1994.

15.*http://www.fda.gov/ohrms/dockets/ac/01/transcripts/3755t1.pdf*

16.*http://www.fda.gov/ohrms/dockets/ac/01/transcripts/3805t2__01.pdf*

17.*http://www.fda.gov/ohrms/dockets/ac/01/transcripts/3805t2__02.pdf*

18.*http://www.fda.gov/ohrms//dockets/ac/02/transcripts/3842t1.pdf*

19.*http://www.fda.gov/cber/gdlns/leverhnbk.pdf*

List of Subjects

21 CFR Part 201

Drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 610

Biologics, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated by the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 201 and 610 be amended as follows:

PART 201—LABELING

1. The authority citation for 21 CFR part 201 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 358, 360, 360b, 360gg–360ss, 371, 374, 379e; 42 U.S.C 216, 241, 262, 264.

2. Section 201.59 is amended in the table in paragraph (a)(3) by:

a. Removing ''HFB–240'' everywhere it appears and adding in its place ''HFM–99'' in the BIOLOGICS section of the table, under ''Mail Routing Code'';

b. Revising the entries for the drug classes ''Bacterial vaccines and toxoids with standards of potency'' and ''Viral and rickettsial vaccines'' in the BIOLOGICS section of the table to read as follows.

§ 201.59 Effective date of §§ 201.56, 201.57, 201.100(d)(3), and 201.100(e).

(a) * * *

(3) * * *

Effective	Revised labeling due	Drug class	Mail routing code
	Biologics		
[Insert date 30 months after date of publication in the **Federal Register**]	See footnote[3]	Bacterial vaccines and toxoids with standards of potency	HFM–99
* *	* *	* *	*
Nov. 1, 1982[1]	Nov 1, 1980[2]	Viral and rickettsial vaccines	HFM–99
* *	* *	* *	*

[1] Except the effective date for all biological products reviewed generically by the advisory panel is 30 months after a final order is published under § 601.25(g) of this chapter.

[2] Except the due date for all biological products reviewed generically by the advisory panel is 6 months after a final order is published under § 601.25(g) of this chapter.

[3] FDA has determined that a review of product labeling under this section is unnecessary.

* * * * *

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

3. The authority citation for 21 CFR part 610 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360c, 360d, 360h, 360i, 371, 372, 374, 381; 42 U.S.C. 216, 262, 263, 263a, 264.

4. Section 610.21 is amended by revising the entry ''Tetanus Immune Globulin (Human), 50 units of tetanus antitoxin per milliliter'' under the heading ''ANTIBODIES'' to read as follows:

§ 610.21 Limits of potency.

* * * * *

ANTIBODIES

* * * * *

Tetanus Immune Globulin (Human), 250 units of tetanus antitoxin per container.

* * * * *

Dated: December 21, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28322 Filed 12–23–04; 11:16 am]

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REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT DECEMBER 29, 2004

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Australia Group understandings and intersessional decision, implementation; clarafications, corrections, and Chemical Weapons Convention list update ; published 12-29-04

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Preparation, adoption, and submittal—
Volatile organic compounds definition; exclusions; published 11-29-04
Volatile organic compounds definition; exclusions; published 11-29-04

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Fair and Accurate Credit Transactions Act; implementation:
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Retirement plans; cash or deferred arrangements and matching or employee contributions; published 12-29-04

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Fish and shellfish; country of origin labeling; comments due by 1-3-05; published 10-5-04 [FR 04-22309]
Sweet cherries grown in—
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Livestock identification; alternative numbering systems use; comments due by 1-7-05; published 11-8-04 [FR 04-24828]
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Bering Sea and Aleutian Islands groundfish; comments due by 1-7-05; published 12-8-04 [FR 04-26952]
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Red snapper; comments due by 1-7-05; published 11-23-04 [FR 04-25961]
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Commercial fishing authorizations—
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Technical amendments and corrections; comments due by 1-3-05; published 11-1-04 [FR 04-24284]

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Test procedures and efficiency standards—
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Federal Energy Regulatory Commission
Electric rate and corporate regulation filings:
Virginia Electric & Power Co. et al.; Open for comments until further notice; published 10-1-03 [FR 03-24818]

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Electric utility steam generating units; comments due by 1-3-05; published 12-1-04 [FR 04-26579]
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Oregon; comments due by 1-3-05; published 12-1-04 [FR 04-26475]
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Minnesota and Texas; Open for comments until further notice; published 10-16-03 [FR 03-26087]
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Dental noble metal alloys and base metal alloys; Class II special controls; Open for comments until further notice; published 8-23-04 [FR 04-19179]

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Occupational Safety and Health Administration

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Hexavalent chromium; occupational exposure; comments due by 1-3-05; published 10-4-04 [FR 04-21488]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 4012/P.L. 108–457

To amend the District of Columbia College Access Act of 1999 to reauthorize for 2 additional years the public school and private school tuition assistance programs established under the Act. (Dec. 17, 2004; 118 Stat. 3637)

S. 2845/P.L. 108–458

Intelligence Reform and Terrorism Prevention Act of 2004 (Dec. 17, 2004; 118 Stat. 3638)

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